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Appellate Division, First Department

Counsel Fee Award - Domestic Relations Law §237 - 22 NYCRR 202.16[k][2], [3] - Updated Net Worth Statement Not Necessary Where No Evidence Plaintiff's Economic Condition Substantially Changed from Previously-submitted Recent Net Worth Statement.

In Kiwon S. v, Daniel S., --- N.Y.S.2d ----, 2012 WL 1836379 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which granted plaintiff's motion for pendente lite relief to the extent of directing defendant to pay plaintiff's attorney interim counsel fees in the amount of $100,000, subject to reallocation at trial. It held that the court providently exercised its discretion in awarding counsel fees, given the evidence of the large discrepancy in the parties' respective incomes, the significant business investments within defendant's control, the nature of the issues in dispute, and plaintiff's lack of sufficient funds of her own to compensate counsel without depleting her limited assets. Plaintiff's moving papers included both the requisite statement of net worth and affirmation of counsel (22 NYCRR 202.16[k][2], [3]). The court properly exercised its discretion in concluding that plaintiff's failure to provide an updated statement of net worth was not fatal to her motion. Although an updated net worth statement would have given the court the most current information, there was no evidence that plaintiff's economic condition had substantially changed from what had been reported on her previously-submitted recent net worth statement. Nor was movant required to submit a personal affidavit (22 NYCRR202.16[k][2],[3] ).

Evidence - Cross Examination - Hostile Witness - Improper to Ask Leading Questions Where Witness Not Declared Hostile and No Showing She Was Lying or Refused to Answer.

In Maria A.M. v Dextor N., --- N.Y.S.2d ----, 2012 WL 1623377 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which modified the order of custody and awarded petitioner sole legal and physical custody of the child while awarding respondent liberal visitation. Respondent acknowledged that the child did not wish to live with him, there was testimony that, on at least one occasion, the police were called and arrested the child after she had an altercation with respondent, and the child, who would soon turn 18, had requested to live with her mother and younger half sibling. Given this evidence, petitioner established that there had been a change in circumstances since the April 29, 2009 custody and visitation order and stipulation were entered, and that the change in custody from respondent to petitioner was in the child's best interests. Respondent's hearing counsel called petitioner as a witness but did not request that she be declared a hostile witness and made no showing that she was either lying or unwilling to answer his questions. Thus, the referee properly sustained the objection to the leading questions counsel asked petitioner.

In re Giannis F, --- N.Y.S.2d ----, 2012 WL 1673089 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which granted the application of the attorney for the child alleged to have been abused to permit the child to testify at the fact-finding hearing through two-way closed circuit television, subject to contemporaneous cross-examination by the parties. It held that the court properly balanced respondent mother's due process rights with the emotional well-being of the child in permitting the child to testify to years of sexual abuse by her stepbrother, which the mother did not believe took place, outside their presence, but visible via closed-circuit television and subject to contemporaneous cross-examination (citing Matter of Q.-L.H., 27 A.D.3d 738, 739 [2006]) The affidavit of the social worker who interviewed the child on multiple occasions and who spoke with a social worker at the facility where the child was being treated sufficiently established the potential trauma to the child, which would likely interfere with her ability to testify accurately and without inhibition.

Appellate Division, Second Department

Equitable Distribution - Domestic Relations Law 236 [B][6] - Under Circumstances of Case Maintenance Awarded Should Be Taxable to Plaintiff and Deductible by Defendant

In Chaudry v Chaudry. --- N.Y.S.2d ----, 2012 WL 1699445 (N.Y.A.D. 2 Dept.) Supreme Court awarded the plaintiff nontaxable spousal maintenance of $1,583.33 per month for a duration of 4 years commencing June 2010, and $1,235 per month for a duration of 10 years commencing June 2014, directed that the defendant shall not take such maintenance as a tax deduction, directed the defendant to pay the college tuition, fees, and book costs of the parties' unemancipated child, awarded the plaintiff credits of $40,127.52, and denied plaintiff an attorney's fee. The Appellate Division deleted the provision directing that spousal maintenance shall be nontaxable to the plaintiff and that the defendant shall not take such maintenance as a tax deduction, and awarded the plaintiff an attorney's fee of $47,905. It held that under the circumstances of this case, including the present and future earning capacity of the parties, the reduced or lost lifetime earning capacity of the plaintiff, and the marital standard of living, the Supreme Court providently exercised its discretion in its determination of the amount and duration of maintenance. However, it held that the maintenance awarded should be taxable to the plaintiff and deductible by the defendant (citing Markopoulos v. Markopoulos, 274 A.D.2d 457, 459, 710 N.Y.S.2d 636). It found that Supreme Court improvidently exercised its discretion in failing to award the plaintiff an attorney's fee. In determining whether to award fees, the court should "review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions" In light of, among other things, the significant disparity in the parties' incomes and the amount of time spent at trial tracing the funds that the defendant admittedly withdrew from marital accounts without the plaintiff's knowledge, an award of one half of the plaintiff's counsel fees was appropriate. Accordingly, the plaintiff was entitled to an attorney's fee of $47,905.

Pendente Lite Maintenance - Domestic Relations Law § 236(B)(5-a) - Proper to Apply Formula in Separate Action Commenced after effective date of new statutory Formula

In Charasz v. Rozenblum, --- N.Y.S.2d ----, 2012 WL 1699448 (N.Y.A.D. 2 Dept.), the Appellate Division held that as the parties were entitled to commence separate actions for divorce, the Supreme Court properly applied the new statutory formula set forth in Domestic Relations Law § 236(B)(5-a) to determine an appropriate award of temporary maintenance pursuant to the wife's application for pendente lite relief,

which was made in her separate divorce action, commenced after the effective date of the new statutory formula.

Agreements - Construction - College Education Provision - Obligation to Consult - Family Court Did Not Have Jurisdiction to Make a Declaration as to the Validity of an Alleged Oral Modification of a Separation Agreement .

In Tammone v Tammone, --- N.Y.S.2d ----, 2012 WL 1415417 (N.Y.A.D. 2 Dept.) the Appellate Division held that Family Court improperly granted the mother's objections to an order dated October 26, 2010, which granted the father's petition to require the mother to pay a share of the college expenses for the parties' older child pursuant to the parties' separation agreement. Article VII section B of the parties' separation agreement provided in relevant part that the parties "shall be obligated to pay for each child's undergraduate education consisting of four years of undergraduate schooling in proportion to each party's income at the time each child attends college so long as the child pursues said education on a full time, continuous basis with the reasonable diligence calculated to obtain grades commensurate with the child's ability," and that the children's colleges "shall be chosen with the consultation and consideration of their parents [sic] wishes and financial condition," but that "[i]rrespective of the parties [sic] incomes at the time the children attend college, neither party shall pay more than 60% of the above college expenses" after the exhaustion of funds in certain bank accounts and the funds in the father's life insurance policy. The mother admitted that she was consulted at the time the parties' oldest child selected her four-year undergraduate college, but she contended that the father did not comply with the obligation to consult her regarding the selection of the child's school for her second year of college and, therefore, that her obligation to pay her share of the college expenses never arose.. The father admitted that he never consulted the mother regarding the subject child's continued attendance at High Point University for the 2010-2011 academic year, i.e., her second year at this four-year university, contending he had no obligation to do so under the separation agreement.

The Appellate Division agreed with the father. It observed that where the agreement's language is clear and unambiguous, the court should determine the intent of the parties based on that language without resorting to extrinsic evidence. Here, the separation agreement did not provide that the mother was to be consulted regarding the subject child's choice of school on a yearly basis. Such an interpretation would effectively add a term to the separation agreement that did not exist under the guise of contractual interpretation. Courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.

The Appellate Division held that to the extent the Family Court determined that the parties orally modified the separation agreement, or that the father waived rights thereunder, those determinations were incorrect. The Family Court did not have jurisdiction to make a declaration as to the validity of an alleged oral modification of a separation agreement (Gottlieb v. Gottlieb, 294 A.D.2d 537, 538). Moreover, even if the mother had sought an order modifying her support obligations, and even if the Family Court had jurisdiction to grant such relief, the mother made no showing that an unanticipated and unreasonable change in circumstances had occurred since the parties entered into the separation agreement. Furthermore, the father did not waive any rights provided under the separation agreement, since waiver is not created by negligence, oversight or thoughtlessness, and cannot be inferred from mere silence. In any event, the separation agreement in this case included a "no waiver" clause which required a written stipulation to alter its terms.

Neglect - Family Ct Act 1046[b][I] ) - While Domestic Violence May Be a Permissible Basis upon Which to Make a Finding of Neglect Not Every Child Exposed to Domestic Violence Is at Risk of Impairment.

In Matter of Chiam R., --- N.Y.S.2d ----, 2012 WL 1415432 (N.Y.A.D. 2 Dept.) at approximately 1:30 A.M. on December 10, 2009, the mother and father were arguing in the living room of their home. The argument led to a physical altercation in which both the mother and father sustained minor physical injuries.

The police were called and, when they arrived, the mother was sitting calmly on the couch in the living room while the father was standing holding the youngest child, who was then seven months old. The older child, then two years old, was in the bedroom, and neither child was crying. After interviewing the parents, the

police arrested them and charged them each with assault in the third degree. The petitioner filed neglect petitions against the mother and father, alleging that they neglected the children when they perpetrated acts of physical abuse against each other. In subsequent interviews with a caseworker, the mother initially stated that the children were not present during the argument, but later stated that they were. The father admitted that he and the mother had argued, but did not provide further details to the caseworker. At the fact-finding hearing, the petitioner elicited the above evidence by presenting the testimony of the police officer who responded to the home after the incident and the caseworker who had interviewed the mother and father. No evidence was provided detailing the altercation or regarding the impairment of the children's physical, mental, or emotional condition. The mother and father did not testify. At the conclusion of the hearing, the Family Court entered a neglect finding against both parents. The Family Court subsequently issued a dispositional

order, that upon releasing the children to the mother's custody, directed that she be supervised by the petitioner for a period of six months and that the father be supervised by the petitioner for a period of 12 months, complete an anger management course, and attend individual therapy.

The Appellate Division reversed and dismissed the petitions. It observed that to establish neglect, the petitioner must demonstrate, by a preponderance of the evidence, (1) that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is due to the failure of the parent or caretaker to exercise a minimum degree of care in providing the child

with proper supervision or guardianship (Family Ct Act 1046[b][i] ). While domestic violence may be a permissible basis upon which to make a finding of neglect not every child exposed to domestic violence is at risk of impairment ( Nicholson v. Scoppetta, 3 N.Y.3d at 375). Under the facts presented here, the petitioner failed to establish by a preponderance of the evidence that the children's physical, mental, or emotional conditions had been impaired or were in imminent danger of becoming impaired as a result of the incident of domestic violence between the parents.

Child Support - Modification - Substantial change in circumstances - father's support obligation to his son from a different relationship could not be basis for a downward modification of obligation to instant child.

In Matter of Montgomery v Prioleau, --- N.Y.S.2d ----, 2012 WL 1415446 (N.Y.A.D. 2 Dept.), the mother and the father hade one child in common, who was four years old at the time of the hearing . The father was obligated to pay the mother a total of $160 per week in child support, pursuant to an order of the Family Court dated September 23, 2008. The father also paid approximately $160 per week in child support for his son from a different relationship, pursuant to an order of the Family Court, Bronx County, dated March 13, 2007. In 2010, the father filed a petition in the Family Court, Westchester County, for a downward modification of his child support obligation as set forth in the order of that court dated September 23, 2008. At the ensuing hearing, the father testified that he had maintained his two jobs working for Pepsi and Gristedes Supermarket, but that his overtime hours had been cut due to the economic downturn. In an order dated December 16, 2010, the Support Magistrate in Westchester County found that the father was not entitled to a downward modification of his support obligation, holding that the father had failed to demonstrate a substantial change in circumstances. The Family Court denied the father's written objections .

The Appellate Division affirmed. It held that contrary to the father's contention that he need only demonstrate a change in circumstances in order to obtain a downward modification in his child support obligation, a party seeking a downward modification of a support order must demonstrate a substantial change in circumstances warranting the modification. Family Court properly found that the father failed to demonstrate such a substantial change in circumstances. Family Court properly concluded that the father's support obligation to his son from a different relationship could not, under the circumstances, be a basis for a downward modification of his obligation to the instant child. The father's obligation to the son from a different relationship was set by the Family Court, Bronx County, before his obligation to the child in this case was set by the Family Court, Westchester County. Accordingly, the Family Court properly denied the father's objections to so much of the Support Magistrate's order as denied the father's petition for a downward modification of his child support obligation.

Child Custody - Modification - Substantial Change of Circumstances - Recurring Medical Issues and lateness to school demonstrated change of circumstances warranting modification of custody order.

In Matter of Ferran v Fenner, --- N.Y.S.2d ----, 2012 WL 1415468 (N.Y.A.D. 2 Dept.) the father presented evidence at the hearing which established that the child had developed recurring infections while in the mother's care, and the mother failed to treat the infections as prescribed by the doctor. In addition, the father's evidence showed that the child had numerous absences and was late to school on many occasions when she was in the mother's care. The child was thriving in the father's care, and her previously recurring medical issues had resolved. Moreover, the father actively participated in the child's educational process and fostered the relationship between the child and the noncustodial parent. This evidence was sufficient to demonstrate a change in circumstances warranting a modification of the prior order of custody to protect the best interests of the child. Accordingly, it declined to disturb the Family Court's award of sole custody of the child to the father with certain visitation to the mother.

Appellate Division, Third Department

Child Custody - Natural Parent Vs. “Stranger” - Extraordinary Circumstances Demonstrated Where Boys Living in Deplorable, Unsanitary and Unsafe Conditions.

In Matter of Carpenter v Puglese, --- N.Y.S.2d ----, 2012 WL 1431836 (N.Y.A.D. 3 Dept.), Edward A. Carpenter Jr. ( father) and Brandy M. Sharp (mother) were the unmarried biological parents of fraternal twin boys. Approximately five weeks after the boys' birth in February 2008, a caseworker from the local social services agency made an unannounced visit to the parents' home and discovered that the boys were living in what she described as deplorable, unsanitary and unsafe conditions. Specifically, the parents' residence was littered with garbage, animal feces and the remnants of a cat's afterbirth, had several broken windows and lacked a working stove, toilet and heating system. At the time of the caseworker's visit, the boys were at the home of the mother's uncle, Robert P. Puglese, and his girlfriend, Melissa S. Switzer. Following discussions with the caseworker, Puglese and Switzer agreed to allow the mother and the boys to stay with them. Although the mother returned to live with the father shortly thereafter, the boys remained with Puglese and Switzer. The father proceedings in April 2010 seeking custody of the boys and naming the mother and Puglese as respondents. Puglese and Switzer then commenced a separate custody proceeding against the mother and the father in August 2010, which was followed by the mother's petition for custody in October 2010. Following a hearing, Family Court awarded custody of the boys to Puglese and Switzer with supervised visitation to the mother and the father.

The Appellate Division affirmed. The Appellate Division observed that evidence that the parent has failed either to maintain substantial, repeated and continuous contact with a child or to plan for the child's future has been found to constitute persistent neglect sufficient to rise to the level of an extraordinary circumstance. Puglese and Switzer met their heavy burden of demonstrating the requisite extraordinary circumstances here. By his own admission, the father only saw the boys for brief periods of time (15 to 30 minutes each) on three occasions shortly after they went to live with Puglese and Switzer in April 2008 and subsequently did not see them again until August 2008. The father attempted to see the boys once in 2009 but, upon finding no one at home, "never went back ... there for awhile." the father did not see the boys at all during 2009 and, as of the time of the hearing, The father did not own a car, possessed only a restricted driver's license and, with the exception of his last two visits with the boys, never provided them with gifts or otherwise contributed to their support. Thus, notwithstanding the father's attempt to gain custody of the boys in 2008, there was ample evidence to support Family Court's finding that he persistently neglected the boys.

The Appellate Division reached a similar conclusion as to Family Court's finding that the father was

an unfit parent. In addition to the foregoing, the father's decision to permit his newborn twins to reside in a residence with several broken windows, "snow coming in underneath the front door and so forth" and no working stove, toilet or heating system, coupled with the parents' history of domestic violence, evidenced a lack of judgment sufficient to rise to the level of parental unfitness. The mother admitted that she was bipolar, and the father testified that she was prone to fits of violence. On one occasion, the mother purportedly came at the father with a butcher knife, prompting him to "literally punch her in the head and knock her out" in order to protect himself. Upon considering the totality of the circumstances, including the parents' respective housing and employment situations, it was in the boys' best interests to award custody to Puglese and Switzer, who had been caring for them since shortly after their birth.

Equitable Distribution - Marital Residence - plaintiff entitled to a credit for he contributed to closing costs and down payment, and amount of the mortgage loan balance forgiven by his mother.

In Lurie v Lurie, --- N.Y.S.2d ----, 2012 WL 1431850 (N.Y.A.D. 3 Dept.) an action for divorce, defendant challenged Supreme Court's division of the equity in the parties' marital residence. The residence was purchased in July 1998, approximately one month after the parties were married. In order to pay for the purchase price of $130,000, plaintiff liquidated an individual retirement account that he acquired prior to the marriage and secured a personal loan from his mother. At the closing, defendant discovered that the deed to the property was issued to plaintiff alone, and insisted that she be added as a grantee. Shortly after the closing, another deed from the sellers was recorded, which named both plaintiff and defendant as grantees. In November 2000, plaintiff's mother forgave the balance then existing on the mortgage. Thereafter, plaintiff executed a quitclaim deed in August 2003, which transferred the property from his name, alone, to both him and defendant as tenants by the entirety. Plaintiff commenced this action for divorce in July 2008. Supreme Court ordered, among other things, that plaintiff was entitled to a credit in the distribution of the equity in the marital residence for the amounts he contributed to the closing costs and down payment for its purchase, as well as the amount of the mortgage loan balance forgiven by his mother.

The Appellate Division affirmed. It observed that the parties did not dispute that the marital residence constituted marital property subject to equitable distribution or that plaintiff's contributions to its acquisition, including the mortgage loan forgiveness, constituted his separate property . It rejected defendant’s argument that Supreme Court improperly credited plaintiff for such contributions in the distribution of the residence and should have divided the equity in that asset equally between the parties. Specifically, defendant contended that Supreme Court failed to consider the implications of certain financial circumstances and of various transactions that occurred with respect to the parties' properties during the marriage which, she argued, resulted in the transmutation of plaintiff's separate property interest in the marital residence into marital property. For example, defendant emphasized that she was the primary wage-earner during the marriage, paid the majority of the marital expenses, including the expenses related to the marital residence, and negotiated a reduction in mortgage payments. In addition, she noted that the marital residence was debt free by December 2000, but was encumbered by a mortgage in the amount of approximately $44,000 at the time of trial as a result of various other investments, including a failed business on plaintiff's part, which were financed by loans secured by the marital residence. Defendant also argued that the 2003 quitclaim deed was intended by plaintiff to convert to marital property any separate property claim that he may have had to the equity in the marital residence. Plaintiff gave varying explanations for this deed. After hearing the testimony, Supreme Court apparently discredited defendant's interpretation as to its significance.

The Appellate Division observed that absent an abuse of discretion, it may not disturb the trial court's distributive award (Fields v. Fields, 15 N.Y.3d 158, 170 [2010]). Moreover, given Supreme Court's superior opportunity to assess the credibility of the witnesses, it defers to its determinations. It was clear that Supreme Court considered the parties' respective financial contributions to the acquisition of their marital property in general, and to the marital residence in particular. Moreover, the record evidence supported Supreme Court's conclusion that plaintiff contributed separate funds toward the acquisition of the marital residence and did not relinquish or forgo his claim to such separate contribution. It discerned no abuse of Supreme Court's discretion in its determination to credit plaintiff for his separate property contributions to the marital residence in equitably distributing that asset.

Family Court - Support - Family Ct Act § 451(1) - Family Court Not Required to Dismiss Petition Based upon Petitioner's Failure to File Supporting Affidavit - Family Ct Act § 424-a [C] - Financial Disclosure Requirement Is Not Waivable by the Parties or the Court.

In Malcolm v Trupiano, --- N.Y.S.2d ----, 2012 WL 1431883 (N.Y.A.D. 3 Dept.) the parties were the parents of one child (born in 2001). By order entered in January 2011 and corrected in February 2011, Family Court found that respondent's pro rata share of child support, including health insurance premiums, was $813.30. The court then determined that this amount would be unjust or inappropriate due to petitioner's receipt, as representative payee, of $1,008 monthly from the Social Security Administration ( SSA) on behalf of the child as a result of respondent's entitlement to Social Security retirement benefits (Family Ct Act 413[1][f] ). The court set respondent's support obligation at $540.15 per month. At the end of January 2011, petitioner commenced a proceeding seeking to modify the newly issued order, alleging that respondent had contacted the SSA requesting that he be named the child's representative payee, the SSA made the change, and the child's Social Security check had been redirected to respondent. Following two appearances at which no sworn testimony was taken and no documents were received into evidence, the Support Magistrate granted petitioner's application, set respondent's child support obligation at $1,300 per month and continued all other provisions of the prior order. Family Court denied respondent's objections.

The Appellate Division reversed. It observed that Family Court was not required to dismiss the petition based upon petitioner's failure to file a supporting affidavit. Because the language of Family Ct Act § 451(1) is "permissive rather than preemptory," the court has discretion to determine whether to proceed with a hearing on an application to modify an order of support. Nevertheless, reversal was required because in all support proceedings, including modification proceedings, "there shall be compulsory disclosure by both parties of their respective financial states" ( Family Ct Act § 424-a [a] ). While dismissal of the petition is not required if a petitioner fails to file mandated financial disclosure documents, "the court may on its own motion or upon application of any party adjourn such proceeding until such time as the petitioner files with the court such statements and tax returns" (Family Ct Act § 424-a [c] ). It held that although respondent did not seek such an adjournment, Family Court should have imposed one. The record did not indicate that disclosure of any of the statutorily required financial information occurred. As no documents were admitted and no testimony was taken, no actual hearing occurred, the record lacked any reliable information upon which the court could base its determination. The Support Magistrate presumably relied on the financial information supplied in conjunction with the prior petition, which had been resolved shortly before the commencement of this proceeding. It held that the financial disclosure requirement is not waivable by the parties or the court (see Matter of Skrandel v. Haese, 2 AD3d 1188, 1189 [2003] ). Relying on recent information is important especially where, as here, a party alleges that the financial circumstances have changed. Additionally, the court did not calculate respondent's child support obligation in conformity with the requirements of the Child Support Standards Act. The order was reversed and the matter remitted to Family Court for further proceedings on the petition.

Appellate Division, Fourth Department

Child Custody - Attorney for Child - Role - Attorney for Child Has Right to Be Heard and Object to Proposed Settlement but No Right to Veto Settlement.

In Matter of McDermott v Bale, --- N.Y.S.2d ----, 2012 WL 1450178 (N.Y.A.D. 4 Dept.), a custody proceeding pursuant to Family Court Act article 6, the Attorney for the Children (AFC) appealed from an order granting the parties joint custody of their two children, with primary physical residence to petitioner-respondent mother and liberal visitation to respondent-petitioner father. The order incorporated the terms of a written stipulation executed by the parties on the eve of trial. The AFC refused to join in the stipulation, but Family Court approved the stipulation over the AFC's objection. We reject the AFC's contention that the court erred in approving the stipulation. Although we agree with the AFC that he " 'must be afforded the same opportunity as any other party to fully participate in [the] proceeding and that the court may not "relegate the [AFC] to a meaningless role" the children represented by the AFC are not permitted to "veto" a proposed settlement reached by their parents and thereby force a trial. The record reflected that, unlike in Matter of Figueroa, upon which the AFC relies, the court here gave the AFC a full and fair opportunity to be heard, and the AFC stated in detail all of the reasons that he opposed the stipulation. Indeed, the court gave credence to many of the comments made by the AFC, as did the attorneys for the parents, both of whom agreed to modify the stipulation to address several of the AFC's concerns. It rejected the argument of the AFC that children in custody cases should be given full-party status such that their consent is necessary to effectuate a settlement. The purpose of an attorney for the children is "to help protect their interests and to help them express their wishes to the court" . There is a significant difference between allowing children to express their wishes to the court and allowing their wishes to scuttle a proposed settlement. It noted that the court is not required to appoint an attorney for the children in contested custody proceedings, although that is no doubt the preferred practice. Thus, there is no support for the AFC's contention that children in a custody proceeding have the same legal status as their parents. It concluded that where the court in a custody case appoints an attorney for the children, he or she has the right to be heard with respect to a proposed settlement and to object to the settlement but not the right to preclude the court from approving the settlement in the event that the court determines that the terms of the settlement are in the children's best interests. Parents who wish to settle their disputes should not be required to engage in costly and often times embittered litigation merely because their children or the attorney for the children would prefer a different custodial arrangement.

Equitable Distribution - Factor 14 - Tax Consequences - Dependency Exemption - Proper to Allow husband to purchase wife's exemption for amount of tax savings wife would have realized - Pensions - Error to Direct that wife shall not share in any early retirement benefits or enhanced pension payments, if any, that husband may receive in future.

In D’Ambra v D’Ambra, --- N.Y.S.2d ----, 2012 WL 1450282 (N.Y.A.D. 4 Dept.) the Appellate Division found no merit to the wife's contention that the court erred in granting one dependency exemption to each party while allowing the husband to purchase in any given year the wife's exemption for the amount of tax savings the wife would have realized were she to claim the child on her tax return. It noted at the outset that the wife did not appear to be aggrieved thereby. According to the uncontradicted testimony of the husband's tax expert, the wife would derive no benefit from the dependency exemption due to her limited income, which consisted solely of disability benefits. In any event, nothing in the language of the federal tax law limits the discretion of a state court to allocate the dependency exemption ( Agnello v. Payne, 26 AD3d 837), and the court therefore could have awarded both exemptions to the husband. It agreed with the wife that the court erred in awarding the husband one half of the funds in the wife's M & T savings account as of the date of commencement of the action, and modified the judgment accordingly. That account was in the wife's name only, and she established at trial that the funds in the account came exclusively from her disability payments. Domestic Relations Law §236(B)(1)(d)(2) provides that "compensation for personal injuries" is separate property not subject to equitable distribution, and disability payments constitute compensation for personal injuries. It concluded that the court erred in determining that the wife shall not share in any early retirement benefits or enhanced pension payments, if any, that the husband may receive in the future and modified the judgment accordingly. "Vested rights in a noncontributory pension plan are marital property to the extent that they were acquired between the date of the marriage and the commencement of a matrimonial action, even though the rights are unmatured at the time the action is begun" ( Majauskas v. Majauskas, 61 N.Y.2d 481, 485-486). Although Social Security bridge payments and severance payments generally are not subject to distribution under Majauskas, early retirement or pension benefits of the type at issue in this case have been treated differently (Olivo v. Olivo, 82 N.Y.2d 202, 207-209). It rejected the wife's contention that the court erred in awarding her only a 15% share of the husband's business, given that the wife made only indirect contributions to that business and concluded that the " 'equities of the case and the financial circumstances of the parties' " supported the court's refusal to award attorney's fees to plaintiff.

Child Support - Family Court Act 580-201(5) - Acts of Parents Who Requested Children Be Placed in Care of Aunt in New York, Executed Limited Power of Attorney Authorizing Aunt to Withdraw Child from School, and Executed Durable Powers of Attorney for Health Care in New Mexico, Supported Conclusion That Children Resided in New York "As a Result of the Acts or Directives" of Respondents” - Due Process - Parents Voluntary Decision to Place Children with Aunt in New York and Formal Acts Effectuating Decision Constituted More than Mere Acquiescence. As Distinguished from Kulko, Parents Purposefully Availed Themselves of the Privilege of Conducting Activities Within this State , by Sending Their Children to Live with Their Aunt Without Providing Financial Support for Children.

In Matter of Chautauqua County Department of Social Services o/b/o Colleen A. Y.,--- N.Y.S.2d ----, 2012 WL 1450294 (N.Y.A.D. 4 Dept.) Petitioner commenced proceedings pursuant to Family Court Act article 4 seeking an order directing Rita M.S., the respondent in proceeding No. 1 (hereafter, stepmother), and Kenneth M.Y., the respondent in proceeding No. 2 (hereafter, father), both of whom were nonresidents of New York, to furnish support for the four children who were the subjects of these proceedings (collectively, children). Petitioner sought child support retroactive to the time that the children entered the foster care system in New York. Upon respondents' default, the Support Magistrate, directed the father to pay child support in the amount of $775 per week effective the date on which the children were placed in foster care and directed the stepmother to notify the Support Collection Unit of any change in employment status and health insurance benefits. The support orders were dated July 6, 2010. Respondents did not file objections to the July orders. In October 2010, respondents moved to vacate the support orders and to dismiss the support proceedings pursuant to CPLR 5015(a)(4) based upon Family Court's alleged lack of personal jurisdiction. By orders dated November 9, 2010 , the Support Magistrate "denied and dismissed" respondents' motions to vacate the support orders, determining that the court had jurisdiction over respondents pursuant to Family Court Act 580-201(5). Respondents filed objections to the November orders, and Family Court dismissed those objections and affirmed the November orders of the Support Magistrate. The Appellate Division affirmed.

The Appellate Division rejected respondents argument on appeal that the court erred in failing to review their challenges to the July orders in the context of their objections to the November orders. Although respondents were correct that the proper procedure to challenge an order entered upon a default is by way of a motion to vacate the default pursuant to CPLR 5015(a) rather than by way of the filing of objections pursuant to Family Court Act 439(e) respondents moved to vacate the July orders and to dismiss the proceedings solely on the basis of alleged lack of personal jurisdiction pursuant to CPLR 5015(a)(4), not on the basis of excusable default pursuant to CPLR 5015(a)(1). Thus, respondents' motions brought up for

review only the issue of jurisdiction, not the underlying merits of the July orders.

The Court rejected the Respondents argument that the court's jurisdictional determination had to be vacated because it was not based upon competent evidence.. Contrary to respondents' contention, the Support Magistrate was not required to hold a hearing on the issue of personal jurisdiction before issuing the July orders. The support petitions alleged that New York had long-arm jurisdiction over respondents pursuant to Family Court Act 580-201(5), and respondents failed to answer the petitions, failed to move to dismiss the petitions for lack of personal jurisdiction (see CPLR 3211[a][8] ), and failed to appear in court in opposition to the petitions. It concluded that the Support Magistrate properly determined, based upon the documentation provided by petitioner, that it had long-arm jurisdiction over respondents. The court observed that when respondents moved to vacate the July orders on the ground that the court lacked personal jurisdiction, the Support Magistrate was faced with conflicting submissions on that issue from respondents and petitioner. Assuming, arguendo, that respondents' submissions disputed the underlying jurisdictional facts and not simply the legal conclusions to be drawn therefrom, respondents would have been entitled to a hearing on the issue of personal jurisdiction. Respondents, however, waived any right to a hearing on jurisdiction by submitting their motion on papers only.

The Appellate Division concluded that respondents failed to preserve for review their contention that the Support Magistrate's jurisdictional findings were not based upon competent evidence inasmuch as they did not challenge the competence of the evidence submitted by petitioner in their motions to vacate the July orders. Although respondents contended in their objections to the November orders denying their motions to

vacate the July orders that those orders were not based upon competent proof, Family Court properly determined that such contention was unpreserved inasmuch as it was not raised before the Support Magistrate in the motions to vacate.

The Appellate Division concluded that the court properly determined that it had personal jurisdiction over them. Family Court Act § 580-201 provides that, "[i]n a proceeding to establish ... a support order ..., the tribunal of this state may exercise personal jurisdiction over a nonresident individual ... if[, inter alia,] the child[ren] reside[ ] in this state as a result of the acts or directives of the individual" . It held that the

children clearly resided in New York as a result of respondents' acts and directives. After respondents were arrested and each charged with felony child abuse against the children, the Magistrate Court for Dona Ana County, Las Cruces, New Mexico ordered respondents to avoid all contact with the children. In light of the no-contact order, respondents requested that the children be placed in the care of the children's aunt in New York. In an August 2008 letter to the New Mexico Children, Youth and Families Department (CYFD), the father stated that "[t]he relative who will be available to take custody of any or all of the girls on our behalf is their aunt who would take them back to her dairy farm. We request they be released to her Monday 8/11/08 ... [I]t is beyond all doubt in their best interest to be in such household rather than in foster care. She will be here as early tomorrow as you say they might be released."To that end, respondents executed a limited power of attorney authorizing the aunt to withdraw one of the children from school, and executed durable powers of attorney for health care designating the aunt as the children's agent for health care decisions. On August

11, 2008, CYFD and the aunt entered into a "safety contract" pursuant to which the aunt agreed to provide for the children's basic needs. In addition, the safety contract stated that the aunt understood that respondents "have voluntarily placed the children in [her] care for an undetermined length of time," and that she was

"to contact [respondents] if [she were] in need of any financial assistance for the [children], as the [ respondents] are still legally responsible for the[ children's] well-being."Thereafter, the aunt transported the children to her home in New York. Under those circumstances, we conclude that the children began

residing in New York "as a result of the acts or directives" of respondents within the meaning of Family Court Act 580-201(5), and thus that the court properly exercised personal jurisdiction over respondents.

The Court rejected respondents further contention that the assertion of jurisdiction in this case violates due process. "As a general rule, in order for the courts of one State to exercise jurisdiction over an individual who is domiciled in another State, due process requires that there be sufficient minimum contacts between that individual and the forum State such that the forum State's assertion of jurisdiction will not offend ' "traditional notions of fair play and substantial justice" ' ". In particular, the subject individual's "conduct and connection with the forum State [must be] such that he [or she] should reasonably anticipate being haled into court there". Respondents rely on Kulko v. Superior Ct. of California (436 U.S. 84), in which the United States Supreme Court addressed the issue of personal jurisdiction in a child support action. There, the Supreme Court held that the father's mere "acquiescence" in his daughter's desire to live with the mother in California did not confer jurisdiction over the father in the California courts . Respondents contended that they merely acquiesced in the arrangement between CYFD and the aunt to place the children temporarily in New York with the aunt. Unlike in Kulko, where the father assented to his daughter's desire to live with her mother in California, here respondents chose to send the children to New York after they were ordered to have no contact with the children. Respondents notified CYFD that they wished the children to reside with the children's aunt in New York rather than being placed in foster care in New Mexico, and they executed the necessary documents to facilitate the transfer of the children to the aunt. Respondents' voluntary decision to place the children with the aunt in New York and their formal acts in effectuating that decision constitute more than mere acquiescence, and the fact that respondents did not make the children's travel arrangements was not dispositive. Further, as distinguished from Kulko, here respondents " 'purposefully avail[ed themselves] of the privilege of conducting activities within th[is] State' ", by sending their children to New York to live with their aunt, a New York resident, without providing financial support for the children. Pursuant to the safety contract, the aunt "agree[d] to provide for the [children's] basic needs, to include their medical, educational, and mental health needs." The aunt further agreed that she would "contact [respondents] if [she was] in need of any financial assistance for the [children], as they are still legally responsible for their well-being " . The Support Magistrate aptly noted, "[i]t [wa]s foreseeable, certainly that someone, whether it be [petitioner] or the aunt herself, was, at some point, going to be asking for support of children that are not theirs." It thus concluded that respondents' conduct in relation to New York was such that they "should [have] reasonably anticipate[d] being haled into court here, and, thus that the court properly exercised personal jurisdiction over respondents

Family Court - Jurisdiction - Court Erred in Adding Provision with Respect to Tax Deductions and Exemptions as Jurisdiction Is Generally Limited "To Matters Pertaining to Child Support and Custody", and Tax Deductions or Exemptions Are Not an Element of Support.

In Warner v Warner, --- N.Y.S.2d ----, 2012 WL 1450408 (N.Y.A.D. 4 Dept.) the Appellate Division reversed that part of the judgment of divorce providing that all future "issues relative to income tax deductions and exemptions concerning the children" shall be referred to Family Court. Although the judgment was entered upon consent, the provision was added by Supreme Court sua sponte, and defendant's attorney objected to that provision. Thus, defendant's contention was properly before the Court. It agreed with defendant that the court erred in adding the provision with respect to the tax deductions and exemptions inasmuch as the jurisdiction of Family Court is generally limited "to matters pertaining to child support and custody", and tax deductions or exemptions are not an element of support. Although Family Court Act § 115(b) provides that Family Court has jurisdiction "over applications for support, maintenance, a distribution of marital property and custody in matrimonial actions when referred to the family court by the supreme court", marital property is defined as that property which is acquired during the marriage, and the parties' entitlement to tax deductions and exemptions concerning the children will affect only property acquired after the marriage.

Supreme Court Decisions

Health and Medical Insurance - Domestic Relations Law § 236[B](8)(A) - Obligation to Provide Insurance Ceases upon the Termination of the Spouse's Duty to Provide Maintenance, Child Support or a Distributive Award Despite Prior Appellate Division Holding.

In Lomaglio v Lomaglio, 2012 WL 1676768 (N.Y.Sup.) Unreported Disposition, the parties were divorced in 1998. It was undisputed that the original divorce judgment, which was not submitted on the motion, required the husband to pay maintenance for 18 months. The judgment did not require him to contribute any sum to the wife's health insurance costs. In 1999 Supreme Court held a hearing on the wife's request for modification of her maintenance and to require the husband to make a contribution to her health insurance costs. After a trial, the court denied her request for modification of maintenance and a contribution to her health insurance. The Appellate Division affirmed the trial court's conclusion that the wife was not entitled to permanent maintenance. (LoMaglio v. LoMaglio, 273 A.D.2d 823 (4th Dep't 2000). It found that 18 months was a sufficient period to permit the wife to become self-sufficient concluding there was "no basis to disturb the court's exercise of discretion in awarding durational maintenance for that limited period." However, considering the application for contribution to or purchase of health insurance, the court directed: “because defendant's medical condition is likely to be permanent, the court should have directed plaintiff to continue to provide the same level of medical insurance coverage that he provided during the marriage to the extent such coverage is not provided by defendant's employer.” It modified the judgment accordingly.

The Supreme Court found that the Appellate Division determination regarding the "permanency" of the wife's condition was intriguing. The lower court concluded that her condition did "not prevent her from maintaining regular full-time employment." The Appellate Division declined to modify the maintenance provision in the divorce decree but, in the quoted section, gave some direction regarding the husband's obligation to provide health insurance for the wife. After the Appellate Division decision, the husband continued to provide "medical insurance" for the wife. He paid for premiums for the coverage from 2000 through 2008. In 2008, he discontinued paying the premiums. The wife brought an application for reimbursement and restoration of the health insurance coverage. The husband challenged the interpretation of the Appellate Division, arguing that the court's use of the word "permanent," while describing the wife's infirmities, did not require non-durational health insurance coverage. The husband argued that interpreting this language to require him to provide non-durational health insurance coverage defied the Domestic Relations Law and was unenforceable. Supreme Court observed that DRL § 236[B](8)(a) provides, in relevant part, that: “The obligation to provide such insurance shall cease upon the termination of the spouse's duty to provide maintenance, child support or a distributive award.”

The husband argued that regardless of the Appellate Division's use of the word

"permanent" to describe the wife's infirmities, the Court was without the statutory authority to require the husband to provide health insurance for the wife beyond the term of the maintenance which, under the separation agreement, was only 18 months. The wife argued that the Appellate Division holding was decisive on the question of the husband's obligation to provide health insurance and that DRL §236[B](8)(a) does not undercut the Appellate Division holding as either res judicata or the law of the case.

Supreme Court granted the husbands cross-motion to extinguish the husband's obligation to provide health insurance. Supreme Court found no evidence that either party raised the question before the Court in 2000 and, there was no evidence the Appellate Division even considered the statute. It could not ignore the statutory language of DRL § 236B(8)(a), which limits the period in which an order for the continuation of health insurance can occur. It observed that the Legislature could not have been clearer: the obligation to provide health insurance "shall cease upon the termination of the spouse's duty to provide maintenance." There was simply no statutory authority to continue the husband's obligation to pay for health insurance beyond the 18-month period for maintenance that the original divorce decree mandated. After reviewing the existing case law Supreme Count found that there was there is no case authority which required the husband to pay health insurance costs after the period of maintenance terminates. Given this express statutory command, the Court could not read the 2000 Appellate Division decision in Lomaglio v. Lomaglio to require the husband to continue health insurance payments beyond the 18-month period set forth in the divorce decree. The Court concludes that the Appellate Division's Court's use of the phrase "permanent" in the text of its Lomaglio v. Lomaglio opinion was ambiguous and was used to only describe the wife's infirmities and was not intended to be construed to create a requirement for the husband to pay health insurance costs beyond the expiration of his maintenance.

The court declined to hold that the husband's voluntary payment of health insurance premiums well beyond the period of maintenance required him to continue to pay them. It also declined to preclude the husband's claims through invocation of either res judicata or the law of the case doctrines.

May 16, 2012

Appellate Division, First Department

Child Support - DRL § 240(1-b)(c)(7) - College Expenses - Decision to Impose a Suny Cap on Cost of Child’s College Education must Be Determined on a Case-by-case Basis, Considering Parties' Means and Child's Educational Needs.

In Tishman v Bogatin,--- N.Y.S.2d ----, 2012 WL 1392995 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which directed defendant to pay 40% of the cost of the parties' older child's college education. It held that the motion court properly rejected defendant's contention that a so-called SUNY cap should be imposed on his obligation to contribute to the costs of the child's college education-that is, that his contribution should be based on the cost of an education at a college in the State University of New York system, because plaintiff failed to show that the child's needs cannot be met adequately at a SUNY college. Whether to impose a SUNY cap is determined on a case-by-case basis, considering the parties' means and the child's educational needs. A rule that, absent unusual circumstances, a parent's obligation is limited to the maximum SUNY tuition would be inconsistent with Domestic Relations Law § 240(1-b)(c)(7), which provides that a court may award educational expenses where it determines, "having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires," that the education sought to be paid for is appropriate. The record supported the court's direction that defendant pay 40% of the costs of the parties' older child's education at a private college. The child attended an elite public high school, his reasons for preferring the private college over SUNY schools were sound, both parties attended private college and private law school, and both parties had the resources to pay the tuition at the private college where the child was enrolled

Appellate Division, Second Department

Judgments - Incorporation of Agreement - Where Judgment Does Not Accurately Incorporate the Provisions of a Stipulation of Settlement the Stipulation Prevails

In Ayrovainen v Ayrovainen, --- N.Y.S.2d ----, 2012 WL 1322433 (N.Y.A.D. 2 Dept.) the Appellate Division observed that when a party alleges that a judgment does not accurately incorporate the provisions of a stipulation of settlement, the preferred remedy is to move in the trial court to resettle or vacate the judgment, rather than to appeal. Nevertheless, the Court may address the issue and, upon examining the stipulation and the judgment appealed from in this matter, it found that the latter did not conform to the former in several key respects including: the percentage of the college expenses of the parties' children for which the defendant was responsible, the date upon which the defendant's obligation to maintain the former marital residence would cease, under what conditions the defendant's maintenance obligation would terminate, and the manner in which the parties would claim their youngest child as a tax exemption. In addition, the judgment conflicted with the stipulation with respect to the defendant's responsibility to maintain a life insurance policy with the plaintiff as a beneficiary, whether the parties agreed that there would be a cost of living increase for the defendant's child support obligation, and whether the defendant was to assist the plaintiff with a potential sale of certain real property located in Livingston Manor. It remitted the matter to the Supreme Court to issue a corrected judgment which accurately reflects the terms of the parties' stipulation entered on the record in open court.

Supreme Court Decisions

Divorce - Irretrievable Breakdown - Supreme Court Permits Amendment of Complaint to Add Irretrievable Breakdown Ground under DRL § 170 (7) Rejecting Strack and Schiffer Decisions - Finds No Statute of Limitations Under DRL § 170 (7) and Res Judicata Does Not Apply to DRL § 170 (7)

In Palermo v Palermo, 2011 WL 7711557 (N.Y.Sup.), 2011 N.Y. Slip Op. 52506(U), the couple were married in 1977. In September 2000, the wife moved out of the marital residence. In 2001, the wife commenced a divorce action against the husband on grounds of cruel and inhuman treatment and a jury returned a verdict of no cause for action. In February 2011, the wife again filed a verified complaint, this time on the grounds that the marital relationship had broken down for a period in excess of six months. The husband answered, denying the allegations, and asserting an affirmative defense that the couple had lived separate and apart for a period of at least 10 years. The husband moved to dismiss the wife's complaint, arguing that the statute of limitations had expired on her claims, that they were barred by res judicata, and that the complaint failed to state a cause of action. The wife cross-moved to replead the claim under DRL § 170(7) to include the specific allegation that the marriage was irretrievably broken for a period of greater than six months. Because amendments to pleadings at the early stages of litigation are widely favored, the motion to amend and serve the complaint was granted. CPLR 3025(b).

The Supreme Court held that the verified statement of "irretrievable breakdown" of a marriage, in itself, without a trial, provided the necessary predicate to granting a divorce under the Domestic Relations Law. It examined the history of New York’s no fault divorce law. It observed that in Gleason v. Gleason, 26 N.Y.2d 28 (1970) the Court of Appeals pointed out that the legislature recognized "that it is socially and morally undesirable to compel a couple whose marriage is dead to remain subject to its bond." The Gleason decision is important to the current question because it recognizes that the state legislature could fashion divorce remedies based on both parties consent to end their marriage without further testimony or evidence as to their private intentions. In this case, the question was whether the state legislature provided the same relief-divorce-based on the intentions of just one of the two partners to the marriage, without any inquiry into their intent or conduct by enacting DRL § 170(7). Supreme Court pointed out that under this statute the legislature no longer requires evidence of the "mutual contemporaneous intention" as required by the two previous no-fault grounds. Under DRL § 170(7), one partner alone can declare the marriage is "dead" if sworn to under oath, in accordance with the statutory language. While a strict reading of the statute suggests that the declaration alone provides the basis for a divorce, the husband contended that he was entitled to a trial on this provision relying on Strack v. Strack, 31 Misc.2d 258 (Sup.Ct. Essex Cty.2011), where, citing the Domestic Relations Law provision for a right to trial by jury, the court concluded that te legislature failed to include anything in the Domestic Relations Law § 170(7) to suggest that the grounds contained therein are exempt from this right to trial. Had it intended to abolish the right to a trial for the grounds contained in the Domestic Relations Law, it would explicitly have done so. The court concluded that the question of whether a breakdown is irretrievable is a question of fact to be determined at trial.

In view of the Strack decision, there was an apparent collision of the no-fault entitlement under DRL §170(7), and the trial right under DRL § 173. The legislative history of New York's newest no-fault statute demonstrated the legislature's recognition of this "evil" and the proposed "remedy." It was apparent that the legislature intended to provide estranged couples a simple and incontestable basis for ending their marriage, and avoid the squabbling over issues that flow from the other objective grounds in DRL § 170. In view of this intent, the court declined to follow the logic or holding of Strack. The court concurred with A.C. v. D.R., 32 Misc.3d 293 (Sup. Cty. Nassau Cty.2011) that there is "no defense to the no-fault grounds." This court also considered the opinion in Schiffer v. Schiffer, 33 Misc.3d 795 (Sup.Ct. Duchess Cty.2011), which followed the logic of Strack, holding that the no-fault assertion under DRL § 170(7) was subject to the trial requirement. The court found little in Schiffer that differed from the analysis in Strack and declined to follow it. The Schiffer court suggested that what is required, as a matter of fact finding under DRL § 170(7), is that the relationship be irretrievably broken and a statement under oath by the party seeking the divorce. However, there is no "and" connecting the sworn statement provision and the " "irretrievable breakdown for six months" assertion. The legislature used another connector: "provided." The use of this word-" "provided"-rather than "and" means that the "irretrievable breakdown for six months" must be accepted as true "provided" one party swears that it is true. The court in Schiffer also raised a "due process" argument, claiming that the courts should not deprive a spouse of the right to trial on irretrievable breakdown and that to hold otherwise reduces the court to a "rubber stamp" when presented with a claim under DRL § 170(7). This suggestion ignored the Court of Appeals directive in Gleason: [R]ights growing out of the [marriage] relationship may be modified or abolished by the Legislature without violating the provisions of the Federal or State Constitution which forbid the taking of life, liberty or property without due process of law. Gleason v. Gleason, 26 N.Y.2d 28 (1970); see also A.C. v. D.R., 32 Misc.3d 293, 306 (Sup. Cty. Nassau Cty. 2011) (reasserting compelling conclusion of Gleason that there is no due process right to any defense in matters involving the dissolution of marriages).For these reasons, this court declined to follow Schiffer. The defendant's motion to dismiss the complaint, because it

failed to state a cause of action, was denied.

The Supreme Court also denied the motion to dismiss for violation of the statute of limitations. It held that there is no statute of limitations under DRL § 170(7) because the cause of action only arises at the time the party swears that the marriage has been irretrievably broken for a period in excess of six months. A cause does not accrue until there is "a legal right" to be enforced. Hahn Automotive v. Amer. Zurish Ins. Co., 81 AD3d 1331 (4th Dep't 2011). The cause of action for divorce on the basis of irretrievable breakdown accrues at the time of the attestation by one partner and not sooner. The statute of limitations has no pertinence to a cause of action that arises at the time of the filing of the complaint.

Finally, the Supreme Court denied the defendant's motion to dismiss based on res judicata. It held that res judicata did not preclude the claim under DRL § 170(7) because it is based on a different theory and cause of action. A jury finding that no cause of action for cruel and inhuman treatment existed a decade ago only applied to the facts before the jury at that time. It did not preclude this claim for a divorce on the grounds that one party has sworn that the marriage has been irretrievably broken for a period of excess six months.

Divorce - Irretrievable Breakdown - Supreme Court Permits Amendment of Complaint to Add Irretrievable Breakdown Ground under DRL § 170(7) Even Though Amendment States That the Act Shall Apply to Matrimonial Actions Commenced after the Effective Date

In G.C v G.C., 2012 WL 1292729 (N.Y.Sup.), 2012 N.Y. Slip Op. 50653(U) Supreme Court permitted an amendment to a divorce complaint to add new causes of action under the Domestic Relations Law which arose after the filing of the complaint. The plaintiff brought a divorce action prior to October 10, 2010. He alleged that his wife had engaged in cruel and inhuman treatment toward him. The wife answered the complaint, denying the specific allegations. After the commencement, the parties lived apart. The wife moved to Ohio. During discussions over the status of the case, the wife made it clear that she would contest the grounds for the divorce. The husband moved to amend the complaint to assert two new grounds: a ground under Domestic Relations Law § 170(2) for abandonment and a claim under Domestic Relations Law § 170(7) for an "irretrievably broken" marriage. The wife opposed the abandonment amendment, arguing that the husband can not allege abandonment when it occurred during a year after the filing of complaint and that its assertion, now, after the action has been pending for more than two years, is untimely and prejudicial. She opposed he amendment on the grounds of under Domestic Relations Law § 170(7) because the complaint was filed prior to the effective date of the change.

Supreme Court observed that amendments were both made pursuant to CPLR 3025(b), which provides that amendments should be freely given or a complaint may be supplemented "by setting forth additional or subsequent transactions or occurrences, at any time by leave of court."CPLR 3025(b). An avalanche of authority directs that the leave to amend a complaint should be "freely granted" unless the proposed amendment is clearly and patently insufficient on its face. Williams v. Ludlow's Sand & Gravel Co., 122 A.D.2d 612 (4th Dep't 1986). A cause of action under Domestic Relations Law s 170(2) requires allegations that a spouse's actual physical departure from the marital residence for one year is unjustified, voluntary, without consent of the plaintiff spouse, and with the intention of the departing spouse not to return. The amended complaint, on its face, met this minimal pleading requirement: it alleged that the wife left the marital residence in 2009, has not returned and her leaving was without justification. The pleading stated the cause of action. Under the weight of cases favoring "freely granting" amendments to complaint, the cause of action for abandonment, although it accrued while this action had been pending, was properly pleaded and did not lack merit.

The Court pointed out that in October, 2010, the Legislature added a statutory change to the Domestic Relations Law which created "no-fault divorce" and permitted one party to be granted the divorce upon a sworn declaration that the marriage was "irretrievably broken for a period in excess of six months" and the parties had agreed on all the issues related to support and equitable distribution The wife correctly noted that the statutory amendment states that the "act ... shall apply to matrimonial actions commenced after the effective date."It was undisputed that the effective date was October 12, 2010. The clear intention of the Legislature, based on this language, was to not allow litigants to simply amend their complaints, after the amendment took effect, and allow those claims to proceed to adjudication on the basis of the new "no-fault" allegations by claiming that the six months of "irretrievable breakdown" included time before the effective date of the amendment. Nevertheless, the court granted his motion noting that the husband was not seeking any relief other than that sought in the original complaint: a divorce and accompanying property distribution. By virtue of the statutory change, the husband, having waited six months after its effective date, could now meet the time requirement of six months because all of the time accrued after the amendment took effect. The court reasoned that the husbands motion did not violate the language of the statute or the intention of the Legislature. Instead, he sought to invoke what the Legislature extended to him: a cause of action that has ripened because more than six months have passed since the date of the amendment and during that time, the husband swears that his marriage has been irretrievably broken. It pointed out that in Gleason v. Gleason, 26 N.Y.2d 28 (1970), the Court held that a statutory amendment, which added subdivision (4) to Section 170 of the Domestic Relations Law, could be used to permit an uncontested divorce to incorporate a separation agreement signed before the effective date of the statutory change. The Court of Appeals, in resolving the issue of the application of a new ground for divorce to an agreement, signed before the effective date of new statute, could not ignore the beneficial aspect of the statute and its goal of reducing tensions in obtaining final judgments in matrimonial cases. In this case, the change created by the addition of Section 170(7) paralleled the statutory change in Gleason v. Gleason: it simply provides another ground for a divorce. The new statute does not create greater rights for a spouse in a divorce. The no-fault change provides a speedy method for establishing the grounds and does not obviate the wife's right to insist on a trial regarding any and all financial issues related to the couple. The new change gives neither party any greater property rights. For these reasons, the language of CPLR 3025(b), the lack of any prejudice to the wife's property rights and the judicial command to "freely grant" such applications weigh heavily in favor of granting this motion. The motion to amend to add claims under Section 170(4) and 170(7) was granted.

May 1, 2012

First Department Holds Although Husband Retained All the Property, Court Will Not Set Aside Agreement on Ground of Unconscionability Where Inequitable Conduct Lacking

In Barocas v Barocas, --- N.Y.S.2d ----, 2012 WL 1293783 (N.Y.A.D. 1 Dept.) the Appellate Division rejected defendant's contention that the property division provisions of the parties prenuptial agreement were unconscionable. Defendant failed to establish that her execution of the agreement was the result of inequitable conduct on plaintiff's part. Rather, the parties fully disclosed their respective assets and net worth, and the agreement was reviewed by independent counsel, who defendant admitted had told her that the agreement was "completely unfair" and advised against signing it. The fact that plaintiff's attorney recommended defendant's counsel, and that plaintiff paid her counsel's fees, was insufficient to demonstrate duress or overreaching. Defendant's claim that she believed that there would be no wedding if she did not sign the agreement, that the wedding was only two weeks away and that wedding plans had been made, was insufficient to demonstrate duress. Although application of the provisions would result in plaintiff retaining essentially all the property, courts will not set aside an agreement on the ground of unconscionability where inequitable conduct was lacking and simply because, in retrospect, the agreement proves to be improvident or one-sided. The circumstances surrounding the execution of the agreement disclosed no issue of fact as to whether there was overreaching. It therefore adhered to the general rule that " '[i]f the execution of the agreement ... be fair, no further inquiry will be made' " (Levine v. Levine, 56 N.Y.2d 42, 47 [1982], citing Christian, 42 N.Y.2d at 73). Moreover, duly executed prenuptial agreements are accorded the same presumption of legality as any other contract" ( Bloomfield v. Bloomfield, 97 N.Y.2d 188, 193 [2001] ). The majority disagreed with the dissent's conclusion that there was an issue of fact as to whether the property division provisions of the instant agreement are unconscionable. They observed that an unconscionable contract is one "which is so grossly unreasonable as to be unenforcible because of an absence of meaningful choice on part of one of the parties together with contract terms which are unreasonably favorable to the other party" ( King v. Fox, 7 NY3d 181, 191 [2006] ). Here, meaningful choice was not an issue inasmuch as defendant knowingly entered into the agreement against the advice of her counsel.

The majority also held that although defendant's waiver of spousal support was not unfair or unreasonable at the time she signed the agreement, given her knowing and voluntary execution thereof with benefit of counsel, factual issues existed as to whether the waiver would be unconscionable as applied to the present circumstances (Domestic Relations Law 236[B][3][3] ). A Child support award for the parties' two children had not been established, and it was unclear whether defendant would become a public charge without spousal support. It was also unclear whether waiver of all spousal support would result in inequality "so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense" ( Christian, 42 N.Y.2d at 71). The evidence showed that, despite the 15-year marriage, under the agreement, plaintiff would be entitled to retain property valued at about $4,600,000, while defendant would be entitled to only an IRA account valued at approximately $30,550. She claimed that she had no other assets or sources of income, and could no longer work, given that she was now 50 years old and that plaintiff had thwarted her efforts to get a college education and pursue a career during the marriage. Plaintiff, contends that defendant chose not to get a college degree or pursue a career, and that, while he supported her various business projects, the projects failed or she would quit after losing interest. The majority found that issues of fact existed as to whether the maintenance waiver would be unconscionable as applied to the current circumstances. Justices Freedman and Manzanet-Daniels dissented in part in separate memoranda.

Finding of Neglect Does Not Require Actual Injury But, Rather, an Imminent Threat That Such Injury or Impairment May Result.

In Matter of Lamarcus E.,--- N.Y.S.2d ----, 2012 WL 1211389 (N.Y.A.D. 3 Dept.) Respondent, the father of the child (born in 2002), was granted custody in 2008 in a contested proceeding against the child's mother. In August 2009, while under petitioner's supervision, respondent informed petitioner that he intended to relocate to Connecticut in October 2009 to obtain employment and live with his girlfriend, but that he would not be taking his then seven-year-old son with him. Petitioner rejected respondent's request to accept the child into a voluntary placement. After Family Court and petitioner rejected three different plans proposed by respondent for the future care of the child, petitioner filed a neglect petition against him alleging that he intended to imminently implement his plan to permanently relocate to Connecticut without the child and without any viable plan for the child's care. Upon receipt of the petition, the court immediately removed the child and placed him in the temporary custody of petitioner, and respondent relocated to Connecticut as planned. Following a fact-finding hearing, respondent, who remained living out of state, was found to have neglected the child and, after a dispositional hearing, the court continued the child's placement with petitioner in foster care. The Appellate Division affirmed. It observed that a finding of neglect does not require actual injury but, rather, an imminent threat that such injury or impairment may result. In addition, the impairment "must be a consequence of the parent's failure to exercise a minimum degree of parental care" ( Matter of Afton C. [James C.], 17 NY3d at 9; Nicholson v. Scoppetta, 3 NY3d at 368, 370). Parental behavior, in turn, is evaluated by asking whether, under the circumstances, a reasonable and prudent parent would have so acted. Family Court based its determination of neglect upon respondent's plan to effectively abandon the care and custody of his child which, absent the intervention of petitioner, the court found would "certainly" have led to the impairment of the child's physical, mental or emotional condition. Upon learning of his plan to leave his child behind without a viable caretaker, petitioner's caseworkers had multiple discussions with respondent regarding the child's future. One caseworker testified that, during these discussions, respondent told her that he did not want to take the child along because he was "too much to handle" and he did not want to be responsible for facilitating, from Connecticut, visitation with the child's mother; he persistently requested that the child be placed in foster care. Significantly, although Family Court had previously ordered respondent not to relocate with the child out of state, he told a caseworker that he would not be taking his child with him even if granted the court's permission to do so and he did not file a petition to modify that restriction. While respondent implied in his brief that petitioner's refusal to permit him to voluntarily place his child in foster care is the basis for the neglect finding against him, a voluntary placement is appropriate only where a parent is unable to care for his or her child, and not where a parent is simply unwilling to do so, as here (see Social Services Law 384-a). Respondent's knowledge that his child would be placed in foster care upon his refusal to take him to Connecticut, fully aware that this placement would result in a charge of neglect against him, reflected his clear intention to abdicate his parental obligations, including his responsibility to adequately plan for his child's needs, thereby placing the child at risk. Respondent's suggested alternatives to placing his child in foster care reflected a glaring and fundamental misunderstanding of his responsibilities as a parent. Respondent's blatant unwillingness to provide proper care and supervision for his child placed the child in imminent danger of impairment.

Supreme Court Holds Agreement Provision Prohibiting Divorce until Apartment Sold Violated Public Policy Governing Divorces in New York

In Filstein v Bromberg, --- N.Y.S.2d ----, 2012 WL 1167458 (N.Y.Sup.) the parties were married in 1989. They parties purchased the marital residence, a three-bedroom condominium located on West 23rd Street in Manhattan ("the apartment") in 1998. In October 2007 the wife brought an action for separation. On February 15, 2008, the parties entered into the separation agreement that settled the wife's action for separation. The separation agreement, at Article IV, Paragraph 4(G), provides, in relevant part: “ Prior to the sale of the Apartment, (i) the parties' attorneys shall prepare a package of documents for the parties and counsel to sign, pursuant to which the Husband will be able to obtain an uncontested divorce based upon the Wife's having abandoned the Husband more than one year prior to the commencement of this action; and (ii) neither party shall file any papers to obtain a judgment of divorce.” More than four years after the parties entered the separation agreement resolving the 2007 action for separation, the apartment remained unsold and the parties remained married. The husband commenced an action in March 2011 for divorce and for a declaratory judgment determining that the no-divorce clause of the separation agreement was unenforceable. The husband moved pursuant to CPLR 3212 for partial summary judgment on his cause of action for declaratory judgment. He argued that conditioning the ability to obtain a judgment of divorce on the parties' ability to sell the apartment violated public policy. The wife argued in opposition that the clause is an enforceable contractual provision and that striking it would amount to the court finding that there is an absolute right to divorce. The wife also argues that if the no-divorce clause is held to be unenforceable, then she is entitled to have the entire separation agreement invalidated.

Supreme Court held that Article IV, Paragraph 4(G) of the parties' separation agreement violated public policy governing divorces in this state. In Gleason v. Gleason, 26 N.Y.2d 28 (1970), the Court of Appeals laid out New York's public policy position: “Implicit in the statutory scheme is the legislative recognition that it is socially and morally undesirable to compel couples to a dead marriage to retain an illusory and deceptive status and that the best interests not only of the parties but of society itself will be furthered by enabling them "to extricate themselves from a perpetual state of marital limbo." He observed that in P.B. v. L.B., 19 Misc.3d 186 (Sup Ct, 2008), the trial court applied the policy enunciated in the Gleason case to a party's challenge of a separation agreement clause preventing the husband from filing for divorce for five years after the parties signed the agreement. The court found that the clause was unenforceable, stating that "no waiver of a person's right to seek a divorce for longer than the statutory one year after execution of a separation agreement will be enforced by the court." Subsequently, another trial court found that a separation agreement preventing either spouse from commencing a divorce action for five years was void for the same reasons. Corso v. Corso, 21 Misc.3d 1102(A) (Sup Ct, 2008). The husband's motion for partial summary judgment was granted.

Supreme Court rejected the wife’s argument that if the court strikes the provision, then it must strike the entire agreement. The agreement contained a severability clause. Case law makes clear that when a clause in a separation agreement is voided, it can be severed and the rest of the agreement may stand. The court found the rest of the agreement was valid and remained enforceable.

Supreme Court Holds That Breach of the Collaborative Law Participation Agreement Does Not Require Finding That Husband Overreached During Collaborative Law Process.

In H.K. v A. K., 2012 WL 1232970 (N.Y.Sup.), 2012 N.Y. Slip Op. 50639(U) (Table, Text in WESTLAW), Unreported Disposition, the parties were married in 1980 and had three children, two of whom were emancipated. They encountered marital problems and entered into a collaborative law process, each retaining attorneys experienced in collaborative law, and signed a participation agreement. The participation agreement executed by the parties and their attorneys, on September 8, 2009, stated that the collaborative process "relies on honesty, co-operation, integrity, and professionalism" and that the parties will deal in good faith and "shall provide all relevant and reasonable information" which includes "sworn statement of net worth and supporting documentation of their income, assets and debts ." The parties acknowledge that they are setting aside "certain procedures" including "formal discovery proceedings." To assist in handling the couple's complicated finances, the parties retained a financial specialist who also signed the agreement. A lengthy collaborative process ensued. It was undisputed that the husband was in charge of the couple's finances. He had significant assets, traceable to his family, which provided the backbone of their income, and held senior titles in various real estate based entities. The wife was a part-time college professor. Once the collaborative process commenced, the husband provided significant financial disclosure. He averred, without contradiction, that he provided income tax returns, financial statements, and detailed financial records to the attorneys and the retained financial specialist.

The couple signed a separation agreement on June 10, 2010. In it they acknowledged the role of the collaborative process, that they had "applied their individual standards of reasonableness and acceptability to the agreement," and that they believed the agreement "to be fair, just, adequate, and reasonable." In the final paragraphs, the parties acknowledged that they had full and complete discovery and they "unequivocally waive" any further disclosure. The attorneys oversaw the preparation of the agreement and notarized their respective clients' signatures.

After signing the agreement, the wife learned from a third-party that the husband had a girlfriend and allegedly used marital funds to finance that relationship during the time he was negotiating the separation agreement. According to the wife, she raised this issue with her counsel and the attorney probed the husband on it. The wife alleged that the husband then refused to negotiate and was unwilling to fully disclose his involvement in the alleged relationship. When the issue boiled over, the wife changed counsel and the collaborative process ended. Shortly thereafter, this action was commenced and the competing motions for summary judgment were filed.

The wife argued that the husband breached the collaborative agreement and such a breach constituted fraud or overreaching under the principles established by the Court of Appeals in Christian v. Christian, 42 N.Y.2d 63 (1977). The wife argued that the husband breached the collaborative law agreement by misrepresenting the status of his EMA asset and requiring his wife to transfer it to their children's trusts. The wife's argument that the collaborative agreement sets a standard of conduct, which when breached by the husband constituted overreaching, was an issue of first impression in New York. The Court observed that the "collaborative law" process is a relatively new concept in matrimonial practice. New York courts have never considered its application. Collaborative law attempts to foster an amiable rather than an adversarial atmosphere by creating a "four-way" agreement between each party and their attorneys "in which all are expected to participate actively". The question of the scope of the participant's voluntary disclosure, which commentators have suggested is at the "hallmark" of the collaborative process, remains somewhat unsettled. A party can unilaterally terminate collaborative law at any time and for any reason, including failure of another party to produce requested information. Thus, if a party wishes to abandon collaborative law in favor of litigation for failure of voluntary disclosure, the party is free to do so and to engage in any court sanctioned discovery that might be available. In this case, the wife did not terminate the process prior to executing the agreement, nor did either attorney. Only after the agreement was signed, when the wife was told that the husband had financed his relationship with his girlfriend, did the wife terminate. For most intents and purposes the process had already reached its goal: the separation agreement was signed. Under these circumstances, the court declined to consider whether the husband's alleged breach of the collaborative agreement would subject the husband to a finding of overreaching under Christian v. Christian. The Court pointed out that if the wife or her attorneys suspected the husband was guilty of overreaching, they could have discontinued the process, but they chose not to. The Court held that a breach of the participation agreement did not require a finding that the husband overreached during the collaborative law process.

In Valuing Wife’s Law Decree Any Reliable Analysis of the Wife's Potential Earning Capacity Had to Assume That If She Had Not Attended Law School, She Would Have Sought Employment Commensurate with Her Education and Bachelor's Degree.

In Shea v Shea, --- N.Y.S.2d ----, 2012 WL 1124582 (N.Y.A.D. 3 Dept.) after the parties married in 1991, defendant (husband) completed his studies in psychology and obtained his Ph.D. degree. During the marriage, plaintiff (wife), in addition to having two children, attended law school and earned a law degree. After this divorce action was commenced in December 2006, the wife passed the bar exam and received her license to practice law. After a trial, Supreme Court awarded the husband $12,600, 10% of the value it placed on the wife's law degree. The court also directed the husband to pay $1,200 a month in child support and decreed that he owed $17,363.51 in child support arrears dating back to when the divorce action was commenced. In addition, the court denied applications by the wife that she be awarded a distributive share of the husband's Ph.D. degree, and by the husband that the wife be removed as custodian of bank accounts held in trust for their children.

On appeal the husband challenged Supreme Court's decision which adopted the opinion offered by the wife's expert that placed the value on her law degree at $126,000. He argued that since his expert's analysis was based in large measure on the wife's actual employment history, that analysis was more reliable, and the value of $252,617.82 that his expert placed on the degree should have been adopted by the court. The Appellate Division observed that in analyzing the value of the law degree, both experts compared what they believed the wife should have been able to earn during the relevant time period with and without a law degree and then factored the wife's work-life expectancy into the difference between these two figures to determine the extent to which the degree served to enhance her earning capacity. The principal difference in the evaluations offered by both experts revolved around what each believed the wife's earning capacity would have been had she not obtained a law degree. The wife's expert focused on her actual employment history, as well as statistical data on what an individual with a Bachelor's degree could have earned in the area where she lived during the relevant time period, and concluded that, without a law degree, the wife would have had an annual earning capacity of $44,500. The husband's expert arrived at a significantly lower figure primarily because of the emphasis he placed on the wife's actual employment history in the period prior to obtaining her law degree. He assumed in his analysis that the wife would not have entered the work force until 2006, or after she was admitted to practice law, and that she would have continued to work as a clerk throughout this entire period, even though before attending law school she had obtained a Bachelor's degree and had been accepted into a doctoral program at Indiana University. He concluded, given this history and based on these assumptions, that the wife's potential earning capacity, even with a Bachelor's degree, would not have exceeded $22,827 per year. Supreme Court rejected the opinion of the husband's expert and concluded, as did the wife's expert, that any reliable analysis of the wife's potential earning capacity had to assume that if she had not attended law school, she would have sought employment commensurate with her education and Bachelor's degree. The Appellate Division found that the decision to adopt the opinion of the wife's expert as to the value of her law degree was supported by credible evidence introduced at trial.

The Appellate Division rejected the husbands argument that he was entitled to a greater degree of the value of the wife's law degree because he was the family's primary wage earner during the parties' marriage and arranged his work schedule so that he could care for their children while the wife attended law school. It observed that a nontitled spouse seeking a portion of the enhanced earning potential attributable to a professional license or degree of a titled spouse is required to establish that a substantial contribution was made to the acquisition of the degree or license". Where only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree or professional license, and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit the distributed amount of that enhanced earning capacity". His sacrifices represented overall contributions to the marriage rather than an additional effort to support the wife in obtaining her license. In addition, the wife's own efforts in obtaining her law degree could not be minimized. For example, she worked in part-time positions throughout the marriage and was employed during the summer months while attending law school. She earned merit scholarships and paid a significant part of her law school tuition with an inheritance she received during the marriage. It reached a similar conclusion as to the wife's claim that she should share in the value of the husband's Ph.D. degree. The husband had satisfied most of the requirements he needed to obtain this degree before the parties married and paid for it while providing financial support for his family. What assistance the wife may have provided in aiding him in acquiring this degree was simply not so significant or unique as to warrant awarding her a distributive share of its value.

Bonus Which Was Compensation for Future Services That Were Not Performed Prior to the Commencement of the Action Was Separate Property Not Subject to Equitable Distribution

In Ropiecki v Ropiecki, --- N.Y.S.2d ----, 2012 WL 1109179 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court properly exercised its discretion in directing that the husbands maintenance obligations be retroactive to the date the action was commenced and properly awarded the defendant credit toward the maintenance arrears for voluntary payments he had made of $180,179.28. The defendant was not entitled to any further credit for voluntary payments, as the expenses from his net worth statement included payments made on behalf of himself and his emancipated children, payments for which the wife was not responsible (see Horne v. Horne, 22 N.Y.2d 219, 224; LiGreci v. LiGreci, 87 AD3d 722, 724). The Appellate Division found that Supreme Court properly considered the relevant statutory factors in fashioning the distribution. The parties were married for 27 years, and the plaintiff's very limited earning potential was a result of her staying home and taking care of the parties' four children, including their daughter, who suffered from Retts Syndrome and was severely disabled. The defendant, by contrast, acquired considerable earning potential. Under the circumstances, the Supreme Court providently exercised its discretion in awarding the plaintiff 100% of the equity in the marital home. Similarly, the Supreme Court properly required the defendant to pay the remaining mortgage debt on the marital home in full before transferring title to the plaintiff.

The Appellate Division agreed with the defendant that the Supreme Court improperly awarded the plaintiff a portion of his bonus in the sum of $200,000 as part of the equitable distribution of marital assets. The defendant's bonus, awarded in 2006, after the commencement of the action, was provided as an incentive for future services. Based on the defendant's testimony at trial, as well as the Executive Incentive Bonus Plan, the bonus plan was adopted by the defendant's employer in October 2006 as an incentive for certain employees, including the defendant, to meet certain goals and to ensure the successful sale of the company in the future. Accordingly, the bonus was compensation for future services that were not performed prior to the commencement of the action and, thus, was separate property not subject to equitable distribution. In light of the foregoing, the distributive award had to be reconsidered to ensure that the plaintiff was awarded her equitable share of the marital property, and the matter was remitted to Supreme Court for further review and a recalculation, if warranted, of the equitable distribution of marital property other than the marital residence.

The Appellate Division held that under the circumstances of this case, including the monthly amount of the defendant's maintenance obligation and the ages of the parties, the $1,500,00 of life insurance the defendant was required to carry, as ordered by the Supreme Court, was excessive, and was reduced by substituting a provision directing the defendant to maintain a life insurance policy naming the plaintiff as an irrevocable beneficiary in the sum of $1,200,000 until the plaintiff reaches the age of 65, and in the sum of $600,000 thereafter for as long as the defendant is obligated to pay maintenance. It also held that Supreme Court improvidently directed the defendant to pay 90% of the plaintiff's unreimbursed health care expenses, as such open-ended obligations have been consistently disfavored by the Court. It held that Supreme Court should have directed the defendant to pay 90% of the plaintiff's unreimbursed health care expenses only for as long as he is obligated to pay maintenance.

Argument, That Child Should Have Attended less Expensive College, Without Merit Where Parties Stipulation Did Not Require Parental Consent to Child's College Choice, and Did Not Place Limit on Tuition Amount

In Matter of Filosa v Donnelly, --- N.Y.S.2d ----, 2012 WL 1109332 (N.Y.A.D. 2 Dept.) the Appellate Division found that the father failed to establish, in accordance with the terms of the parties' stipulation of settlement of divorce, that he was financially unable to pay for the child's college tuition or that the mother did not comply with her obligation to encourage the child's use of financial aid, scholarships, and available student loans. Thus, Family Court did not improvidently exercise its discretion in granting the mother's petition and apportioning 50% of those expenses to him. It found his argument, that the child should have attended a less expensive college, without merit. The parties' stipulation did not mandate parental consent to the child's college choice, and it did not place a limit on the tuition amount for which the parties were responsible. Similarly, the father was not entitled to a credit toward his child support payment by virtue of the room-and-board component of the child's tuition, as no such credit was contemplated by the parties' stipulation of settlement.

Default must Be Vacated Once Movant Demonstrates Lack of Personal Jurisdiction, and Movant Is Relieved of Obligation to Demonstrate a Reasonable Excuse for Default and Meritorious Defense

In Matter of Anna M, 940 N.Y.S.2d 121, 2012 N.Y. Slip Op. 01676 (2d Dept 2012) in an order dated October 24, 2008, the Family Court appointed the petitioner, the uncle of the subject children, as guardian of the children. The father had failed to appear in these proceedings. Almost two years later, the father moved, inter alia, to vacate the order of guardianship, arguing that the Family Court lacked personal jurisdiction over him. The father argued, among other things, that he was not served with the order to show cause or petitions in this matter. In addition, his attorney argued that the affidavit of service stated that the father was served on September 28, 2008, which was a Sunday, rendering service void (see General Business Law 11). Family Court denied the father's motion without addressing the issue of personal jurisdiction. It found that the father had notice of the petitioner's request for guardianship but failed "to take action" and "explain his delay" in moving to vacate the order of guardianship and opposing the petitions. The Family Court therefore determined that even if there was a defect in service," the doctrine of laches operated to bar the father from vacating the guardianship order. The Appellate Division held that this was error. CPLR 5015 provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just," upon the ground of, inter alia, "excusable default" (CPLR 5015[a][1]) or "lack of jurisdiction to render the judgment or order" (CPLR 5015[a][4] ). A court may not rule on the excusable nature of a defendant's default under CPLR 5015(a)(1) without first determining the jurisdictional question under CPLR 5015(a)(4). Where want of jurisdiction is the ground for a motion to vacate pursuant to CPLR 5015, a default must be vacated once the movant demonstrates a lack of personal jurisdiction, and the movant is relieved of any obligation to demonstrate a reasonable excuse for the default and a potentially meritorious defense. Family Court failed to determine whether personal service was properly effected, or whether any defect in service could be disregarded as an irregularity under CPLR 2001 . The matter was remitted to the Family Court for a hearing to determine the issue of personal jurisdiction and thereafter for a new determination of the motion to vacate the order dated October 24, 2008.

April 16 2012

Court of Appeals Rejects Husbands Argument That Intention to Equally Divide Marital Estate Was Frustrated Because Both Parties Operated under "Mistake" or Misconception as to Existence of a Legitimate Madoff Investment Account

In Simkin v Blank, --- N.E.2d ----, 2012 WL 1080295 (N.Y.) Plaintiff Steven Simkin (husband) and defendant Laura Blank (wife) married in 1973 and had two children. The Husband was a partner at a New York law firm and the wife, also an attorney, was employed by a university. After almost 30 years of marriage, the parties separated in 2002 and stipulated in 2004 that the cut-off date for determining the value of marital assets would be September 1, 2004. The parties, represented by counsel, spent two years negotiating a detailed 22-page settlement agreement, executed in June 2006. In August 2006, the settlement agreement was incorporated, but not merged, into the parties' final judgment of divorce. The settlement agreement set forth a comprehensive division of marital property. The Husband agreed to pay the wife $6,250,000 "[a]s and for an equitable distribution of property ... and in satisfaction of the Wife's support and marital property rights."In addition, wife retained title to a Manhattan apartment (subject to a $370,000 mortgage), an automobile, her retirement accounts and any "bank, brokerage and similar financial accounts in her name."Upon receipt of her distributive payment, the wife agreed to convey her interest in the Scarsdale marital residence to husband. The Husband received title to three automobiles and kept his retirement accounts, less $368,000 to equalize the value of the parties' retirement accounts. He also retained "bank, brokerage and similar financial accounts" that were in his name, two of which were specifically referenced-his capital account as a partner at the law firm and a Citibank account. The agreement also contained a number of mutual releases between the parties. Each party waived any interest in the other's law license and released or discharged any debts or further claims against the other. Although the agreement acknowledged that the property division was "fair and reasonable," it did not state that the parties intended an equal distribution or other designated percentage division of the marital estate. The only provision that explicitly contemplated an equal division was the reference to equalizing the values of the parties' retirement accounts. The parties further acknowledged that the settlement constituted: "an agreement between them with respect to any and all funds, assets or properties, both real and personal, including property in which either of them may have an equitable or beneficial interest wherever situated, now owned by the parties or either of them, or standing in their respective names or which may hereafter be acquired by either of them, and all other rights and obligations arising out of the marital relationship."

At the time the parties entered into the settlement, one of husband's unspecified brokerage accounts was maintained by Bernard L. Madoff Investment Securities (the Madoff account). According to husband, the parties believed the account was valued at $5.4 million as of September 1, 2004, the valuation date for marital assets. The Husband withdrew funds from this account to pay a portion of his distributive payment owed wife in 2006, and continued to invest in the account subsequent to the divorce. In December 2008, Bernard Madoff's colossal Ponzi scheme was publicly exposed and Madoff later pleaded guilty to federal securities fraud and related offenses. As a result of the disclosure of Madoff's fraud, in February 2009, about 2 ½ years after the divorce was finalized, the husband commenced an action against wife alleging two causes of action: (1) reformation of the settlement agreement predicated on a mutual mistake and (2) unjust enrichment. The amended complaint asserted that the settlement agreement was intended to accomplish an "approximately equal division of [the couple's] marital assets," including a 50-50 division of the Madoff account. To that end, the amended complaint stated that $2,700,000 of wife's $6,250,000 distributive payment represented her "share" of the Madoff account. The Husband alleged that the parties' intention to equally divide the marital estate was frustrated because both parties operated under the "mistake" or misconception as to the existence of a legitimate investment account with Madoff which, in fact, was revealed to be part of a fraudulent Ponzi scheme. The amended complaint admitted, however, that funds were previously " 'withdrawn' from the 'Account' " by husband and applied to his obligation to pay wife.

In his claim for reformation, the husband requested that the court "determine the couple's true assets with respect to the Madoff account" and alter the settlement terms to reflect an equal division of the actual value of the Madoff account. The second cause of action sought restitution from wife "in an amount to be determined at trial" based on her unjust enrichment arising from husband's payment of what the parties mistakenly believed to be wife's share of the Madoff account. Supreme Court granted the Wife’s motion to dismiss the amended complaint. The Appellate Division, with two Justices dissenting, reversed and reinstated the action ( 80 AD3d 401 [1st Dept 2011] ).

The Court of Appeals observed that on a motion to dismiss under CPLR 3211, the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference. At the same time, however, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" . Moreover, a claim predicated on mutual mistake must be pleaded with the requisite particularity necessitated under CPLR 3016(b). The Court, in an opinion by Judge Graffeo, noted that marital settlement agreements are judicially favored and are not to be easily set aside. Nevertheless, in the proper case, an agreement may be subject to rescission or reformation based on a mutual mistake by the parties. Similarly, a release of claims may be avoided due to mutual mistake. The mutual mistake must exist at the time the contract is entered into and must be substantial". Put differently, the mistake must be "so material that ... it goes to the foundation of the agreement". Court-ordered relief is therefore reserved only for "exceptional situations". The premise underlying the doctrine of mutual mistake is that "the agreement as expressed, in some material respect, does not represent the meeting of the minds of the parties". After reviewing Appellate mutual mistake cases in the context of marital settlement agreements the Court was of the view that the amended complaint failed to adequately state a cause of action based on mutual mistake. As an initial matter, the husband's claim that the alleged mutual mistake undermined the foundation of the settlement agreement, a precondition to relief under the Court’s precedents, was belied by the terms of the agreement itself. The Court pointed out that in True v. True (63 AD3d 1145 [2d Dept 2009] ), the settlement agreement provided that the husband's stock awards from his employer would be "divided 50-50 in kind" and recited that 3,655 shares were available for division between the parties. After the wife redeemed her half of the shares, the husband learned that only 150 shares remained and brought an action to reform the agreement, arguing that the parties mistakenly specified the gross number of shares (3,655) rather than the net number that was actually available for distribution. The Second Department agreed and reformed the agreement to effectuate the parties' intent to divide the shares equally, holding that the husband had established "that the parties' use of 3,655 gross shares was a mutual mistake because it undermined their intent to divide the net shares available for division, 50-50 in kind" (id. at 1148). Unlike the settlement agreement in True that expressly incorporated a "50-50" division of a stated number of stock shares, the settlement agreement here, on its face, did not mention the Madoff account, much less evince an intent to divide the account in equal or other proportionate shares. To the contrary, the agreement provided that the $6,250,000 payment to wife was "in satisfaction of [her] support and marital property rights," along with her release of various claims and inheritance rights. Despite the fact that the agreement permitted husband to retain title to his "bank, brokerage and similar financial accounts" and enumerated two such accounts, his alleged $5.4 million Madoff investment account was neither identified nor valued. Given the extensive and carefully negotiated nature of the settlement agreement, the Court did not believe that this presented one of those "exceptional situations") warranting reformation or rescission of a divorce settlement after all marital assets have been distributed.

Even putting the language of the agreement aside, the core allegation underpinning the husband's mutual mistake claim, that the Madoff account was "nonexistent" when the parties executed their settlement agreement in June 2006, did not amount to a "material" mistake of fact as required by case law. The amended complaint contained an admission that husband was able to withdraw funds from the account in 2006 to partially pay his distributive payment to wife. Given that the mutual mistake must have existed at the time the agreement was executed in 2006 the fact the husband could no longer withdraw funds years later was not determinative. This situation, however sympathetic, was more akin to a marital asset that unexpectedly loses value after dissolution of a marriage; the asset had value at the time of the settlement but the purported value did not remain consistent. The Court found this case analogous to the Appellate Division precedents denying a spouse's attempt to reopen a settlement agreement based on post-divorce changes in asset valuation. The Court held that the husband's unjust enrichment claim likewise failed to state a cause of action. It is well settled that, where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded. Accordingly, the order of the Appellate Division was reversed, the order of Supreme Court reinstated, and the certified question answered in the negative.

QDRO Based on a Stipulation Can Convey Only Those Rights to Which the Parties Stipulated as a Basis for the Judgment

In Gursky v Gursky, --- N.Y.S.2d ----, 2012 WL 1033543 (N.Y.A.D. 3 Dept.) after plaintiff commenced an action for divorce, the parties entered into a partial written stipulation in which they agreed upon the total present value of the marital portion of the defined benefits component of plaintiff's pension. They did not reach any agreement as to the division of this asset. Instead, they specifically reserved their rights with respect to its equitable distribution. When they appeared for trial, they entered into an oral stipulation in which they agreed that the pension "will be divided pursuant to the Majauskas [f]ormula" (Majauskas v. Majauskas, 61 N.Y.2d 481 [1984] ). The stipulation was incorporated but not merged into the judgment of divorce, and defendant then moved for an order directing entry of his proposed qualified domestic relations order. Plaintiff objected, arguing that the proposed order exceeded the terms of the parties' stipulation because it created a separate pension interest for defendant by providing that he could elect to receive payment from the pension plan when plaintiff reached the plan's early retirement age of 55, regardless of whether she had yet retired. Supreme Court rejected plaintiff's objections and granted the motion. The Appellate Division reversed and denied the motion. It observed that a qualified domestic relations order based on a stipulation "can convey only those rights to which the parties stipulated as a basis for the judgment" ( McCoy v. Feinman, 99 N.Y.2d 295, 304 [2002]). Where the language of the stipulation is unambiguous, the intent of the parties must be ascertained from within its four corners and the Court will not add language that the parties did not include. Here, there was no ambiguity. The parties agreed to divide the pension by applying the Majauskas formula. To interpret that agreement, Supreme Court was required to look to Majauskas, where the formula entitled the nonemployee spouse to receive a proportionate share of one half of each pension check received by the employee spouse, with the denominator of the fraction based on the length of the employee spouse's employment prior to his or her retirement. By invoking the Majauskas formula, without more, the parties stipulated that distribution of the pension would take effect upon plaintiff's retirement, as in Majauskas, resulting in a shared payment. Thus, Supreme Court's distribution of a separate pension interest to defendant prior to plaintiff's retirement improperly expanded the terms of the parties' stipulation.

Wife Did Not Waive Right to Challenge Husband's Claims Regarding Income Because She Signed Joint Tax Returns That Listed His Annual Income.

In Harrington v Harrington, --- N.Y.S.2d ----, 2012 WL 1033451 (N.Y.A.D. 3 Dept.) Plaintiff (husband) and defendant (wife) were married in 1991 and had two children (born in 1989 and 1991). The husband was a self-employed contractor who operated his own construction business while the wife, who was permanently disabled, devoted herself to the care of the parties' children and was not otherwise employed. The husband commenced this action for a divorce in December 2008. After a trial, Supreme Court granted the wife's counterclaim for divorce, distributed certain marital assets, and directed the husband to pay maintenance for 15 years and approximately $10,000 towards the wife's counsel fees. The Appellate Division affirmed. It rejected the husbands challenge to Supreme Court's decision to impute an additional $30,000 to the income he claimed to earn each year. The Appellate Division held that Supreme Court is not bound by representations made by a party in a matrimonial action regarding his or her annual income and may increase that figure where the record establishes, as it did here, that a party routinely paid "personal expenses from business accounts" and had access to other income to offset such expenses. In support of his claim regarding his annual income, the husband submitted tax returns for a four-year period beginning in 2005 in which he claimed annual adjusted gross income between $13,802 and $33,689. Supreme Court found, and the record established, that despite the husband's claims regarding his limited income, he paid, in addition to other expenses, $559 per month in child support and $2,000 each month to his girlfriend to live at her residence and for bookkeeping services she provided his contracting business. Also, the husband admitted using the business checking account for personal expenses and paying for numerous vacations he had taken with his girlfriend, plus $950 a month in rent for a residence in which he did not reside. This evidence provided ample support for Supreme Court's determination that additional income should be imputed to the husband to reflect an annual income of $60,000 per year. Supreme Court was not bound by a determination previously rendered by Family Court in a child support proceeding that his annual income was $30,000. Here, evidence was presented that the husband's claims in this regard were not accurate or credible, and provided a rational basis for Supreme Court's decision placing his annual income at $60,000. In addition, the wife did not waive her right to challenge the husband's claims regarding his annual income simply because she had previously signed joint tax returns that listed his annual income as $30,000.

Supreme Court conducted a hearing at which the wife's counsel testified to the legal services she provided during the course of these proceedings. Given the wife's need for these legal services, and the parties' respective financial conditions, the Appellate Division held that court did not abuse its discretion by directing the husband to contribute $9,816 to the payment of the legal expenses that the wife incurred in these proceedings. While the wife's counsel did not, as required, bill the wife every 60 days for her services, she did provide her with a copy of a retainer agreement, as well as a statement of client's rights and responsibilities pursuant to 22 NYCRR 1400.3. Counsel's failure to bill the wife for these services every 60 days was not a ground upon which the husband can rely to avoid paying a share of her legal expenses. The court noted that the action was commenced prior to the amendment to Domestic Relations Law 237(a) (see L 2010, ch 329, s 1 ).

Error in Failing to Afford Father Opportunity to Make Closing Statement Does Not Require Reversal Where Court Familiar with the Facts of Case and Parties' Arguments

In Matter of Bond v Bond, --- N.Y.S.2d ----, 2012 WL 1033469 (N.Y.A.D. 3 Dept.) Petitioner (father) and respondent (mother) were the parents of six children. The three youngest children, two daughters (born in 1994 and 1995) and a son (born in 2001), were the subject of the proceeding on appeal. In November 2004, the parties stipulated to a custody arrangement by which the mother had sole legal and primary physical custody of the three children, with extended alternate weekend visitation with the father. This agreement was later incorporated into a custody order in January 2005 and the judgment of divorce in March 2007. In April 2010, the father filed a petition for modification seeking joint legal and primary physical custody of the younger daughter and joint legal and shared physical custody of the son. Following trial, Family Court dismissed the petition on the ground that the father had failed to establish a sufficient change in circumstances. The Appellate Division affirmed. It observed that the father's petition alleged that the two younger children wished to spend more time with him, that the mother was verbally and physically abusive, and that the mother disappointed the younger daughter by failing to bring her to an out-of-state award ceremony. As the allegations of abuse were unsubstantiated and the children's preferences standing alone did not establish a sufficient change in circumstances, there was a sound and substantial basis in the record supporting Family Court's determination. The Appellate Division observed that the trial testimony and decision referenced events occurring prior to the existing custody order. As the father argued, relying upon those prior events would be improper in assessing whether there had been a change in circumstances. However, it did not find that the Courts analysis relied upon these extraneous references. It rejected that the father's contention that Family Court's error in failing to afford him the opportunity to make a closing statement required reversal (see CPLR 4016[a] ). At the conclusion of the fact-finding hearing, the father's counsel stated that he wished to make a short closing statement only if the mother did so, and the court indicated that arrangements would be made following the Lincoln hearing. The mother subsequently submitted a written closing statement; the father neither responded to this submission nor requested a further appearance, and more than four weeks passed before the decision was rendered. Considering these circumstances, and that the court was fully familiar with the facts of the case as well as the parties' arguments, no reversible error occurred (See Matter of Saggese v. Steinmetz, 83 A.D.3d 1144, 1145 [2011; Lohmiller v. Lohmiller, 140 A.D.2d 497, 498 [1988] ).

On Motion to Dismiss Family Offense Petition Pursuant to CPLR 3211(a) (7) Court Should Wade Through Allegations and Dismiss Only Those Which Do Not Sufficiently Allege Conduct That Constitutes a Family Offense

In Matter of Pamela N v Neil N, --- N.Y.S.2d ----, 2012 WL 1033487 (N.Y.A.D. 3 Dept.), Petitioner (mother) and respondent (father) were married in 2003 and had twins in 2005. The father was awarded custody by order of August 20, 2010. In December 2010, the mother filed two family offense petitions against the father, and filed a third such petition in February 2011, as well as a modification of custody petition. Family Court granted the father's motions to dismiss the two December 2010 family offense petitions, and also dismissed the custody petition given that a divorce action was then pending in Supreme Court. The court also dismissed the February 2011 family offense petition, on the father's motion, for failure to state a cause of action (CPLR 3211[a][7] ), without a hearing. The Appellate Division observed that presented with a motion to dismiss pursuant to CPLR 3211(a)(7), which is proper here in that family offense proceedings under Family Ct Act article 8 are civil in nature a court may freely consider affidavits submitted by the petitioner to remedy any defects in the petition, and the criterion is whether the proponent of the pleading has a cause of action, not whether he or she has stated one. ( Guggenheimer v. Ginzburg, 43 N.Y.2d at 275). A family offense proceeding is originated by filing a petition alleging that the respondent committed one of the enumerated offenses against, among others, a spouse, former spouse or child. In her pro se February 2011 petition, the mother checked all boxes on the petition form listing those enumerated offenses. Her attached affidavit and handwritten answers contained many conclusory, irrelevant, ambiguous and insufficiently specific allegations, including claims against individuals who were not "members of the same family or household". However, liberally construing the petition and giving it the benefit of every favorable inference (Leon v. Martinez, 84 N.Y.2d at 87-88), the Court found that while it was inartfully drafted, it adequately alleged, at the very least, that the father had stalked and harassed her. For example, the mother alleged in her affidavit that on November 23, 2008, the father came to her house while she had the children and threatened and harassed her, making excuses for his presence; he then called her three times that evening and continued to make excuses for coming to her house, leading her to file a domestic incident report with police the next day. These allegations described the type of conduct required to originate a family offense proceeding (Family Ct Act 821[1] ) in that they adequately allege, so as to survive a motion to dismiss for failure to state a cause of action (CPLR 3211 [a][7] ), that the father, acting with the requisite intent that is inferable from the alleged circumstances, engaged in a course of conduct which alarmed or seriously annoyed the mother, which served no legitimate purpose, thereby committing the offense of harassment in the second degree (Penal Law 240.26 [3]) Additionally, the allegations, if credited, were sufficient to allege that respondent committed the offense of stalking in the fourth degree (Penal Law 120.45[1], [2] ). The Appellate Division agreed with the mother and attorney for the children that Family Court should not have dismissed the petition in its entirety but, rather, should have waded through the myriad allegations and dismissed with specificity only those which did not sufficiently allege conduct that constituted harassment, stalking or any other act listed in Family Ct Act 821(1). The order granting respondent's motion to dismiss the February 18, 2011 petition was reversed, the motion denied and matter remitted to the Family Court for further proceedings not inconsistent with the Court's decision.

Family Court Lacks Subject Matter Jurisdiction to Enforce Purported Modification Agreement Not Incorporated into Judgment

In Hirsch v Schwartz, --- N.Y.S.2d ----, 2012 WL 1033520 (N.Y.A.D. 3 Dept.) Petitioner (mother) and respondent ( father) were divorced in 2009 and had two children from the marriage (born in 2001 and 2003). The parties' 2007 separation agreement, which required the father to pay 96% of all child-care expenses, was incorporated but not merged into their 2009 judgment of divorce. Shortly thereafter, the mother sent the father a letter offer which proposed a reduction of the father's child-care expenses from 96% to 75%. Although the father did not sign and return the letter offer he made at least two full reimbursement payments and several partial payments in the months that followed. The mother subsequently commenced this proceeding seeking to enforce the child support provisions of the judgment of divorce. In response, the father argued that the mother's letter offer served to modify his support obligations and that the terms of this subsequent agreement should be enforced. Following a trial, a Support Magistrate found that the letter offer constituted a valid modification of the parties' separation agreement that reduced the father's child-care expenses to 75%, and ordered arrears in the amount of $2,625.25. Upon the mother's written objections, Family Court concluded that the Support Magistrate lacked the authority to enforce the terms of the purported modification agreement and, therefore, the provisions in the judgment of divorce concerning the father's child-care obligations controlled. The Appellate Division affirmed. It observed that Family Court, as a court of limited jurisdiction, may only enforce or modify child support provisions contained in a valid court order or judgment ( Family Ct Act 422, 461[b][I]; 466; Matter of Johna M.S. v. Russell E.S., 10 NY3d 364, 366 [2008]; Matter of Brescia v. Fitts, 56 N.Y.2d 132, 139 [1982]; Kleila v. Kleila, 50 N.Y.2d 277, 282 [1980] ). Thus, even assuming that the mother's letter offer constituted a valid modification of the parties' separation agreement, Family Court did not have subject matter jurisdiction to enforce the amended agreement which stands as an independent contract between the parties .

April 2, 2012

New Child Support Standards Chart released April 1, 2012

According to the Child Support Standards Chart, [LDSS 4515 (4/12)] released April 1, 2012, prepared by New York State Office of Temporary and Disability Assistance, Division of Child Support Enforcement, the 2012 poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services is $11,170 and the 2012 self-support reserve is $15,080.

The combined parental income amount is $136,000. It will be adjusted every two years (effective January 31st for applicable years) based on the average annual percent changes to the federal Department of Labor’s Consumer Price Index for Urban Consumers. The adjusted combined parental income amount will be announced and available at January 31st until such time as this revised form is released. st for applicable years) based on the average annual percent changes to the federal Department of Labor’s Consumer Price Index for Urban Consumers. The adjusted combined parental income amount will be announced and available at www.childsupport.ny.gov until the revised Child Support Standards Chart is released.

The Child Support Standards Chart is released each year on or before April 1. The income tables are used to determine the annual child support obligation amount pursuant to the provisions of Chapter 567 of the Laws of 1989. The chart may be downloaded from https://newyorkchildsupport.com/dcse/pdfs/cssa\_2012.pdf.

Res Judicata Bars Court from Considering Fathers Biological Parental Status Which Holds He Has No Standing to Seek Visitation with Child

In Matter of Weaver v Durfy--- N.Y.S.2d ----, 2012 WL 895497 (N.Y.A.D. 4 Dept.) Family Court dismissed the Petitioners prior petition seeking to establish paternity of the child. The court found that respondents were married when the child was born and at the time of the hearing on the paternity petition and that, based upon petitioner's admissions, he had acted as a friendly neighbor to the child, although he had regular and significant contact with the child with respondents' consent. The court therefore determined that it was not in the best interests of the child to disrupt her legitimate paternal relationship with respondent father. After he perfected his appeal from the prior order dismissing the paternity petition, petitioner discontinued that appeal based on his agreement with respondents that respondent mother and the child would participate in DNA testing, which revealed a probability of 99 .99% that petitioner was the child's biological father, and that respondents would permit petitioner to visit with the child. The child subsequently began to receive Social Security benefits as petitioner's biological child. Thereafter, respondents refused to permit petitioner to visit with the child, and he filed a petition seeking, inter alia, visitation based upon the DNA test results. Family Court determined that the petition was barred by res judicata and dismissed the petition. The Appellate Division affirmed. It observed that the resolution of the proceeding presented a coalescence of the various societal interests promoted by the doctrine of res judicata, particularly the need for finality, stability and consistency in family status determinations. Thus, the court properly determined that it was prohibited by the doctrine of res judicata from considering petitioner's biological parental status as a basis for determining his standing to seek visitation with the child and as petitioner has no legal standing to seek visitation with the child, the court properly dismissed the petition.

Where Agreement Required Decedent to Name Children as the "Joint Irrevocable Designated Beneficiaries" He Was Without Authority to Name Any Other Person as a Partial or Sole Beneficiary

In Johnson v New York State and Local Retirement System, --- N.Y.S.2d ----, 2012 WL 895707 (N.Y.A.D. 4 Dept.) Plaintiff Wendy Johnson and Dan Johnson (decedent) were divorced in 1998. During the divorce action, they executed a matrimonial settlement agreement, pursuant to which they were required to name their children, plaintiffs Dane Johnson and Danika Johnson, as "joint irrevocable designated beneficiaries" of, inter alia, the death benefits provided by their retirement plans. That agreement was subsequently incorporated but not merged into the judgment of divorce. In March 1998, shortly before executing the matrimonial settlement agreement, decedent had named his then girlfriend, defendant Kimberly Leone-Johnson, as a one-third beneficiary of his New York State Retirement Plan death benefit and each of his children as a one-third beneficiary. Leone was not removed as a beneficiary after the judgment of divorce was entered in May 1998 and, moreover, in June 1998 decedent purportedly designated Leone as the sole beneficiary of his retirement plan death benefit. In July 2000 decedent and Leone executed a prenuptial agreement and were married. Pursuant to that agreement, decedent and Leone expressly waived all rights and claims to each other's pensions and retirement plans. In June 2006, decedent and Leone executed a separation agreement, which contained clauses that, inter alia, reaffirmed the pension and retirement plan waivers contained in the prenuptial agreement and mutually released and waived all rights that decedent and Leone had to each other's estate. Decedent and Leone allegedly reconciled without divorcing just prior to decedent's death in October 2008. No beneficiary changes were made to decedent's retirement plan death benefit after Leone was allegedly named the sole beneficiary in 1998. After decedent died, however, defendant New York State and Local Retirement System (System) notified Leone that decedent's designation naming her as the sole beneficiary was invalid and that the System intended to disburse the death benefit to Leone and the children in accordance with decedent's March 1998 designation. Plaintiffs commenced an action seeking to designate the children as the joint irrevocable beneficiaries of decedent's retirement plan death benefit in compliance with the matrimonial settlement agreement and to remove Leone as a beneficiary thereof. They moved for summary judgment and Supreme Court determined that Leone and the children were each entitled to one-third of decedent's retirement plan death benefit. The Appellate Division held that Leone was not entitled to any part of decedent's retirement plan death benefit. The matrimonial settlement agreement clearly required decedent to name the children as the "joint irrevocable designated beneficiaries" of his retirement plan death benefit. As a result of that agreement, decedent was without authority to name any other person as a partial or sole beneficiary of such death benefit. Moreover, any right to that benefit that Leone would have acquired by virtue of being married to decedent was waived by the prenuptial and separation agreements. The court erred in determining that Leone's waiver of her interest in the retirement plan death benefit was not "explicit, voluntary and made in good faith" ( Silber v. Silber, 99 N.Y.2d 395, 404,cert denied 540 U.S. 817). The contention of Leone that decedent's obligation to name the children as beneficiaries of his retirement plan death benefit was solely to provide security for his child support obligation was contrary to a fair interpretation of the matrimonial settlement agreement. It rejected Leone's further contention that her separation agreement with decedent became void when they allegedly reconciled prior to his death. By its terms, the separation agreement could only be canceled in writing.

Improper for Court to Take Judicial Notice of Factual Material in Filed Net Worth Statement.

In Halse v Halse, --- N.Y.S.2d ----, 2012 WL 850604 (N.Y.A.D. 3 Dept.) Plaintiff commenced an action for divorce in September 2008 and, thereafter, a pendente lite order was entered which, among other things, directed the parties to submit to drug testing and prohibited the parties from selling or transferring any assets. In June 2010, plaintiff moved to have defendant held in contempt, alleging that she had sold various marital assets and was using drugs and alcohol. After a nonjury trial, Supreme Court issued a judgment of divorce, ordered the equitable distribution of marital assets, awarded maintenance to defendant and ordered plaintiff to pay child support for the parties' two children. In a separate order, the court adjudged defendant to be in contempt of the pendente lite order, but imposed no punishment.

The Appellate Division held that substantial deference is accorded to the trial court's determination regarding equitable distribution so long as the requisite statutory factors were considered. In this case, it was apparent that Supreme Court considered all of the relevant factors before equitably distributing the parties' marital assets; of particular note was the long duration of the marriage and the parties widely disparate future financial circumstances. Moreover, contrary to plaintiff's contention, the record reflected that Supreme Court adequately addressed defendant's dissipation of marital assets. Notably, the court awarded plaintiff adjustments to compensate him for the value of various items of marital property that had been improperly sold by defendant, including $12,500 representing half of the value of a backhoe. As for the marital residence, it was not persuaded by plaintiff's contention that he should have been awarded an adjustment based upon defendant's alleged dissipation of that asset. While the evidence did indicate that defendant had not maintained the residence in optimal condition, there was also evidence that the real estate market was overburdened with properties in the residence's price range and that market conditions, in general, had declined. As such, there was no definitive proof that the approximately $200,000 decline in the market value of the house was due solely to defendant's actions. Further, although plaintiff opined that the residence needed between $45,000 and $62,000 in repairs to become marketable, he submitted no proof to support these figures. In awarding defendant maintenance, Supreme Court considered the statutory factors and determined that a maintenance award to defendant in the amount of $3,000 per month for two years and then $2,500 per month for three years was appropriate. Although defendant did not offer a statement of net worth at trial, the record contained sufficient evidence regarding both parties' assets and liabilities to permit it to conclude that the durational maintenance award was a provident exercise of the court's discretion The Appellate Division pointed out in a footnote that although defendant filed a statement of net worth with Supreme Court in 2008, it was not proper for the court to take judicial notice of the factual material contained therein (citing Matter of Grange v. Grange, 78 A.D.3d 1253, 1255 [2010] ).

Failure to Disclose Financial Information and Lack of Counsel Insufficient to Set Aside Prenuptial Agreement

In Cohen v Cohen, --- N.Y.S.2d ----, 2012 WL 851206 (N.Y.A.D. 1 Dept.) the Appellate Division held that plaintiff's alleged threat to cancel the wedding if defendant refused to sign the agreement did not constitute duress ( Colello v. Colello, 9 A.D.3d 855, 858 [2004]). Nor did the absence of legal representation establish overreaching or require an automatic nullification of the prenuptial agreement, especially as the evidence showed that the agreement was prepared by an independent public official unaligned with either party. Plaintiff's alleged failure to fully disclose his financial situation was also insufficient to vitiate the prenuptial agreement ( Strong v. Dubin, 48 A.D.3d 232, 233 [2008] ). There was no evidence that plaintiff concealed or misrepresented any financial information or the terms of the agreement. To the extent the prenuptial agreement, to be enforceable in New York, must contain an acknowledgment sufficient to entitle a real property deed to be recorded, this requirement was satisfied by plaintiff's filing, at the direction of the court, of a certificate of conformity attesting to the credentials of the French official who drafted the agreement, and certifying that his proof of acknowledgment of the agreement conformed to the laws of France (Real Property Law 301-a).

Where Supreme Court Refers Issue to Family Court, it Has Jurisdiction to Determine Issue of Child Support During Divorce Action.

In Francois v Francois, --- N.Y.S.2d ----, 2012 WL 833185 (N.Y.A.D. 2 Dept.) the Appellate Division held that the Family Court had subject matter jurisdiction to hear and determine the issue of child support during the pendency of the divorce action. When an action for divorce is pending, the Family Court may exercise its jurisdiction only in certain situations, such as where the Supreme Court refers an application for support to it ... or where the Supreme Court has not acted concerning support and the spouse is likely to need public assistance" ( FCA 464). Here the Supreme Court referred all issues of child support to the Family Court for a hearing and determination .Accordingly, the Family Court properly exercised its jurisdiction over the child support proceeding.

Spouse generally obligated to pay 50% share of income tax liability if spouse benefits from use of funds or delay in paying tax liability. Imputation of income may be based upon testimony of expert. Provision for Future Modification Improper.

In Lago v Adrion,--- N.Y.S.2d ----, 2012 WL 833203 (N.Y.A.D. 2 Dept.), the parties were married on September 10, 1995, and had one child, born October 28, 1996. The plaintiff wife commenced the action by filing a summons and complaint on September 19, 2006, after 11 years of marriage. The parties agreed on joint custody of the child and the primary physical residence of the child with the plaintiff, and consented to a divorce on the ground of constructive abandonment. In March 2010 the parties proceeded to a nonjury trial on certain financial issues. At the conclusion of the trial, the Supreme Court found that the defendant was a tax attorney with a current income of $475,000 per year, that the plaintiff was not working, and that the plaintiff had a masters' degree in architecture from Harvard University and performed some doctoral work at the Massachusetts Institute of Technology. Based upon her educational qualifications and experience, and expert testimony, the Supreme Court imputed income of $80,000 per year to the plaintiff. The Supreme Court determined that the defendant was obligated to pay $2,041 per month in basic child support based on the plaintiff's imputed income of $80,000 per year, and a finding that the child support percentage should only be applied to the first $150,000 of the defendant's annual income. The supplemental findings of fact stated that "[t]o the extent that this court may have deviated from the guideline standards," it did so for the reasons that the child was "thriving" on the pendente lite child support of $2,041 per month, and the parties' standard of living during the marriage was that of a "middle-class" family. The judgment appealed from further provided that "should the Defendant lose his law license by suspension, revocation, or otherwise, and be unable to sustain his current level of income, such event shall constitute a sufficient change of circumstances warranting application for downward modification" of child support. With respect to the equitable distribution of property, the Supreme Court concluded that the parties incurred Federal tax liability of $430,476 for 2005 and 2006 up until September 19, 2006, and New York State tax liability of $38,000 for that same period, which constituted a marital debt which should be divided equally between the parties. This tax liability included interest and penalties. The Supreme Court held that the plaintiff's one-half share of that tax liability was $234,238.

The Appellate Division held that Supreme Court properly imputed $80,000 in annual income to the plaintiff based upon her education and experience, and the testimony of the defendant's expert. "In determining a child support obligation, a court need not rely on a party's own account of his or her finances", but may, in the exercise of its considerable discretion, impute income to a party based upon his or her employment history, future earning capacity, and educational background , and what he or she is capable of earning, based upon prevailing market conditions and prevailing salaries paid to individuals with the party's credentials in his or her chosen field . Further, imputation of income may be based upon the testimony of an expert regarding a party's ability to earn an income. Here, the Supreme Court's imputation of income was supported by unrefuted expert testimony and testimony regarding the plaintiff's education and experience.

The Court observed that effective January 31, 2010, the Child Support Standards Act provides that the applicable child support percentage should be applied to the first $130,000 of combined parental income (DRL 240[1-b] [c][2]; SSL111-i[2][b]). Where the parents' income exceeds the income cap, as in this case, the amount of child support in excess of the income cap is determined based upon a consideration of factors set forth in DRL 240 (1-b)(f) "and/or the child support percentage" (DRL 240 [1-b][c][3]). The factors set forth in Domestic Relations Law s 240(1-b)(f) include, in pertinent part, the financial resources of both parents, the needs of the child, the standard of living the child would have enjoyed had the marriage not been dissolved, nonmonetary contribution that the parents will make to the care and well-being of the child, and any other factor which the court determines to be relevant to the case. Here, the evidence at the trial supported the Supreme Court's conclusion that, during the marriage, the child enjoyed a "middle-class" lifestyle, and her needs were met by the pendente lite child support award of $2,041 per month. The application of the child support percentage to the first $150,000 of the defendant's annual income, and the amount of child support awarded was supported by the record.

The Appellate Division held that the provision of the judgment of divorce which stated that, "should the Defendant lose his law license by suspension, revocation, or otherwise, and be unable to sustain his current level of income, such event shall constitute a sufficient change of circumstances warranting application for downward modification" of child support, was improper. ( Matter of Knights v. Knights, 71 N.Y.2d 865). This provision of the judgment was deleted.

The Appellate Division observed that the income tax liability of the parties was subject to equitable distribution, but equitable distribution does not necessarily mean equal distribution. A spouse is generally obligated to pay his or her 50% share of income tax liability during the marriage if the spouse benefits from use of the funds or the delay in paying the tax liability. However, if one spouse makes the financial decisions regarding the income tax return, and earned virtually 100% of the parties' income during the period, the court, in its discretion, may direct that spouse to pay the entire tax liability. The defendant acknowledged that he handled all tax matters for the parties during the marriage, and attributed his inability to pay his taxes from his current income to the fact that his expenses were too high, in part because he had to maintain a rented home for his family while the parties' house in Pawling was being renovated. The evidence adduced at trial indicated that it was his decision to move the parties' full-time residence to the house in Pawling, despite the fact that the house was in "bad shape." Under the circumstances of this case, it could not be said that the plaintiff derived a benefit from the defendant's failure to pay the taxes . The Appellate Division held that Supreme Court, in its discretion, should have directed the defendant to pay the entire tax liability.

Supreme Court Agree’s with Justice Falanga - Holds Plaintiff's Self-serving Declaration about State of Mind Is All Required for Divorce on “Irretrievable Breakdown” Ground, Disagreeing with Schiffer v. Schiffer and Strack v. Strack.

In Vahey v Vahey, --- N.Y.S.2d ----, 2012 WL 832350 (N.Y.Sup.) Supreme Court granted the defendant’s motion to dismiss the action pursuant to CPLR 3211(a)(7) to the extent that the first and second causes of action, alleging cruel and inhuman treatment and constructive abandonment, respectively, were dismissed.

Supreme Court observed that CPLR 3016(c) requires that in an action for divorce, "the nature and circumstances of a party's alleged misconduct, if any, and the time and place of each act complained of, if any, shall be specified in the complaint ..." In this case, the plaintiff has sought a divorce on three grounds: cruel and inhuman treatment, and an irretrievable breakdown in the marital relationship.

The Court agreed with the defendant that a claim of cruel and inhuman treatment was not made out, as it did not specify the time and place of the misconduct, and, in addition, did not allege conduct that rises to the required level. All that was alleged was that the wife called the husband vile names and used obscene language, told the plaintiff husband that she didn't want to be married to him any more, and that he was not a good husband. This was patently insufficient and this claim was dismissed.

The plaintiff alleged in his verified complaint that "The relationship between Plaintiff and Defendant has broken down irretrievable [sic] for a period of at least six months."The Supreme Court disagreed with the defendant that CPLR 3016(c) and the cases that cite that statute mandate factual allegations supporting this claim. CPLR 3016(c) refers to the necessity of pleading allegations of "misconduct." Domestic Relations Law 170(7) permits a party to seek a divorce upon a sworn statement by that party that the marital relationship between husband and wife has broken down irretrievably for a period of at least six months. This has been pled. This section does not require the plaintiff to allege that the other party was responsible for the breakdown or had misbehaved in any way. The very essence of the law is to dispense with the necessity of proving misconduct by the other spouse. CPLR 3016(c) speaks only of pleading acts of misconduct, and misconduct does not have to be alleged under Domestic Relations Law 170(7). Therefore, it is more accurate to say that CPLR 3016(c) continues to apply where marital fault is alleged, but does not apply when the plaintiff alleges a breakdown in the relationship, as there is no need to cast blame on the other party. Given the clear language of the statute regarding the need to prove "misconduct," the lack of an amendment to CPLR 3016 indicated that the Legislature was not requiring a party asserting the new "no-fault" ground to plead and prove facts in support of the irretrievable breakdown. If its intention were otherwise, such an amendment to the divorce action pleading requirements would be needed. Rather, all that is required is the sworn statement of the irretrievable breakdown, a statement that finds no counterpart in any of the "fault" grounds. Accordingly, the motion to dismiss was denied as to the claim made under Domestic Relations Law 170 (7). The Court noted that as the Legislature in adopting section 170(7) has not required the pleading of objective facts of the breakdown, but has required instead no more than a sworn statement of a breakdown by the plaintiff, it did not appear that a plaintiff can be put to his or her proof on the subject. Under this ground the plaintiff's sworn belief about the state of the relationship must be deemed sufficient, for if not the party seeking the divorce on this basis could be put through the same type of litigation regarding the martial relationship that this legislative addition was clearly designed to avoid. The Court agreed with the analysis set forth by Justice Falanga that the section 170(7) ground is inherently subjective in nature, and "a plaintiff's self-serving declaration about his or her state of mind is all that is required for the dissolution of a marriage on the ground that it is irretrievably broken." D.R.C. v. A.C., 32 Misc.3d 293 (Sup Ct Nassau County 2011). The Court disagreed with the views expressed in Schiffer v. Schiffer, 33 Misc.3d 795 (Sup Ct Dutchess County, 2011) and Strack v. Strack, 31 Misc.3d 258 (Sup Ct Essex County 2011).

The Court denied that cross motion for a sharing of family expenses pro rata based upon the parties' income at the commencement of the action. There was no demonstration that the reasonable needs of the movant or of the parties' children were not being met, as all continued to reside together in the marital residence, and it was apparent that the bills were being paid. The basis of the request for this relief was that plaintiff believed it unfair that the defendant, who retired from the New York City Police Department after the action was commenced, now asserted that she no longer had her full salary and thus had less to contribute to household expenses. Plaintiff, in effect, wanted the Court to "balance the scales" by imputing income to the defendant and to direct specific percentages based on such imputed income. This is not the purpose of a pendente lite award. Here, there was no proven need for support on the part of the moving party, especially in view of the fact that even before the defendant's retirement the plaintiff's income exceeded hers.

March 17, 2012

Temporary Maintenance Guidelines Income Cap Raised from $500,000 to $524,000.

The "cap" on each spouses annual income, to be utilized in calculating temporary maintenance orders, has increased from $500,000 to $524,000 effective January 31, 2012 in accordance with Domestic Relations Law § 236 [B][5-a][b][5] . (See Temporary Maintenance Guidelines Worksheet, revised January 31, 2012 at www.nycourts.gov/divorce/TMG-worksheet.pdf or Temporary Spousal Maintenance Guidelines Calculator, revised January 31, 2012 at www.nycourts.gov/divorce/calculator.pdf) Beginning January 31, 2010 and every two years thereafter, the income cap increases by the product of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the united states department of labor bureau of labor statistics for the two year period rounded to the nearest one thousand dollars. The office of court administration is required to determine and publish the income cap. See Domestic Relations Law § 236[B], [5-a][b][5].

Downward Modification of Child Support Based on a Loss of Employment Due to Injury Granted Where Father Demonstrated Injuries Severely Limited His Ability to Resume His Veterinary Practice

In Smith v Smith, --- N.Y.S.2d ----, 2012 WL 88100 (N.Y.A.D. 3 Dept.) pursuant to a 2002 judgment of divorce, defendant (mother) was awarded sole custody of the parties' four children. Pursuant to the Child Support Standards Act (DRL 240[1-b] ), plaintiff (father) was directed to pay $2,887 per month in child support based on his imputed income of $160,000 as the sole proprietor of a veterinary practice. The mother, who had no income, was awarded durational maintenance. In 2007, the father was seriously injured in a motor vehicle accident and, in 2009, he sought a downward modification of his child support payments, alleging that there had been a substantial change in circumstances because, among other things, his injuries severely limited his ability to resume his veterinary practice and to perform veterinary services. After a hearing, Supreme Court granted the motion and recalculated the father's monthly child support payments under the Child Support Standards Act to be $634.96 based on the mother's present income of $49,605 from her work as a part-time dental hygienist and the father's income of $24,877.20 from his limited practice and his Social Security disability benefits. The mother appealed, contending that, despite the father's injuries and disability, the motion for a downward modification should have been denied because the father could provide support through some other type of veterinary practice. The Appellate Division affirmed. It observed that she did not present any evidence contradicting the father's proof of his limited ability to work or supporting her claim that he could hire other veterinarians to assist in running his practice. While a request for a downward modification of child support based on a loss of employment due to injury or illness may be denied where the parent seeking the modification still has the ability to provide support through some other type of employment Supreme Court credited the father's testimony that he is no longer able to work full time at his own practice, could not afford to hire another person to assist him in his practice and was not employable at another practice because of his condition. Giving deference to Supreme Court's credibility determinations there was no basis to disturb its determination that the father demonstrated a significant change in circumstances warranting a downward modification of his child support obligation. The Appellate Division rejected the mothers argument that the presumptively correct amount of child support was unjust or inappropriate and that, as a result, the father's personal injury settlement should have been considered in determining his child support obligation The children received derivative Social Security benefits, and the evidence established that most of the father's settlement had already been used to pay the father's child support arrears, continue his child support payments and otherwise mitigate his financial problems.

Appellate Division Generally Accords Deference to Supreme Court's Determination Regarding Amount and Duration of Maintenance as Long as the Court Considers the Statutory Factors and Provides a Basis for its Conclusion

In O’Connor v O’Connor, --- N.Y.S.2d ----, 2012 WL 88226 (N.Y.A.D. 3 Dept.) the parties in this matrimonial action were married in 1986, they had three children (one born in 1990 and twins born in 1992), and plaintiff commenced this action in August 2009 premised upon defendant's abandonment. Following a nonjury trial, Supreme Court, as relevant to this appeal, awarded plaintiff maintenance of $1,000 per month until she was eligible for Social Security retirement benefits in January 2022, subject to earlier termination upon various conditions, including if she remarries or the commencement of her receipt of her share of defendant's pension. In its decision and order, the court also partially granted plaintiff's motion for counsel fees, awarding $7,500 of the over $20,000 in then unpaid counsel fees and disbursements. These awards were included in the April 2011 judgment of divorce. Defendant, challenging the duration of maintenance, appealed from the judgment, which prompted plaintiff to cross-appeal therefrom and to move for an award of appellate counsel fees. Supreme Court, in July 2011, granted plaintiff $900 in counsel fees for making the motion and $9,000 for appellate counsel fees. Defendant appealed from the July 2011 order.

The Appellate Division stated that while its authority is as broad as Supreme Court's regarding maintenance it generally accords deference to Supreme Court's determination regarding the amount and duration of maintenance" 'as long as the court considers the statutory factors and provides a basis for its conclusion. Maintenance is appropriate where, among other things, the marriage is of long duration, the recipient spouse has been out of the work force for a number of years, has sacrificed her or his own career development or has made substantial noneconomic contributions to the household or to the career of the payor. The fact that a wife has the ability to be self-supporting by some standard of living does not mean that she is self-supporting in the context of the marital standard of living. Here, Supreme Court discussed each of the statutory factors. This was a long-term marriage of 24 years and plaintiff was 50 years old. Although she had a marketing degree and had a job related to her degree early in the marriage, she passed on a promotion because defendant would not move, and later she gave up her position in order to raise the parties' children. She has not worked in marketing since early 1992. At the time of the divorce, she worked as a school aide and her earnings for 2009 and 2010 were about $14,000 and $18,000, respectively. Supreme Court accepted her testimony that she would need considerable educational updating of an unknown duration and cost before being able to return to a marketing position or another professional field. Defendant's 2010 income was about $78,854, but Supreme Court noted that he did not work available overtime which, in the prior four years, resulted in income levels between approximately $95,000 and $117,000. Defendant's child support obligation for the oldest child ended in August 2011 and the remaining obligation ceases in June 2013. In light of Supreme Court's discussion of the pertinent factors, the length of the marriage, career sacrifice by plaintiff, large discrepancy in current earning power and plaintiff's age, the Appellate Division was unpersuaded that the duration of maintenance determined by Supreme Court should be modified. It rejected defendants argument that it was error to order him to pay counsel fees for the underlying action and the appeal. It is within the discretionary power of Supreme Court to award counsel fees and, in doing so, "a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions" ( DeCabrera v. Cabrera-Rosete, 70 N.Y.2d 879, 881 [1987]). Supreme Court discussed the financial position of the parties, including defendant's superior earning capacity, and otherwise adequately explained its reasons for awarding counsel fees. Although plaintiff did not pursue her cross appeal, plaintiff's counsel stated in an affirmation that the cross appeal involved a narrow issue that appellate counsel had indicated did not affect her fee. It found no abuse of discretion by Supreme Court in the award of counsel fees .

Equitable Distribution and Counsel Fees Denied Where Parties Elected Not to Treat Marriage as an Economic Partnership

In Medley v Medley, 2011 WL 6975934 (N.Y.Sup.), 2011 N.Y. Slip Op. 52457(U) (Table, Text in WESTLAW), Unreported Disposition, the action was commenced August 2007 for absolute divorce by Plaintiff, Claudette Medley, against Defendant, Maurice Medley. A divorce was granted in favor of Defendant after inquest on the grounds of constructive abandonment. There were no children of the marriage. A trial was held on the ancillary issues of equitable distribution and counsel fees. The parties were married in a civil ceremony on March 5, 1997, after a brief courtship. At the time of the marriage, Plaintiff was in the United States with temporary legal status and Defendant was an American citizen. Prior to the marriage, each party resided in and owned their own home. Plaintiff's home, 141-15 255th Street, Queens, N.Y. ("255 Street property"), was jointly owned with a friend and Defendant was the sole owner of 130-60 221st Street, Queens, N.Y. ("221 Street property"). The parties agree that they lived together at 130-33 221st Street, Queens, N.Y. ( "130-33 Street property"), from March 2005 until July 7, 2007. The parties' living arrangements between March 1997 and 2005 were disputed and was the core issue at trial. Both parties engaged in real estate investments. Plaintiff as a real estate sales agent and owned real estate businesses. Defendant bought and sold investment properties. Except for one joint ownership, all their investments, businesses were conducted separately by each.

Supreme Court found that Plaintiff migrated to the United States in 1988 under a temporary Visa with a work permit. She was employed in administration at a Hospital. In 1994, Plaintiff purchased the 255 Street property, jointly with a friend. Her friend and co-owner subsequently deceased and the one half share was inherited by her friend's daughter. Upon the death of Plaintiff's friend, the mortgage insurance paid off the mortgage on the 255 Street property. Plaintiff later refinanced the property by herself and solely kept the undisclosed proceeds. It was unclear how Plaintiff, solely, refinanced the joint ownership 255 Street property. The daughter did testify that she was aware the property was refinanced; however, no documents were executed by the daughter nor did she receive any of the undisclosed proceeds. After three months of dating, in early 1997, Plaintiff showed Defendant a letter from Immigration and Naturalization Service ("INS") informing Plaintiff that her Visa status had expired. The parties ensued in a conversation on how to change Plaintiff's status or whether Plaintiff will leave the United States to, what Plaintiff classified as, "her father's farm". After this conversation, the parties immediately planned the wedding. The day before the marriage, at Plaintiff's residence, the parties discussed drafting a pre-nuptial agreement. Plaintiff wrote a handwritten document. The document entitled, Prenuptial Agreement between Maurice Medley and Claudette as of 3/3/97,' states "that neither party would take any legal action to seek the other's assets". The agreement, though not acknowledged, is signed by both parties and dated March 4, 1997. One day later, the parties were married, March 5, 1997. It was undisputed that the parties resided together from March 2005 until July 2007 at the 130-33 Street property. Plaintiff had one child, not of the marriage, who resided with Plaintiff and one other family member. There was no document placed into evidence to show that the parties filed joint tax returns or commingled their incomes and bank accounts. Although no tax records were placed into evidence, as Plaintiff claimed joint filing, she contradicted her testimony by acknowledging that as of 2003 she filed as head of household. Plaintiff filed as head of household to show diminished income so that her son could receive financial aid and a scholarship from the private school he attended in New Jersey. The tuition for the school was approximately $28,000.00 to $30,000.00 annually. As a result of Plaintiff's tax filing and the financial application she misrepresented to the school, her son obtained the scholarship and she paid $2,400.00 annually as a single parent.

Plaintiff obtained a Bachelor of Arts degree from York College in 2004. From 1997 through 2005, she earned approximately $30,000.00 annually from Memorial Sloan Kettering. In 2005, her salary increased to $50,000.00. Plaintiff obtained her real estate license in 1997 and began real estate sales. In addition to Plaintiff's earnings from the hospital, she earned additional income ranging through 2010 from as high as $50,000.00 to low as $2,000.00. Consistent with the document signed on March 4, 2005, Plaintiff kept her income separate and apart from Defendant and some of this income was not disclosed prior to the commencement of this case.

All income received from the properties were kept and used by Defendant towards the mortgages and carrying charges on the properties. Although there was a marriage on paper, the parties communication and financial partnership was non existent. Plaintiff's incomes were either not disclosed or shared. Defendant's income although known was not shared.

The credible evidence showed that the parties lived their lives in a manner consistent with the written document they signed in March 1997. Each engaged in separate investment ventures, buying and selling investment properties and kept all their incomes separate from each other. Plaintiff did not disclose any of her real estate investment income prior to trial to Defendant although she claimed entitlement to Defendant's. Defendant did not claim any entitlement to Plaintiff's income, investments or license claiming this was the intent of the parties. Throughout the marriage, there was no credible evidence that the parties spent any significant time together but rather maintained a separate business lifestyle. At most the parties had a sparse emotional life but it was impacted by a clear separate financial life. What contribution Plaintiff made to the investment property purchased with Defendant's funds was unproven since the record was devoid of any documents to support Plaintiff's claim except her testimony.

The Court found that there were several innuendoes of the purpose and true meaning of the parties nuptial. Their arrangement was a sparse emotional life with no financial partnership. For an approximate ten year marriage, the parties lived together for a total of two years and four months just prior to filing of the action. There was evidence that Plaintiff filed deceptive and misrepresented legal school documents and tax returns. Although the Court would not define or marshal what is a "married life". The cliche "you know it when you see it" could be inferred in this case. These parties engaged in a pattern of behavior that was inconsistent of any semblance of a marriage life in its ordinary and reasonable meaning. Plaintiff failed to present any documentary proof or credible evidence for her claims of entitlement. It was undisputed that during the marriage, Defendant purchased three properties, titled solely in his name. Defendant claimed that Plaintiff failed to meet her burden to establish that she made any contribution to these properties, thus warranting an equitable distribution of the value of these real properties. Defendant made no claim of an equitable distribution of Plaintiff's businesses or license.

Looking to DRL 236(B)(1)(c), it was clear that all property acquired during a marriage acquired by either spouse, with the exception of property in specifically delineated categories, is considered to be marital property. In this matter, Defendant purchased the Dean Street property, the DeCosta Avenue property, and the 130-33 Street property, during the marriage in 1999, 2001 and 2005, respectively. Pursuant to the statutory presumption, all three properties are deemed to be marital property. In addition to the real property acquired during the marriage, both parties also acquired retirement benefits throughout the duration of the marriage. The Court found that to the extent the benefits were accrued during the marriage, the retirement benefits were marital property.

Turning to the unique circumstances of this case, the Court considered the economic partnership, as created by the parties in this marriage. While the living arrangements of the parties from March 1997 through May 2005 was disputed, it was undisputed that from the outset of the marriage the parties agreed not to treat the marriage as an economic partnership. While the document signed on March 4, 1997, was not a pre-nuptial agreement, as it did not satisfy the requirements for a pre-nuptial agreement as required by DRL 236(B)(3), the written signed document evinced the intent of the parties to forego any legal claim each party may have to the other party's assets in the event that the marriage was unsuccessful. While the Plaintiff testified that the agreement only concerned the property owned prior to the marriage, the evidence presented established that the parties maintained separate finances throughout the life of the marriage. Although Plaintiff testified that the parties held one joint account until approximately 2004, she failed to present evidence to establish the existence of that or any joint account. Plaintiff did not contribute to the down payment or mortgage payments nor made any spousal or homemaker contribution on any of the properties purchased by Defendant. Moreover, while Plaintiff testified that the parties filed joint tax returns during the early years of the marriage, until approximately 2004, she failed to present any joint tax returns for any year during the marriage.

In addition to maintaining separate bank accounts, the parties also conducted their real estate investments and business endeavors separately. The parties' separate real estate dealings evinced an intention to maintain separate financial accounts and investments consistent with the document written and signed on March 4, 1997. Plaintiff's testimony of the parties' intent was inconsistent with the parties' actions. The manner in which the parties conducted their real estate endeavors was inconsistent with the economic partnership theory.

Supreme Court observed that Courts have held in matrimonial proceedings where parties conduct themselves in a manner inconsistent with the economic partnership, the Court may find that equitable distribution of property is not warranted (see Duspiva v. Duspiva, 181 A.D.2d 810, [2d Dept 1992]; Miller v. Miller, 4 AD3d 718, [3d Dept 2004]; Galvin v. Galvin, 20 AD3d 550, [2d Dept 2005] ). The parties began their marriage with an agreement that neither party would pursue legal action to claim the other party's assets. For the duration of the marriage, the parties lived in a manner consistent with the terms of that the document they wrote and signed. Although the parties resided in the same residence, 130-33 Street property, the Court found that the parties continued to conduct themselves in a manner consistent with the terms of the document signed on March 4, 1997, and conducted themselves in a manner inconsistent with the typical economic partnership and, therefore, equitable distribution of the property was not warranted.

Plaintiff presented evidence and testimony to establish that she purchased furniture for the residence at 130-33 221st Street in the sum of $11,734.23. Plaintiff further testified that although she left the residence in July 2007 Defendant did not allow her to remove the furniture from the residence. In light of the parties' agreement and conduct consistent with the agreement, the Court finds that the furniture purchased for the 130-33 221st Street residence is property of Plaintiff. However, as the furniture has remained in Defendant's possession since 2007, Defendant had to pay Plaintiff for the cost of the furniture. Defendant was directed to pay Plaintiff $11,734.23 for the furnishings in the residence.

Plaintiff sought counsel fees. According to Plaintiff's testimony, in 2009, she earned approximately $70,000.00 from her employment at the hospital and an additional $20,000.00 from her real estate businesses. Additionally, she testified that for the year 2010, she anticipated earning approximately $70,000.00 from the hospital and has already derived $15,000.00 from her real estate businesses. Plaintiff earned a minimum of $85,000.00 in 2010. Defendant's Amended Statement of Net Worth indicated that Defendant's monthly income was $12,707.44. While Defendant's income was greater than that of Plaintiff, throughout the duration of the marriage, the parties maintained separate finances and Plaintiff was able to meet her financial obligations without the assistance of Defendant. Considering the unique circumstances of this case, Plaintiff's request for counsel fees was denied.

March 1, 2012

Child Support Cap Raised from $130,000 to $136,000

The “combined parental income amount” to be utilized in calculating child support orders has increased from $130,000 to $136,000 effective January 31, 2012. (See Child Support Worksheet (Form UD-8) revised January 2012).

Where Support Obligation in Judgment Which Incorporated a Surviving Agreement Is Modified in Court on Consent, Party Seeking Further Modification must Show a Substantial Change in Circumstances

In Anderson v Anderson, --- N.Y.S.2d ----, 2012 WL 503584 (N.Y.A.D. 2 Dept.) the parties originally executed a separation agreement that was incorporated, but not merged, into a judgment of divorce dated August 24, 2006. Upon a petition by the mother, the Family Court conducted a hearing, after which the support obligations as set forth in the separation agreement were modified, upon the consent of the parties, in an order of the Family Court dated February 5, 2008. In May 2010 the mother commenced a proceeding to modify the father's child support obligations as set forth in the order dated February 5, 2008. The Appellate Division affirmed the order granting an upward modification. It observed that where a party seeks to modify a child support order entered on consent, he or she "has the burden of showing that there has been a substantial change in circumstances" ( Matter of Ceballos v. Castillo, 85 AD3d 1161, 1162; see Matter of Jewett v. Monfoletto, 72 AD3d 688, 688-689; Weiss v. Weiss, 294 A.D.2d 566, 567). Here, in light of the testimony and documentary evidence demonstrating the increased cost of clothing, food, and heating oil, as well as the increased expenses related to the son's special education needs and the children's involvement in activities such as music lessons, karate lessons, soccer, and girl scouts, the mother demonstrated a substantial change in circumstances sufficient t to warrant the modification of the father's child support obligation.

Attorney for Child May Not Report to Court Contents of Her Conversations with Child. Inappropriate for Attorney for Child to Present Reports Containing Facts Which Are Not Part of the Record.

In Matter of New v Sharma, --- N.Y.S.2d ----, 2012 WL 89855 (N.Y.A.D. 2 Dept.) in October 2010 the father filed a petition to modify a prior order of visitation dated January 14, 2010. In opposing the father's petition, the attorney for the child, based on the father's submissions, requested that the Court limit the father's parenting time to periods of "short duration and in a specific location." In an order dated December 7, 2010, the Family Court, without a hearing, in effect, denied the father's petition and granted the application of the attorney for the child to modify the prior order of visitation dated January 14, 2010, so as to limit the father's parenting time to brief visits at public places. The Appellate Division held that contrary to the father's contention, the Family Court had the authority to grant the relief requested by the attorney for the child in her opposition to his petition. However, under the circumstances of this case, the Family Court erred by, in effect, denying the father's petition and granting the application of the attorney for the child without conducting a full evidentiary hearing. Generally, visitation should be determined after a full evidentiary hearing to determine the best interests of the child. A hearing is not necessary, however, "where the court possesses adequate relevant information to enable it to make an informed and provident determination as to the childs best interest". Here, the Family Court did not possess adequate relevant information to determine that the limitation of the father's parenting time to brief visits at public places was in the best interests of the child. To the extent that the Family Court relied on the detailed accounts provided by the attorney for the child concerning her conversations with the child, it is inappropriate for an attorney for the child to present " 'reports containing facts which are not part of the record' " ( Cervera v. Bressler, 50 AD3d 837, 841, quoting Weiglhofer v. Weiglhofer, 1 AD3d 786, 78 n 1; see 22 NYCRR 7.2[b] ). The matter was remitted to the Family Court for a hearing on the father's petition and the application of the attorney for the child, including an in camera interview with the child, and thereafter a new determination. In light of certain remarks made by the Family Court Judge, it directed that the proceeding should be held before a different Judge.

Disposition in Protection Proceeding Must Comply with Interstate Compact on the Placement of Children Where Custody Awarded to Non-respondent Parent Who Lives in Another State.

In Matter of Alexus M, --- N.Y.S.2d ----, 2012 WL 89868 (N.Y.A.D. 2 Dept.) the issue on this appeal was whether the Family Court properly disposed of a child protective petition by transferring custody of the subject child to a nonrespondent parent who lived in another state. The Appellate Division held that under the circumstances, the order transferring custody of the child in this case was improper. The New York City Administration for Children's Services (ACS) commenced a child protective proceeding pursuant to Family Court Act article 10 against the mother in 2008. The mother consented to the jurisdiction of the Family Court pursuant to Family Court Act 1051(a), and a finding of neglect was entered with respect to the child. In July 2008, during the pendency of the proceeding, the child was removed from the mother's home pursuant to Family Court Act 1024, remanded to the custody of the Commissioner of Social Services (Commissioner), and placed in foster care. At some point after the proceeding was commenced, the nonrespondent father, who lived in Virginia, filed a petition for custody of the child. The Family Court, after a hearing, issued an order of disposition which, inter alia, terminated the Commissioner's custody and supervision of the subject child, and awarded temporary custody of the child to the father, pending further proceedings on the father's custody petition. The mother appealed from the order of disposition. The Appellate Division held that the order of disposition violated the provisions of the Interstate Compact on the Placement of Children (ICPC), codified at Social Services Law 374-a. A stated purpose of the ICPC is to ensure that a child who is in the custody or supervision of a Commissioner of Social Services will not be placed in another state with an inappropriate resource. The state that is to receive a child must be provided with a "full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child" (SSL 374-a[1], art I[b] ). Article III of the ICPC provides that the sending agency shall furnish the receiving state with written notices, so that the appropriate child welfare authorities in the receiving state can determine whether the proposed placement is consistent with the interests of the child. That article further provides that a child "shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child" (SSL 374-a[1], art III[d] ). The "physical transfer of the child to the receiving state is not to occur at all absent full compliance with Social Services Law 374-a, including the transmittal of the required written notices to the receiving state and the approval of the proposed placement by the receiving state". Here, the order of disposition terminated the custody and supervision of the child by the Commissioner, and temporarily awarded custody to the father, who lived in Virginia. Where the custody of a child who is under the supervision of the Commissioner is transferred to the custody of a parent or relative in another state, the provisions of the ICPC apply. The relevant authorities in Virginia did not approve the proposed placement of the subject child pursuant to the ICPC. Consequently, the order terminating supervision of the child by the Commissioner and awarding temporary custody to the father was improper. The Appellate Division held that the child had to be remanded to the supervision of the Commissioner, pending a new dispositional hearing and new disposition.

Must Be a Clear and Unequivocal Order to Be Held in Contempt for its Violation

In Matter of Formosa v Litt--- N.Y.S.2d ----, 2012 WL 89886 (N.Y.A.D. 2 Dept.) the Appellate Division observed, inter alia, that to sustain a finding of civil contempt based upon a violation of a court order, it is necessary to establish that a lawful court order clearly expressing an unequivocal mandate was in effect and the person alleged to have violated the order had actual knowledge of its terms). Here, the mother failed to meet her burden in seeking to hold the father in contempt. The relevant provisions of the two court orders that the father allegedly violated directed him to make every effort to provide reasonable accommodation to the mother when she could not drive to visit the daughter on a regular visitation date because of a religious holiday. Due to a religious holiday on the mother's scheduled visit on Wednesday, May 19, 2010, she requested the father to permit her to visit the child on one of the dates she specified. The father allegedly denied the request because the child had activities scheduled on those dates. The subject provisions only required the father to "make every effort to accommodate" the mother when it was "feasible." Accordingly, the father's failure to accommodate the mother on this occasion did not constitute the willful violation of a clear and unequivocal mandate

Severance of Claims in Matrimonial Action Proper Where No Issues of Fact or Questions of Law That Are Common to the Two Causes of Action

In Herskowitz v Klein, --- N.Y.S.2d ----, 2012 WL 89950 (N.Y.A.D. 2 Dept.) the husband commenced this action for a divorce and ancillary relief. The wife interposed an answer asserting three counterclaims against the husband. The third counterclaim sought to recover damages for "theft of intellectual property." It was undisputed that the alleged intellectual property did not constitute marital property, and the wife did not contend that it affected equitable distribution or any other issue in the action. The husband moved, inter alia, to sever the wife's third counterclaim from the action and the Supreme Court granted his motion. The Appellate Division affirmed. It observed that in furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue (CPLR 603). The determination to grant or deny a request for a severance pursuant to CPLR 603 is a matter of judicial discretion. While the granting of a motion for consolidation or joint trial hinges upon a finding of common issues of law or fact, the granting of severance generally depends upon an absence of such commonality. Thus, severance may be inappropriate where there are common factual and legal issues involved in two causes of action, and the interests of judicial economy and consistency of verdicts will be served by having a single trial. Conversely, severance may be appropriate where there are no issues of fact or questions of law to be determined that are common to the two causes of action. Here, the wife's third counterclaim and the other causes of action did not contain common factual or legal issues, and are not intertwined so as to raise concerns regarding the interests of judicial economy or consistency of verdicts . In light of the circumstances of this case, Supreme Court did not improvidently exercise its discretion when it granted the husband's motion.

Award of Counsel Fees to Monied Spouse Cannot Be Made Merely to Punish a Party for Claimed Discovery Delays or for Seeking a Jury Trial on Grounds

In Wells v Serman,--- N.Y.S.2d ----, 2012 WL 539303 (N.Y.A.D. 1 Dept.) the Appellate Division reversed, on the law, an order which granted plaintiff's motion for an award of interim counsel fees in the amount of $17,850. It held that Supreme Court's award of interim counsel fees to plaintiff, the monied spouse, based solely on defendant's conduct in delaying the litigation, was improper under Domestic Relations Law 237. An award of counsel fees under DRL 237 cannot be made merely to punish a party for claimed discovery delays or for seeking a jury trial on grounds (see Silverman v. Silverman, 304 A.D.2d 41, 47-48 [2003] ).

Although Emergency Jurisdiction Is Generally Temporary, Court Was Authorized to Make a Permanent Custody Award Under DRL 75-c [2]

In Mater of Tin v Thar Kyi, --- N.Y.S.2d ----, 2012 WL 517161 (N.Y.A.D. 4 Dept.), the Appellate Division affirmed an order granting custody of the parties' two children to petitioner mother, with visitation to the father as the parties agree. The court conducted a fact-finding hearing at which the mother testified without contradiction that the father had physically and verbally abused her and that he had physically abused one of the children. The mother further testified that the father threatened her life shortly before the hearing. The father did not testify at the hearing and called no witnesses. In its findings of fact, the court stated that it found the mother to be credible. Thus there was a sufficient evidentiary basis for the court to award custody of the children to the mother. Evidence of the father's acts of domestic violence demonstrated that he possessed a character was is ill-suited to the difficult task of providing his young child[ren] with moral and intellectual guidance. The Court also concluded that the court had subject matter jurisdiction over the custody proceeding pursuant to Domestic Relations Law 76-c, based on evidence that the father had committed acts of physical violence against the mother and one of the children (see Matter of Callahan v. Smith, 23 A.D.3d 957, 958, 805 N.Y.S.2d 157). Although emergency jurisdiction is generally temporary, the court was authorized to make a permanent custody award because no other custody proceeding had been instituted in a competing forum and New York had become the children's home state following commencement of the proceeding (76-c [2] ).

Father’s Appeal Dismissed for Failure to Assemble Proper Record

In Butti v Butti, --- N.Y.S.2d ----, 2012 WL 503580 (N.Y.A.D. 2 Dept.) the Appellate Division dismissed the father’s appeal form an order which directed him to pay a certain sum for college expenses for the child because the record did not contain the transcript of the hearing. It noted that an appellant is obligated "to assemble a proper record on appeal, which must include any relevant transcripts of proceedings" before the hearing court or trial court. Here, the appellant's failure to provide the Court with the transcript of the Family Court hearing renders the record on appeal inadequate to enable the Court to reach an informed determination on the merits.

Despite 9 Year Separation Husbands Pension Distributed Equally. Obligation to Pay College Expenses Extended Beyond 21 Where Husband Acknowledged He Had Agreed to Pay Part of Children's College Education Costs.

In Shapiro v Shapiro--- N.Y.S.2d ----, 2012 WL 88161 (N.Y.A.D. 3 Dept.) the parties married in 1985 and had two sons (born in 1990 and 1992). They separated in November 1999. Defendant commenced a divorce action in December 1999; however, plaintiff successfully contested that action, resulting in it being dismissed in 2000. They remained separated and, in January 2008, plaintiff brought this divorce action. After stipulating to a ground for plaintiff to obtain a divorce, a bench trial ensued after which Supreme Court directed, in relevant part, that the marital portion of plaintiff's pension, calculated pursuant to the formula in Majauskas v. Majauskas (61 N.Y.2d 481, 494 [1984] ), be distributed equally in periodic payments when plaintiff received his pension payments. The court also directed that plaintiff contribute a pro rata share to college expenses at a State University of New York college until each child reaches the age of 22. On appeal the Plaintiff urged that the marital portion of his pension should not have been distributed equally in light of the parties' long separation. He presented a report from his economist stating that the value of the marital portion of his pension when defendant sought a divorce in December 1999 was $29,148, whereas such value had increased to $112,613 by January 2008 when plaintiff brought this action. The Appellate Division pointed out that while the value of the pension at the time of the earlier unsuccessful action cannot control, the circumstances surrounding the earlier action can be considered in the overall equitable distribution of marital property. Substantial deference is accorded to the trial court's determination regarding equitable distribution so long as the requisite statutory factors were considered. Supreme Court noted that defendant left the workforce to care for the parties' children, she made substantial noneconomic contributions to the parties' assets during the early years of the marriage, she continued as primary caretaker for the children after the separation, she sacrificed career development and she now earned substantially less than plaintiff. It held that under such circumstances, Supreme Court did not abuse its discretion in awarding defendant half the marital portion of plaintiff's pension. Plaintiff argued that the portion of his pension considered marital property should have been distributed in a lump sum rather than future periodic payments. The Appellate Division held that either method is acceptable , and it generally rests within the discretion of the trial court as to the method best suited for the particular facts of each case. Supreme Court's determination was within its discretion. Plaintiff contended that his obligation to pay college expenses should not extend beyond the age of 21 of his children. The Appellate Division noted that absent an agreement extending the obligation, a parent is not legally obligated to pay college costs for a child that has reached the age of 21 . It found that Plaintiff acknowledged in his testimony that he had, in fact, agreed to pay part of the children's college education costs, there was no indication that he intended to limit his payments to the children's first three years in college, and proof at trial established that funds had been previously set up to assist in such costs. Under these circumstances, it held that it was not error for Supreme Court to direct plaintiff to pay a portion of the children's college costs until they reach the age of 22.

Defendant Wastefully Dissipated Marital Assets by Failing to Make Mortgage Payments, Using Money from His Retirement Account for Personal Reasons Rather than to Prevent Foreclosure and Permitting Vehicles Purchased During the Marriage to Be Repossessed

In Maggiore v Maggiore, --- N.Y.S.2d ----, 2012 WL 88166 (N.Y.A.D. 3 Dept.) defendant contended on appeal that Supreme Court abused its discretion in determining that he had wastefully dissipated marital assets, failed to find economic fault by plaintiff, and erred in granting plaintiff maintenance. The parties were married in 1996, were the parents of two children (born in 1992 and 1996), and defendant commenced a divorce action in 2008. He discontinued his action in December 2009 and plaintiff immediately commenced the current action. Several orders were entered while the actions were pending, including mutual orders of protection as well as an order that defendant continue paying the mortgage on the marital residence and that he keep plaintiff on his health insurance. Defendant, however, stopped the mortgage payments resulting in a foreclosure proceeding, and he removed plaintiff from his health insurance at a time when she was recovering from back surgery. In an attempt to prevent foreclosure on the home, defendant was permitted, with plaintiff's consent, to withdraw some retirement funds, which he instead used for his personal expenses. He also violated the protective order resulting in a multicount indictment, and he pleaded guilty to criminal contempt in the second degree. At the outset of trial, the parties stipulated to grounds for divorce and custody, with a bench trial ensuing on the issues of maintenance, equitable distribution and child support. Although Supreme Court rejected plaintiff's contention that defendant's action constituted egregious conduct that should affect equitable distribution, it did find wasteful dissipation by defendant and was unpersuaded by defendant's assertion of economic fault by plaintiff. The court awarded plaintiff the marital residence (which was characterized by Supreme Court as essentially worthless in light of foreclosure and other judgments) and her salon business, as well as a distributive award of $14,341.71. Plaintiff received maintenance of $250 per week for six years and child support was set at $182 per week. The Appellate Division found that the record supported Supreme Court's determination that defendant wastefully dissipated marital assets, which is one of the statutory factors in equitable distribution analysis (DRL 236[B][5][d][12]). During the divorce actions, defendant failed to make mortgage payments resulting in foreclosure on a primary marital asset, and he used money from his retirement account for personal reasons rather than to prevent foreclosure. He permitted vehicles purchased during the marriage to be repossessed and a judgment to be entered for unpaid marital debt. Defendant repeatedly violated court orders resulting in a substantial reduction in marital assets. Defendant's assertion that Supreme Court erred in not finding economic fault by plaintiff was unpersuasive. This matrimonial action was replete with acrimoniousness and uncooperative postures by both parties. However, Supreme Court was in the best position to consider the credibility of the parties' various accusations and its decision not to attribute economic fault to plaintiff in its equitable distribution analysis was not an abuse of discretion. Supreme Court's determination regarding equitable distribution had ample record support. The requisite statutory factors were considered by Supreme Court regarding maintenance, and the award was well within its discretion. The court noted, among other things, defendant's superior earning power, plaintiff's back problems and the potential affect on her ability to continue working as a hair stylist, her need to train for other work, the length of the marriage, the amount of time before the children reached the age of majority, and plaintiff's role as primary caretaker of the children.

February 16, 2012

Child Support Cap Raised from $130,000 to $136,000

The “combined parental income amount” to be utilized in calculating child support orders has increased from $130,000 to $136,000 effective January 31, 2012. (See Child Support Worksheet (Form UD-8) revised January 2012). The amount of the “combined parental income” is established by Domestic Relations Law § 240 (1-b) (2) as the amount set forth in Social Services Law § 111-I (2) (b). Domestic Relations Law § 240 (1-b) (2) provides that the amount established shall be multiplied by the appropriate child support percentage and such amount shall be prorated in the same proportion as each parent's income is to the combined parental income. Social Services Law § 111-I (2)(b) provides that the $130,000 cap is increased automatically on January 31, 2012 and on January 31 every two years thereafter by the product of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the two year period rounded to the nearest one thousand dollars. (See Bureau of Labor Statistics for its publications at http://www.bls.gov)

First Department Holds That Double Dipping Is Not Allowed Under Temporary Maintenance Guidelines

In Khaira v Khaira, --- N.Y.S.2d ----, 2012 WL 371997 (N.Y.A.D. 1 Dept.) the Appellate Division, in an opinion by Justice Saxe, considered the guidelines for awards of temporary spousal maintenance under Domestic Relations Law 236 (B)(5-a), particularly with regard to the circumstances in which the court may deviate from the guideline amount derived by formula (the presumptive award), and the procedures that must be undertaken to do so. The parties married on July 8, 2006. They had two sons, and the wife had a son from a previous marriage. In September of 2010, the husband voluntarily moved out of the marital residence, and in October 2010, the wife commenced the divorce proceeding. She moved for pendente lite support, asking for monthly maintenance of $11,500 and child support of $7,290, and a direction that the husband directly pay the carrying costs on the marital residence, child care expenses, and all health care expenses for the family.

The court observed that to determine temporary maintenance, the motion court had to apply Domestic Relations Law 236(B)(5-a), which had become effective on October 12, 2010. The court determined the presumptive award to be $11,500 per month, awarded the wife $13,870 in unallocated spousal and child support, tax deductible to the husband, and required the husband to directly pay to the lender the monthly mortgage payments on the marital residence in which the wife and the children continue to reside, and the health care insurance premiums and unreimbursed health care expenses for the family, including his stepson. It also directed the husband to pay the wife interim counsel fees of $42,000.

On appeal, the husband contended that the motion court awarded the wife an excessive sum because it failed to consider his actual, documented net monthly income and cash flow, and incorrectly calculated his annual income by including non-recurring earnings such as a one-time bonus, and illiquid, noncash equity compensation. He challenged the counsel fee award on the ground that the wife's mother guaranteed her counsel fee obligation, and counsel has been paid in full to date. He also challenged the directive that he pay the health care expenses of his stepson.

Justice Saxe observed that Domestic Relations Law 236(B)(5-a) reflects a substantial change in the Legislature's approach to temporary maintenance. The previous spousal maintenance provision gave the court great leeway, directing only in general terms that it order maintenance"in such amount as justice requires," considering the parties' standard of living during the marriage, the reasonable needs of the non-monied spouse and the monied spouse's ability to pay, and with regard to a list of factors such as the parties' respective earning capacities (former DRL 236[B][6] ). Courts applying that provision observed that pendente lite maintenance was awarded to "tide over the more needy party, not to determine the correct ultimate distribution and to ensure that a needy spouse is provided with funds for his or her support and reasonable needs" The new provision, rather than aiming merely to "tide over" the non-monied spouse, creates a substantial presumptive entitlement. He noted that the motion court properly followed the initial procedures. It applied the $500,000 cap to the husband's income, and using $60,000 as the wife's income, based on the monthly payments she acknowledged receiving from her parents, performed the two calculations: for the first, it subtracted 20% of $60,000 ($12,000) from 30% of $500,000 ($150,000), arriving at $138,000; for the second, it calculated 40% of $560,000 ($224,000), then deducted $60,000, arriving at $164,000. It properly treated the lesser of these two calculations, $138,000, as the guideline amount. At that point, the court observed that the parties' 2008 joint income tax return reflected an adjusted gross income of $851,549, almost all from the husband's earnings at the investment firm the Blackstone Group, and that their 2009 tax return reflected an adjusted gross income of $1,063,426, also almost entirely from the husband's employment. However, it did not then proceed to explicitly discuss whether an additional amount of maintenance was warranted from the portion of the husband's income that exceeded the $500,000 cap, as required by 236(B)(5-a)(c)(2). Instead, the court next examined the wife's submitted monthly expense budget of approximately $21,267 and concluded that with the exception of claims for $1,000 for gifts and $225 for charitable contributions, the remainder ($20,041), which included $4,125 for the cost of a nanny, represented the wife's and the children's reasonable needs. In essence, the court simply ruled that the husband should pay the full amount of the wife's and the children's claimed needs, partly through his payment of the mortgage on the marital residence ($5,317) and the family's health care premiums and unreimbursed medical expenses ($855), and partly through monthly payments to the wife of $13,870. In other words, the court awarded the wife $20,041 in unallocated spousal and child support without setting out a calculation of appropriate child support and without discussing or even mentioning the factors in Domestic Relations Law 236[B][5-a][c][2] ).

In considering the husband's challenge to the award, the Court rejected his suggestion that his support obligation should have been calculated based solely on his base pay, without reference to his bonus, or that the court should have taken into consideration his net pay. The statute instructs the court to base the calculations on the payor's gross income as reported in his federal income tax return, and the motion court properly did exactly that, correctly treating the husband's bonuses as income and ignoring his reliance on his net income (which can be manipulated with deductions and deferred compensation). However, the motion court did not strictly comply with the requisites of Domestic Relations Law 236 (B)(5-a).

Justice Saxe observed that no language in either the new temporary maintenance provision or the CSSA specifically addresses whether the statutory formulas are intended to include the portion of the carrying costs of their residence attributable to the non-monied spouse and the children. The new law "does not factor in child support issues or payment of household expenses. In the absence of a specific reference to the carrying charges for the marital residence, the Court considered it reasonable and logical to view the formula adopted by the new maintenance provision as covering all the spouse's basic living expenses, including housing costs as well as the costs of food and clothing and other usual expenses. The Court believed that the new approach of calculating spousal support payments to the non-monied spouse by means of a formula is intended to arrive at the amount that will cover all the payee's presumptive reasonable expenses. By calculating the guideline amount and then simply adding the direct mortgage payment on top of that, the motion court awarded more than the amount reached by the formula, without providing the required explanation.

Justice Saxe indicated that it is possible that directing payment above and beyond the guideline amount may be appropriate in certain situations. For instance, the direct mortgage payment might be justifiable as additional support when the payor's income exceeds $500,000 and the applicable factors listed in Domestic Relations Law 236 (B)(5-a)(c)(2)(a) are taken into account; or, depending on the size of the mortgage payment, perhaps only part of it should be treated as the payee's housing costs, and the remainder should be treated as the upkeep of a marital investment. He suggested that perhaps there are other reasons why the guideline amount is unjust or inappropriate. “It may well be that in this case, consideration of the enumerated factors, such as the stark difference in the parties' current earning capacities, their standard of living during the marriage, and the need to pay for day care, would justify the motion court's direction that the husband pay as additional maintenance a specified portion of his income beyond the $500,000 cap.”

Because the statute expressly requires the court to both make and explain that determination (DRL 236[B][5-a][c][2][b] ), the Appellate Division could not permit the award to remain as it stood. While the ultimate support award may well be appropriate, it must be appropriately supported and explained. The Court therefore modified so as to vacate the support award and remanded the matter for a reconsideration of the award in light of the directives of Domestic Relations Law 236(B)(5-a). It also vacated the portion of the order that placed responsibility on the husband for his stepson's health care insurance and unreimbursed health care expenses. There was no allegation that the stepson was a recipient of public assistance or that he was in danger of becoming a public charge, and no other legal rationale for imposing that obligation on the husband.

The Court upheld the award of counsel fees to the wife as the "less monied spouse" (Domestic Relations Law 237[a] ). Justice Saxe observed that the statute provides that "[p]ayment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section"; the husband's argument that no award of fees was appropriate because the wife's mother paid her attorney's retainer fee failed to rebut the presumption in favor of the award.

Comment:

Counsel for the spouse paying temporary maintenance should request, in his opposing papers, that the temporary maintenance order contain a provision directed the spouse who is awarded temporary maintenance to pay the “carrying costs of the marital residence” . Without such a direction, the spouse receiving the temporary maintenance award will not be under any court ordered obligation to pay those expenses, even though the temporary maintenance award includes sums for their payment, and the credit rating of the payor spouse may suffer or the mortgage may go into foreclosure..

Counsel for a spouse seeking temporary maintenance should to make sure, in preparing an application for temporary support, that the “presumptive award” will be enough to permit his client to pay the “carrying costs of the marital residence.” The application for temporary maintenance should ask the court to specify what items are considered “carrying costs of the marital residence”.

Supreme Court Holds Once a Party Has Stated under Oath That the Marriage Has Been Irretrievably Broken for a Period of at Least Six Months, the Cause of Action for Divorce Has Been Established as a Matter of Law and There Is No Defense

In Townes v Coker, --- N.Y.S.2d ----, 2012 WL 444054 (N.Y.Sup.) the parties were married on June 12, 1981 and had three emancipated children. On October 6, 2008, Wife commenced an action for divorce against Husband. In her verified reply the Wife consented to the entry of the Judgement of Divorce based on Husband's counterclaim for constructive abandonment. On March 23, 2009, the parties executed a Stipulation, "So-Ordered" by Hon. Anthony J. Falanga, wherein Wife agreed to discontinue the 2008 action so that Husband may commence his own action on the grounds of constructive abandonment. Pursuant to the terms of the March 23, 2009 Stipulation, on or about April 8, 2009, the Husband commenced an action for divorce based upon the grounds of constructive abandonment. (Action No. 1). The Wife served a Verified Answer consenting to a divorce on the grounds of constructive abandonment. On or about March 21, 2011 the Husband made a motion seeking to discontinue Action No. 1. The Court denied Husband's motion. On or about February 15, 2011 the Wife commenced Action No. 2 and moved to consolidate Action No. 1 and Action No. 2 pursuant to CPLR 602 which the Court granted. The wife then moved Summary Judgment with respect to her cause of action alleged in Action No. 2, based upon the irretrievable breakdown of the marriage between the parties for at least six (6) months. The Wife's cause of action in Action No 2 was predicated upon the "no-fault" ground for divorce established in DRL 170(7), the irretrievable breakdown of the relationship of the parties. The Wife's Verified Complaint (Action No. 2) stated in relevant part: 11. The grounds for divorce are as follows: Irretrievable Breakdown of the Relationship (DRL Sec. 170(7)): The relationship between the Plaintiff and Defendant has been broken down irretrievably for a period of at least six (6) months. In opposition to Wife's application for summary judgment as to grounds, the Husband categorically denied his Wife's claims that the marriage had broken down irretrievably. The Supreme Court found that the Legislature did not enact a defense to this cause of action and courts cannot employ statutory construction to enact an intent that the Legislature did not express. Thus, neither the Husband, nor the Court, may create a defense where it is clear that the Legislature intentionally declined to do so. See, Pajak v. Pajak, 56 N.Y.2d 394, 452 N.Y.S.2d 381 (1982). Since the Wife stated "under oath" that the marriage is irretrievably broken, there was no basis for directing a trial with regard to this action of action for divorce. DRL 170(7) states that a divorce may be granted where: (7) The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. Thus, once a party has stated under oath that the marriage has been irretrievably broken for a period of at least six months, the cause of action for divorce has been established as a matter of law. The Court declined to follow the holding in Strack v.. Strack, 31 Misc.3d 258, 916 N.Y.S.2d 759 (Sup.Ct., Essex Cty., 2011), which held that a husband has the right to a trial on the "no fault" ground asserted by Wife. Also, see Schiffer v. Schiffer, 33 Misc.3d 795 (Sup.Ct. Dutchess Co., 2011). Supreme Court held that pursuant to DRL §170(7), once either party states under oath that the marriage has been irretrievably broken for at least six months, the grounds are no longer at issue and there is no right to a trial, by jury or otherwise. The entire purpose of the statute was to permit the Court to grant a divorce without requiring a trial. It noted that in AC v. DR, 32 Misc.3d 293, 305, 927 N.Y.S.2d 496 (Sup.Ct. Nassau Co., 2011), Justice Falanga stated the plaintiff's self-serving declaration about his or her state of mind is all that is required for the dissolution of a marriage on grounds that it is irretrievably broken. In the court's view, the Legislature did not intend nor is there a defense to DRL 170(7). Notwithstanding the foregoing and assuming arguendo, that the Husband was entitled to a defense regarding DRL 170(7), here the Husband's general denial of Wife's allegations that the marriage was broken down irretrievably was belied by his sworn statement in his Verified Complaint (Action No. 1) in which he stated: Continuing for a period of more than one (1) year immediately prior to the commencement of this action, defendant has continuously refused to have sexual relations with the plaintiff despite plaintiff's repeated requests to resume such relations. Based upon the Husband's sworn admission that his Wife has refused to have sexual relations with him for at least one (1) year despite his repeated request for same, it was difficult for this Court to imagine a better example of a irretrievable breakdown of the marriage relationship where one spouse continually refuses to have sexual relations with the other spouse for a period of at least one year. Here, the Husband was bound by his own sworn admission contained in his Verified Complaint, thereby eliminating any triable issues of fact for the Court to determine.

UCCJEA Requires Court to Communicate with Sister State Court Where Custody Actions Commenced in Two States

In Guzman v Guzman, --- N.Y.S.2d ----, 2012 WL 401081 (N.Y.A.D. 2 Dept.) in November 2009, the mother commenced a proceeding, seeking to modify the custody and visitation provisions of a 2008 Florida judgment of divorce, entered upon the parties' stipulation, which awarded the father primary residential custody of the child. Before any determination could be made in this proceeding, the father relocated with the child to Florida. Thereafter, on December 22, 2009, the Family Court issued a determination, in effect, dismissing the petition for lack of jurisdiction, and it advised the mother to seek relief in Florida. However, when the mother subsequently commenced a custody proceeding with respect to the child in Florida, the Florida court determined that Florida was an inconvenient forum and that New York was the more appropriate forum, and it stayed the custody proceeding commenced in the Florida court. The mother then moved in the Family Court, Queens County, to vacate the Family Court's determination dated December 22, 2009. Without consulting with the Florida court, the Family Court denied the motion in an order dated March 2, 2011. The Appellate Division held that under the circumstances of this case, the order dated March 2, 2011, had to be reversed, that branch of the mother's motion to vacate the determination dated December 22, 2009, granted, the petition reinstated, and the matter remitted to the Family Court, for further proceedings. At the time the mother commenced this modification proceeding in November 2009 the Family Court, Queens County, had jurisdiction over it pursuant to Domestic Relations Law §76-b, based on the fact that the parties and the child lived in New York, and none of them had resided in Florida for over a year. The child was enrolled in school in New York, her sister had resided in New York with the mother since 2007, the father had commenced a proceeding in New York to modify the custody provisions of the Florida judgment of divorce with respect to the sister, and the Family Court, Queens County, had obtained a forensic study of the parties for use in that proceeding. Therefore, the parties and the subject child had significant connections with this State, and it appeared that "substantial evidence [was] available in this state concerning the child's care, protection, training, and personal relationships" (Domestic Relations Law § 76[1][b][ii] ). Accordingly, New York had jurisdiction to modify the custody and visitation provisions of the parties' Florida judgment of divorce with respect to the subject child. Nonetheless, where custody proceedings relating to a child are pending in different states-in this case, New York and Florida-Domestic Relations Law § 76-e applies, and the courts of the two states must confer with each other. Since the Family Court made its initial determination, in effect, dismissing the petition in this proceeding, the father and the child apparently had resided in Florida. In view of these circumstances, upon remittal, the Family Court, Queens County, was directed to contact the Florida court so that the courts of the two states may confer with each other and determine which state was the more appropriate forum for the proceeding at this juncture.

February 1, 2012

Threat to Cancel Wedding Is Not Duress.

In Ramunno v Ramunno, --- N.Y.S.2d ----, 2012 WL 266464 (N.Y.A.D. 4 Dept.) Plaintiff commenced a action seeking a determination that the parties' Antenuptial Agreement was null and void on the grounds of , inter alia, duress. The Appellate Division held that Supreme Court property determined that defendant's threat to cancel the wedding unless plaintiff signed the agreement did not amount to duress (citing Colello v. Colello, 9 AD3d 855). The Appellate Division held that court erred, however, in sua sponte determining that plaintiff could not, prior to the marriage, waive her right to equitable distribution of defendant's pension (citing Strong v. Dubin, 75 AD3d 66, 72-73) or her right to maintenance (DRL 236[B][3][3] ), and modified the order accordingly.

Husband's Motion to Modify Divorce Judgment to Conform to Agreement Not Barred by the Doctrine of Laches, Although He Waited Eight Years to Make the Motion

In Markell v Markell--- N.Y.S.2d ----, 2012 WL 234084 (N.Y.A.D. 2 Dept.) in a stipulation of settlement dated May 14, 2002, the plaintiff former wife and the defendant former husband agreed, inter alia, that the defendant would pay child support on the fifteenth day of each month, and that unreimbursed health care expenses for their children would be divided equally after the plaintiff paid the initial sum of $500 per child. The Supreme Court issued Findings of Fact and Conclusions of Law dated December 10, 2002, which reflected this agreement. However, the judgment of divorce, which was entered on December 10, 2002, provided that the defendant was to pay child support on the first day of each month and two thirds of the children's unreimbursed health care expenses after the plaintiff paid the initial $500 per child. On or about December 10, 2010, the defendant moved to modify the judgment of divorce to "accurately reflect the provisions of the December 10, 2002 Findings of Fact and Conclusions of Law and [the] parties' May 14, 2002 Stipulation of Settlement." The Supreme Court denied the motion and, upon reargument, adhered to its original determination. The Supreme Court determined that the husband's motion to modify the judgment was barred by the doctrine of laches, in that he waited eight years to make the motion.

The Appellate Division modified the order made upon reargument. It observed that the doctrine of laches is an equitable doctrine which bars the enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to a party. The mere lapse of time without a showing of prejudice will not sustain a defense of laches. In addition, there must be a change in circumstances making it inequitable to grant the relief sought. Notably, prejudice may be established by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay ( Skrodelis v. Norbergs, 272 A.D.2d at 316-317). In support of his motion, the defendant demonstrated that the subject provisions of the judgment were the result of a clerical error, as the parties had been adhering to the terms of the stipulation of settlement for approximately eight years, and that the plaintiff had only recently informed him at a Family Court proceeding that the judgment contained terms different from those in the stipulation of settlement and Findings of Fact and Conclusions of Law. In opposition, the plaintiff conceded that the parties had been complying with their stipulation of settlement since it was executed in May 2002. Since the parties had been operating under the terms of the stipulation of settlement for approximately eight years prior to the husband's motion, the plaintiff failed to demonstrate a change in circumstances that would render inequitable the relief sought by the defendant. Further, the plaintiff failed to show that she would be prejudiced by a modification of the judgment to accurately reflect the provisions contained in the stipulation of settlement and Findings of Fact and Conclusions of Law .

Court Should Not Rely on New Statutory Formula in Domestic Relations Law 236(B)(5-a) in Actions Commenced Prior to its Effective Date

In Truglia v Truglia, --- N.Y.S.2d ----, 2012 WL 233765 (N.Y.A.D. 2 Dept.) the Appellate Division held that in determining an award of pendente lite maintenance, a court should not rely on the new statutory formula in Domestic Relations Law 236(B)(5-a) in actions, such as this one, commenced prior to its effective date (see Ingersoll v. Ingersoll, 86 AD3d 684, 685). Here, however, the Supreme Court's award, while erroneously arrived at using the new statutory formula, was upheld in accordance with the prior standard under former Domestic Relations Law 236(B)(6)(a). The award of pendente lite maintenance reflected " 'an accommodation between the reasonable needs of the moving spouse and the financial ability of the other spouse... with due regard for the preseparation standard of living.

Plaintiff Made Direct Contributions to the Business Established by Husband Prior to Parties Marriage by Serving as Company Bookkeeper for Approximately Seven Years

In Scher v Scher,--- N.Y.S.2d ----, 2012 WL 233930 (N.Y.A.D. 2 Dept.) the Appellate Division held that contrary to the determination of the Supreme Court, the plaintiff was entitled to share in the appreciated value of Home Companion Services of New York, Inc., which the defendant incorporated approximately three years prior to the marriage. Separate property includes "property acquired before [the] marriage" (Domestic Relations Law 236[B] [1][d][1] ), such as the business interest in Home Companion Services in this case, as well as "the increase in value of [such] separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse" (Domestic Relations Law 236[B][1][d][3] ). In order for appreciation in the value of separate property to be deemed marital property subject to equitable distribution, the nontitled spouse must demonstrate the manner in which his or her contributions resulted in the increase in value and the amount of the increase which was attributable to his or her efforts. Here, the Supreme Court improvidently exercised its discretion in finding that the plaintiff made no direct or indirect contributions to the appreciation of Home Companion Services which resulted in the increase in the value of the company. The evidence established that the plaintiff made direct contributions to the business by serving as the company bookkeeper for approximately seven years. The evidence further established that the defendant's active participation in expanding the business was aided and facilitated by the plaintiff's indirect contributions as homemaker and occasional caretaker of one of his children from a prior marriage. Moreover, the defendant failed to establish that the plaintiff committed "wasteful dissipation" of marital assets in her role as bookkeeper. The Appellate Division held that in light of the plaintiff's direct and indirect contributions, the Supreme Court should have awarded her 20% of the appreciated value of Home Companion Services. As the parties stipulated that the appreciated value over the course of the marriage amounted to $1,146,000, the plaintiff was entitled to an award of $229,200.

Furthermore, contrary to the determination of the Supreme Court, the plaintiff was entitled to an equitable share of the appreciated value of the marital residence over the course of the marriage, notwithstanding that the residence was the separate property of the defendant until March 2005, when the property was transferred to the plaintiff and defendant as tenants by the entirety. The increase in the value of separate property remains separate property except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse at which point the increase in value becomes marital property, in accordance with the rule that the definition of marital property is to be broadly construed, given the principle that a marriage is an economic partnership. The parties stipulated to a neutral appraisal which found that the marital residence had increased in value by $40,000 due to "active appreciation" in the form of physical improvements, and $300,000 due to "passive appreciation" in the form of "market forces, without regard to any improvements, except normal maintenance." Since the record established that the $340,000 in appreciation was attributable to the efforts of both parties, the plaintiff was entitled to share equitably in that increased value. Applying the plaintiff's 50% distributive share to the $340,000 in appreciation, she was entitled to an award of $170,000 for the appreciated value in the martial residence from the date of marriage. In light of the plaintiff's contributions, the Supreme Court should have awarded the parties equal shares in the increase in the value of the marital residence.

The Appellate Division found that Supreme Court erred in finding that the interest in Green Fields East Holding, LLC , which was held in the defendant's name, was the separate property of the defendant. Domestic Relations Law 236 defines "marital property" as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held". Likewise, expenses incurred prior to the commencement of an action for a divorce are marital debt to be equally shared by the parties upon an offer of proof that they represent marital expenses. Where a party has paid the other party's share of what proves to be marital debt, reimbursement is required. As the interest in Green Fields was acquired during the marriage and before the commencement of the instant action, it was marital property. Likewise, a loan in the approximate amount of $239,000 which was taken out simultaneously, was marital debt. Since the defendant established that he paid the plaintiff's share of the marital debt by satisfying the loan, reimbursement was required. Taking the market value of the interest in Green Fields ($350,000), and applying the plaintiff's 50% distributive share thereto, she was entitled to an award of $55,500 after reimbursing the defendant the sum of $119,500 for satisfying her portion of the marital debt.

The Appellate Division held that Supreme Court erred in awarding the defendant a separate property credit in the amount of $32,719.59. Where separate property has been commingled with marital property, there is a presumption that the commingled funds constitute marital property. However, a party may overcome this presumption by presenting sufficient evidence that the source of the funds was separate property. Defendant failed to present sufficient evidence to establish that the source of the funds in the disputed profit-sharing plan account was separate property.

Considering the plaintiff's distributive award with respect to the marital residence and Home Companion Services and Green Fields, and in light of the plaintiff's direct and indirect contributions, an award of 10% of the value of the parties financial accounts, except a 529 college savings plan account, was equitable. It declined to disturb the provision of the judgment which directed that the defendant was to receive all the proceeds of the 529 college savings plan account.

In light of the distribution of the marital property and the plaintiff's own testimony regarding her expenses and earning capacity, the Appellate Division declined to disturb the Supreme Court's determination that the plaintiff was not entitled to future maintenance payments and declined to disturb the Supreme Court's determination that the plaintiff was not entitled to an award of an attorney's fee. In light of the substantial distributive award in favor of the plaintiff, she was capable of paying for her own attorney.

January 17, 2012

Emergency Jurisdiction Continues Under UCCJEA for More than Three Years Where Family Court Not Satisfied With Steps to Protect Children Taken by Home State of New Mexico Court

In Matter of Bridget Y, --- N.Y.S.2d ----, 2011 WL 6848352 (N.Y.A.D. 4 Dept.), a 3-2 decision, the primary issue raised was whether Family Court properly exercised temporary emergency jurisdiction over the children pursuant to Domestic Relations Law 76-c (3). The parents Kenneth M.Y. and Rita S., appealed from an order of fact-finding and disposition determining, following a fact-finding hearing, that their children were neglected and placing the children in the custody of petitioner Chautauqua County Department of Social Services (DSS), and from a corrected order that denied their motion to vacate the order of fact-finding and disposition in appeal No. 1. The parents contended in both appeals that Family Court lacked subject matter jurisdiction because New Mexico was the home state of the children, the neglect took place in New Mexico, and the parents were neither domiciliaries of nor otherwise significantly connected to New York State. The majority opinion concluded that the court properly exercised temporary emergency jurisdiction pursuant to Domestic Relations Law 76-c (3) inasmuch as the children were imminent risk of harm, and concluded that both orders should be affirmed.

Respondent Kenneth M.Y. (father), the biological father of the children, married respondent Rita S. (stepmother), after the children's biological mother died in September 2001. The stepmother subsequently adopted the children. At some time between February 2007 and November 2007, the parents moved with the children from Pennsylvania to New Mexico. On August 7, 2008, the parents were arrested and were each charged with seven counts of child abuse with respect to the children. The charges stemmed from allegations that the parents left Kelly and Colleen, then 15 years old, and Michaela, then 12 years old, unsupervised in a bug-infested trailer miles away from the family residence, with limited supplies and inadequate food for a period of six to eight weeks. It was further alleged that the parents, as a form of discipline, had confined each of the children to their bedrooms or to the garage for days, weeks, or months at a time. While confined to the garage, the children received only water, bread, peanut butter and a sleeping bag, and they were permitted to use the bathroom once or twice a day.

As a result of the criminal charges, a Magistrate Court in New Mexico ordered the parents to avoid all contact with the children. In light of the no-contact order, on August 11, 2008 the parents placed the children in the care of their "maternal step-aunt and uncle", Robin S. and Paul S., who were respondents in appeal No. 2. Robin S. signed a "safety contract" with the New Mexico Children, Youth and Families Department (CYFD), which stated that the parents voluntarily placed the children in the care of the aunt and uncle and that the parents were "still legally responsible for the [children's] well-being."Robin S. agreed to prohibit any contact between the parents and the children and to advise the Dona Ana County District Attorney's Office in the event that the parents attempted to remove the children from her care or otherwise to contact the children in any way. Robin S. transported the children to her home in Chautauqua County, New York.

By letter dated September 22, 2008, CYFD notified the parents that it had closed its file concerning the children. The letter further stated that "[t]he Department believes that the voluntary placement of the children with Robin S[.] was in the best interests of the children. However, [the parents] are free to make changes in that voluntary placement if they choose to as they remain the legal custodians of their children. The Department has no legal authority with respect to the children at this time. The safety contract between the Department and Robin S[.] was for placement purposes and does not prevent [the parents] from making changes to the children's placement."

According to the parents, they provided a copy of that letter to the aunt and uncle and notified them of their "intent to revoke the temporary placement of the minor children in their care and place the minor children with an appropriate guardian." The aunt and uncle refused to return the children, however, and instead filed a petition in Family Court seeking custody of the children. On October 1, 2008, the parents were indicted in New Mexico on six counts each of felony abuse of a child. On November 5, 2008, the parents filed a "Petition to Determine Custody Pursuant to the [Uniform Child Custody Jurisdiction and Enforcement Act]" in District Court in New Mexico against the aunt and uncle. The petition alleged, that the parents had resided in New Mexico since February 2007, that New Mexico was the home state of the children, and that the parents had placed the children with the aunt and uncle on a temporary basis "until a more suitable placement could be made or until [the parents'] conditions of release were modified or disposed of so that the children could be reunited with them." By their petition, the parents sought to place the children in the care and custody of a different temporary guardian. The parents thus sought an order confirming that they are the legal guardians of the children, and appointing a temporary guardian for the minor children until the criminal charges against them were resolved or their conditions of release were modified.

Two days later, Family Court issued a temporary order of custody asserting temporary emergency jurisdiction pursuant to Domestic Relations Law 76-c and granting temporary custody of the children to the aunt and uncle. DSS thereafter commenced the neglect proceeding in Family Court by petition filed November 13, 2008, alleging that the parents had neglected each of the children. At a Family Court appearance on November 24, 2008, an attorney for the parents appeared for the limited purpose of contesting jurisdiction, asserting that the parents were residents of New Mexico, that the alleged neglect took place in New Mexico, and that the children remained residents of New Mexico. Family Court continued to assert temporary emergency jurisdiction over the matter.

On December 10, 2008, the New Mexico court issued an "Order Assuming Jurisdiction." The New Mexico court determined that it had jurisdiction over the parties and the subject matter, i.e., the children, noting that the children had resided with the parents in New Mexico since February 2007 and expressly stating that New Mexico is the home state of the children. With respect to the merits, the New Mexico court ruled that the parents "remain the sole legal custodians of the minor children, which includes the right to decide the temporary placement of the minor children with an appropriate guardian of their choosing."According to the New Mexico court, the parents wished to nominate Jim L. and Angela L., residents of Ohio, as temporary guardians of the children. To that end, the New Mexico court ordered the parents to arrange for a home study of the Ohio guardians, and to pay for the cost of the home study. Finally, the New Mexico court ruled that "[t]he issue of permanent custody is hereby reserved pending resolution of the criminal charges. Following resolution of the criminal proceeding, the Court may appoint a guardian ad litem herein and may conduct in camera interviews of the minor children."

The parents sought to register the above New Mexico order in Family Court. At a December 15, 2008 appearance, Family Court indicated that it had some concerns relative to relinquishing jurisdiction to the New Mexico court. Specifically, the Family Court judge indicated that "[w]hat concerns me is, apparently, there is no neglect proceeding in the State of New Mexico. There are criminal proceedings against these parents, but for whatever reason, there was no neglect proceeding ... [W]ith criminal charges pending, and the children being the ones who would be put in the position of testifying, should there be a criminal trial, ... the children are left with no legal remedies. There hasn't even been a law guardian appointed ... for these children in the State of New Mexico. And the parents are given full authority to do whatever, and place these children wherever they so choose."

By order entered January 9, 2009, the New Mexico court approved the home study and ordered the immediate transfer of the children to the Ohio guardians. The New Mexico court reiterated that the parents "are the sole legal guardians of the minor children and maintain their constitutional right to management and control of their minor children," and approved "[t]he parents' selection of placement guardian for their minor children."In light of that order, the parents requested that Family Court issue an order (1) registering and enforcing the New Mexico order assuming jurisdiction; (2) dismissing the New York custody proceeding; (3) dismissing the New York neglect proceeding; (4) vacating the temporary order of custody; and (5) enforcing the New Mexico transfer order.

DSS thereafter sought an award of temporary custody of the children. In support thereof, DSS submitted an affidavit of a psychologist who had counseled each of the children. The psychologist averred that the children "have related very credible stories of child abuse and neglect," and that the parents demonstrated a "disturbing pattern of isolating these children from each other, from children their age, and from their mother's relatives."With respect to the proposed move to Ohio, the psychologist averred that "[a]ny change in placement for the [children] that is instigated by their father or adoptive mother carries the implicit message to these girls that they are still under the control of their father, and therefore still at risk for abuse and maltreatment ... Removing them from an emotionally secure family environment, the friends they have recently established, and a school environment which has been affirming for them, must be considered a further emotional deprivation for these girls, and a demonstration to the girls that they remain at risk of capricious, abusive and insensitive treatment by their father. Accordingly, by generating a constant state of anxiety and uncertainty for them, such a move would result in a perpetuation of the emotional abuse and deprivation that these children suffered under the care of their father and adoptive mother."

Family Court granted temporary custody of the children to DSS, concluding that the basis for asserting emergency jurisdiction continued to exist. Family Court explained that, "[w]hen there is a placement out of state in a situation where parents are facing criminal charges, and there is no underlying custody order, and no law guardian appointed for the children, ... then the children are left without protection, plain and simple." At the fact-finding hearing on the neglect petition, DSS introduced testimony from each of the children as well as from the maternal step-aunt, Robin S., and the children's psychologist, and Family Court received in evidence records from the New Mexico Police Department and financial records relative to the father. The parents failed to appear at the hearing and subsequently moved to dismiss the neglect proceeding for lack of personal and subject matter jurisdiction.

By the order in appeal No. 1, Family Court implicitly denied the parents' motion to dismiss the neglect proceeding by issuing an order of fact-finding and disposition, which determined that the parents neglected each of the four children, ordered that the children be placed in the custody of DSS, and adopted the permanency plan proposed by DSS. By the corrected order in appeal No. 2, Family Court, inter alia, denied the parents' motion to vacate the order of fact-finding and disposition. The Appellate Division initially agreed with the parents that, absent the exercise of temporary emergency jurisdiction, Family Court would lack subject matter jurisdiction over the neglect proceeding. Pursuant to New York's version of the UCCJEA (Domestic Relations Law art 5-A), Domestic Relations Law 76(1) "is the exclusive jurisdictional basis for making a child custody determination by a court of this state" (DRL 76[2] ). A "[ c]hild custody determination" is defined as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order" (DRL 75-a [3] ).

Here, the neglect proceeding commenced by DSS fell within the UCCJEA's expansive definition of a child custody proceeding (DRL 75-a [4] ). There was no question that New Mexico, not New York, was the home state of the children at the time of commencement of the neglect proceeding. New Mexico remained the home state of the children when the neglect proceeding was commenced in New York, and Family Court lacked jurisdiction to make an initial child custody determination. In addition, Domestic Relations Law 76-e states that, "[e]xcept as otherwise provided in section [76-c] of this title[, i .e., temporary emergency jurisdiction], a court of this state may not exercise its jurisdiction under this title if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child[ren] has been commenced in a court of another state having jurisdiction substantially in conformity with this article...." Here, at the time of commencement of the neglect proceeding in New York, the parents had already commenced a custody proceeding in New Mexico. Thus, inasmuch as a custody proceeding was pending in the children's home state when the neglect petition was filed, New York was precluded from exercising jurisdiction except in an emergency.

The Majority concluded that Family Court properly exercised temporary emergency jurisdiction pursuant to Domestic Relations Law 76-c. In the absence of subject matter jurisdiction pursuant to section 76(1), section 76-c provides that a New York court has "temporary emergency jurisdiction if the child[ren are] present in this state and the child[ren] ha [ve] been abandoned or it is necessary in an emergency to protect the child [ren], a sibling or parent of the child[ren]" ( DRL 76-c [1];). There was no question that the children were present in New York at all relevant times in which Family Court exercised temporary emergency jurisdiction. There must, in addition, be an emergency that is real and immediate, and of such a nature as to require [s]tate intervention to protect the child[ren] from imminent physical or emotional danger". The duration of an order rendered pursuant to temporary emergency jurisdiction depends upon whether there is an enforceable child custody determination or a child custody proceeding pending in a court with jurisdiction. Here, a child custody proceeding had been commenced in New Mexico when Family Court first asserted temporary emergency jurisdiction. Thus, Family Court's exercise of temporary emergency jurisdiction was governed by DRL 76-c (3), which provides that "any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under sections [76] through [76-b] of this title. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires, provided, however, that where the child who is the subject of a child custody determination under this section is in imminent risk of harm, any order issued under this section shall remain in effect until a court of a state having jurisdiction under sections [76] through [76-b] of this title has taken steps to assure the protection of the child."

Family Court first exercised temporary emergency jurisdiction on November 7, 2008, when it issued a temporary order of custody in the proceeding commenced by the aunt and uncle. In the Majority’s view there was no question that an emergency existed at that point in time. On September 22, 2008, CYFD notified the parents' attorney that it had closed its file concerning the children and that the parents, as the "legal custodians of their children," were "free to make changes in th[eir] voluntary placement."Shortly thereafter, the parents sent the stepmother's father, who lived with them, to New York in an attempt to take the children to an undisclosed address in New Mexico. On November 5, 2008, the parents commenced a custody proceeding in New Mexico seeking, inter alia, to place the children in the care and custody of yet another temporary guardian. According to the aunt and uncle, the parents also made "a threat ... immediately before the [New Mexico] Grand Jury Proceedings where the children were told that they would be taken to an unknown location."The parents initially sought to appoint the father's office manager as temporary guardian for the children. They then nominated the Ohio guardians, allegedly "long time and close friends of the family," as the temporary guardians of the children. The children told their attorneys and Family Court that they had never met the Ohio guardians. We thus conclude that Family Court properly acted to protect the children from imminent danger, i.e., the likelihood of returning the children to the home at which the abuse and neglect occurred or to another guardian under the control of the parents. At that point in time, no New Mexico court had issued an order protecting the children, and CYFD-the New Mexico equivalent of DSS-had determined that it had "no legal authority with respect to the children."

The orders challenged on appeal, however, were issued after the parents had obtained two orders in New Mexico: (1) the December 10, 2008 order assuming jurisdiction, and (2) the January 9, 2009 order approving the home study and ordering the immediate transfer of the children. The propriety of Family Court's orders thus depended upon whether this case fell within the narrow exception set forth in Domestic Relations Law 76-c (3), which provides that, "where the child[ren] who [are] the subject of a child custody determination under this section [are] in imminent risk of harm, any order issued under this section shall remain in effect until a court [of the home state] has taken steps to assure the protection of the child[ren]." The Majority concluded that this case falls within that category.

With respect to the first of the two New Mexico orders issued before the orders challenged on appeal, the court noted that, despite the criminal charges, the substantial evidence of abuse and neglect, and the no-contact order, the New Mexico court allowed the parents to select new guardians for the children and ruled that it would not address the issue of permanent custody until after the criminal charges had been resolved. The order provided that the New Mexico court "may appoint a guardian ad litem herein and may conduct in camera interviews of the minor children" following resolution of the criminal proceeding. The order further provided that the parents "shall not in any manner communicate with the minor children or cause any third party or their agent to communicate in any manner with the minor children regarding this matter or the criminal matter " (emphasis added). The New Mexico court thus left open the possibility of communication or contact between the parents and the children on other subjects. Although the New Mexico court ordered the parents to "continue to abide by the no[-]contact order or any further order" issued in the criminal proceeding, the court noted that "[t]here is no other order limiting [their] parental rights to the minor children."With respect to the second of the two New Mexico orders, the New Mexico court, after reviewing a home study arranged and paid for by the parents, reiterated that the parents "maintain their constitutional right to management and control of their minor children," approved the parents' "selection of placement guardian[s] for their minor children," and ordered the immediate transfer of the children to the Ohio guardians. Thus, without any input from CYFD or any other agency charged with the protection of children, an attorney for the children, or the children themselves, the New Mexico court ordered that the children be transferred from family members to non-relatives who were strangers to them and who resided in a state with which they had no connection, all at the behest of the parents who had abused them.

The Majority found it particularly troubling that CYFD failed to commence an abuse or neglect proceeding against the parents and that the New Mexico court failed to appoint an attorney for the children to advocate on their behalf pursuant to New Mexico law. CYFD apparently failed to conduct the statutorily mandated investigation into the abuse and neglect allegations against the parents (see NM Stat Ann s 32A-4-4 [A] ), and the agency also failed either to recommend or to refuse to recommend the filing of an abuse or neglect petition against them ( sees 32A-4-4 [C] ). Instead, CYFD simply transferred the children to New York and closed its file, leaving the children's fate to the wishes of their alleged abusers. In addition, upon asserting jurisdiction over the case, the New Mexico court failed to appoint a guardian ad litem or attorney for the children to "represent and protect the best interests of the child[ren] in [the] court proceeding" (s 32A-1-4 [J]; see s 32A-4-10). The New Mexico court then proceeded to change the children's placement at the request of the parents without enabling the children to have a voice in the courtroom and without any consideration, let alone determination, of the children's best interests. The children's psychologist averred in an affidavit presented to Family Court that the parents displayed a "disturbing pattern of isolating these children from each other, from children their age, and from their mother's relatives," and he opined that moving the children to Ohio at the behest of the parents "would result in a perpetuation of the emotional abuse and deprivation that the[ ] children suffered under the care of their father and adoptive mother". The parents' actions in attempting to remove the children from their New

York placement constituted "a continuing pattern of abuse to isolate [the children] from family members," and she and the psychologist similarly concluded that the parents' actions communicated to the children that they remain under the

control of their abusers. In light of the above-described circumstances, including the absence of a neglect proceeding in New Mexico and the refusal of the New Mexico court to act to protect the children pending the resolution of the criminal charges against the parents, the Majority concluded that Family Court properly continued to exercise temporary emergency jurisdiction of the children after the issuance of the two New Mexico orders. In their view, the children remained "in imminent risk of harm," namely, emotional abuse inflicted by the parents, and it appears from the record before us that New Mexico has not acted to "assure the protection of the child[ren]"

The parents further contended that, even if Family Court properly exercised temporary emergency jurisdiction in the neglect proceeding, such jurisdiction did not permit Family Court to enter an order of disposition. The Majority rejected that contention. It stated: “Domestic Relations Law § 76-c (3), however, which is previously quoted herein and governs the instant case in light of the custody proceedings in New Mexico, contains no such provision. Thus, orders issued pursuant to section 76-c (3) are required to expire at a date certain unless the “imminent risk of harm” exception applies, in which case the order applies “until [the home state] has taken steps to assure the protection of the child.” Even assuming, arguendo, that the parents are correct, they concluded that Family Court was not thereby precluded from issuing the order of disposition in appeal No. 1. Although an order of fact-finding and disposition is a final order for purposes of appellate review (see Ocasio v Ocasio, 49 AD2d 801; see generally Matter of Gabriella UU., 83 AD3d 1306; Matter of Mitchell WW., 74 AD3d 1409, 1411-1412), it is not a final or permanent “child custody determination” (§ 76-c [2], [3] [emphasis added]). Rather, the order in appeal No. 1 here simply placed the children in the custody of DSS, scheduled a permanency hearing, and approved a proposed plan for the children. A placement with DSS is never intended to be a final or permanent custodial relationship. In cases such as this in which a child is placed with DSS pursuant to Family Court Act § 1055, the court retains continuous jurisdiction over the case (see § 1088), and the child’s placement is reviewed at permanency hearings conducted every six months (see § 1089 [a] [2], [3]). Such jurisdiction continues until the child is “discharged from placement” (§ 1088), i.e., until permanency is achieved Family Court “maintains complete continuing jurisdiction whenever a child has been placed outside his [or her] home. Accordingly, the case remains on the Court’s calendar — there is no final disposition until permanency has been ordered — and the Court may hear the matter upon motion at any time. There is no need or requirement to wait until the next scheduled hearing date”. The parents therefore may at any time petition for the return of their children and/or move to vacate or terminate the children’s placement with DSS. Thus, the order of fact-finding and disposition in appeal No. 1, which concerns placement rather than custody of the children, does not conflict with New Mexico’s order, which provides that the “issue of permanent custody is hereby reserved pending resolution of the criminal charges” against the parents. Upon resolution of the criminal charges or when the emergency abates, i.e., when the New Mexico court ensures that the children are not “in imminent risk of harm” (Domestic Relations Law § 76-c [3]), the children’s placement with DSS may be revisited and the issue of permanent custody addressed. Until then, the order of fact-finding and disposition simply maintains the status quo – placement in the custody of DSS – with periodic judicial review to assess any changed circumstances. Inasmuch as the order of fact-finding and disposition does not constitute a final custody determination, it cannot be said that Family Court exceeded the scope of its temporary emergency jurisdiction in issuing the order in appeal No. 1. “

Justice Smith dissented in part, only agreeing with the majority that the appeal must be dismissed with respect to the two older children because they were no longer under the age of 18 and voted to reversed in accordance with an opinion in which Judge Lindley concurred. They would reverse the orders on appeal insofar as they applied to the children under the age of 18 and grant the parents’ motion to dismiss the proceeding with respect to them for lack of jurisdiction. The dissent could not agree with the majority that Family Court properly exercised temporary emergency jurisdiction over the subject children and could not agree that such an emergency existed here. The dissent pointed out that: ” The majority fails to note, however, that the latter order contained an order of protection prohibiting the parents from communicating with the children in any manner, including through third parties, regarding the custody case or the criminal proceedings. The New Mexico court also ordered the parents to attend a court- approved Parent Education Workshop, approved a home study of the Ohio family by a licensed social worker and, most importantly, ordered that the children shall not be removed from the care of that family, or from a 100-mile radius of the Ohio family’s residence without the prior approval of the New Mexico court. Consequently, there is no imminent risk that the parents will continue their alleged abuse of the children, and the majority’s conclusion that the New Mexico court acted “without any consideration, let alone determination, of the children’s best interests” is simply incorrect. The dissent also observed that: “Family Court has issued an order that was in conflict with an order of the children’s home state, and which had no provision for the eventual transfer of jurisdiction to the home state. Family Court thereby created a jurisdictional competition rather than eliminating such a competition, the latter of which is required by the UCCJEA.

Under the UCCJEA , which Controls Jurisdiction in Neglect Proceedings, Jurisdictional Facts must Be Demonstrated to the Court's Satisfaction 'In the First Instance' and Whatever May Occur after the Jurisdictional Question Is Determined Is Irrelevant to That Issue"

In Matter of Destiny EE, --- N.Y.S.2d ----, 2011 WL 6820412 (N.Y.A.D. 3 Dept.) Respondent was the mother of two sons (born in 1997 and 2000) and a daughter (born in 2003). In 2001, petitioner commenced abuse and neglect proceedings against respondent and her husband arising out of the husband's sexual abuse of the older son; both sons were removed from their custody. Respondent subsequently consented to a finding of neglect based on, among other things, her admission that she should have known of the abuse. The husband absconded, and Family Court issued a warrant for his arrest, which was never executed. Following an inquest held in the husband's absence, Family Court determined that he had sexually abused the older son and had neglected both sons, and issued orders of protection as to both children; the order applicable to the older son extended until his 18th birthday. In July 2003, the sons were returned to respondent's custody. Petitioner continued to provide services and supervision until approximately June 2005, when the proceedings were closed. Respondent thereafter took the children to Wisconsin, where they lived for approximately 18 months before returning to New York. In June 2007, approximately one month after her return to New York, respondent filed a custody petition alleging that the younger son was visiting the husband in Mississippi, the husband was "doing drugs" and drinking, the husband's girlfriend had hit the younger son with a belt, and the husband had refused respondent's request to return him to her custody. On the day that this custody petition was filed, petitioner applied, pursuant to Family Ct Act 1022, for temporary removal of respondent's children on the ground that she had sent the younger son to visit the husband despite her knowledge of his sexual abuse of the older son. After a two-day hearing, the court found that it had jurisdiction, ordered the removal of the children, and placed them in petitioner's temporary custody. The court also vacated the 2001 warrant against the husband and issued a new warrant for his arrest. The younger son was thereafter returned to New York. Petitioner commenced neglect proceedings as to each of the children and, following respondent's admission that her actions constituted neglect, the court placed the children in petitioner's custody.

In 2009, petitioner commenced proceedings seeking termination of respondent's parental rights as to all three children. Respondent moved to dismiss the petitions and requested vacatur of the 2007 neglect determination and return of the children to her custody. Family Court denied the motion in its entirety, and the Appellate Division affirmed.

Respondent contended that dismissal and vacatur were required because Family Court lacked jurisdiction over the temporary removal and neglect proceedings under Domestic Relations Law article 5-A, known as the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The Appellate Division observed that the UCCJEA controlled as to jurisdiction here, as in all matters falling within the statutory definition of child custody proceedings (DRL 75-a [4]). Here, no jurisdiction other than New York had ever issued custody determinations affecting the subject children, nor had any applications for such determinations been made elsewhere. Therefore it found that Family Court properly determined that it had jurisdiction over the 2007 proceedings.

The Appellate Division observed that the UCCJEA establishes specific grounds as the basis for initial child custody jurisdiction, including, among others, that "this state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state" (DRL 76[1][a] ). The home state is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding" (DRL 75-a [7] ). In certain circumstances, children do not have home states. Respondent's children did not have a home state when the temporary removal proceedings were commenced, as they did not live in Wisconsin immediately before the proceedings were commenced and had not yet lived in New York for the requisite six months (see DRL 75-a [7]). Although Wisconsin had been the children's home state within the previous six months, it did not have jurisdiction when the removal application was filed because no "parent or person acting as a parent" was residing there (DRL 76 [1][a]; see DRL 76[1][b]).

Respondent claimed that the family's stay in New York was intended to be a "temporary absence" (DRL 75-a [7]), that Wisconsin was still the children's home state, and that she was still a Wisconsin resident. However, the record did not support this claim. "Jurisdictional facts must be demonstrated to the court's satisfaction 'in the first instance' and whatever may occur after the jurisdictional question is determined is irrelevant to that issue" ( Gomez v. Gomez, 86 A.D.2d 594, 595 [1982],affd 56 N.Y.2d 746 [1982], quoting Vanneck v. Vanneck, 49 N.Y.2d at 608, 427 N.Y.S.2d 735, 404 N.E.2d 1278). The jurisdictional analysis here thus depended upon the facts presented to Family Court when petitioner filed the emergency removal application in June 2007.

At that time, the record included respondent's sworn statements in her custody petition providing New York addresses for herself and the younger son, alleging that the younger son had lived in New York since May 2007, seeking his return to New York, and giving no indication that either respondent's presence in New York or that of her children was temporary. Respondent and the older son also made several statements indicating that the family had relocated permanently to New York; among other things, respondent told petitioner's caseworkers that she sent the younger son to Mississippi in part to make it easier to get settled after the move, and the older son stated that the family had moved from Wisconsin because of conflict between respondent and the maternal grandmother. During the removal hearing, respondent made no claim that her stay in New York was temporary, nor did she produce any evidence of continued residence in Wisconsin such as a permanent address or an anticipated date of return. Accordingly, the record before Family Court fully supported a determination that neither respondent nor her children still resided in Wisconsin and that their presence in New York was not temporary . Pursuant to Domestic Relations Law 76(1)(b), a New York court may exercise jurisdiction, as pertinent here, when no court in another state has jurisdiction, the child and a parent have a "significant connection" with New York, and "substantial evidence is available in [New York] concerning the child's care, protection, training, and personal relationships."Such a connection exists only when "the forum in which the litigation is to proceed has optimum access to relevant evidence. Maximum rather than minimum contacts with the [s]tate are required" ( Vanneck v. Vanneck, 49 N.Y.2d at 610).

The Appellate Division found that the removal and neglect proceedings in this matter did not depend primarily upon information or contacts available in Wisconsin, but on the degree of risk posed to respondent's children by her decision to permit the younger son to visit the husband. New York was the only jurisdiction with pertinent information about the husband's previous abuse of the older son, respondent's knowledge of that abuse, and the related risk to her children. The prior proceedings took place in the same Family Court where the 2007 proceedings were commenced, extended over a four-year period, and resulted in determinations that the husband had abused the older son-then approximately four years old-by repeated acts of sodomy over an extended period of time, as well as respondent's admission that she knew or should have known of the abuse, and that her failure to protect the older son constituted neglect of both sons. A New York warrant for the husband's arrest was still outstanding at the time of the temporary removal application. At the removal hearing, respondent and the older son were represented by the same attorneys who had represented them throughout the prior proceedings. Petitioner was familiar with respondent and her children, as the sons were in its care between 2001 and 2003, and it had continued to provide supervision and services to the family over the next two years. As to contacts with New York, all three of respondent's children were born here and, except for the 18-month stay in Wisconsin, resided here throughout their lives. The children's previous foster family was still in contact with them; at the emergency removal hearing, respondent's counsel advised the court that the previous foster mother had come to court and was available to act as a resource. Moreover, the record indicated that the fathers of the older son and the daughter reside in New York, although it is unclear whether they had any significant involvement in the children's lives. Accordingly, both the "significant connections" and "substantial evidence" requirements were satisfied. New York was the jurisdiction with optimum access to evidence relevant to the determinations at issue, and Family Court properly exercised jurisdiction under Domestic Relations Law 76(1)(b).

The Appellate Division observed that as an alternative basis for jurisdiction, Domestic Relations Law 76 (1)(d) provides that a New York court may exercise jurisdiction where, as here, "no court of any other state would have jurisdiction under the criteria specified in paragraph (a), (b) or (c) of [DRL 76(1) ]". Accordingly, it did not have to address whether New York's "exclusive, continuing jurisdiction" as to the sons resulting from the prior proceedings was severed by respondent's relocation to Wisconsin (DRL 76-b [1]; see 28 USC 1738A [d])

The Appellate Division rejected respondent's contention that vacatur of the 2007 neglect finding was required based upon a recent determination by the Court of Appeals holding that an untreated sex offender's residence in the same home as his minor children, without more, is insufficient to establish an imminent danger to his

children or neglect by the mother in allowing him to reside there ( Matter of Afton C. [James C.], 17 N.Y.3d 1, 11 [2011] ). In that case, no evidence of actual danger to the children other than the sex offender designation was presented, but the Court of Appeals acknowledged that previous crimes against a child in an offender's care might be sufficient to establish such danger. In this case, the neglect finding against respondent was supported by evidence that the husband had sexually abused a child in his care, and by considerable additional evidence.

January 3, 2012

Where Family Court Has No Jurisdiction to Issue Order of Protection, Such Order Is Void Ab Initio for All Purposes, Including the Power to Hold a Party in Contempt

In Matter of Parrella v Freely, --- N.Y.S.2d ----, 2011 WL 6091331 (N.Y.A.D. 2 Dept.) in January 2010 the appellant was dating the former boyfriend of Lisa Ann Parrella, with whom Parrella had a child. At that time, Parrella filed a petition against the appellant, alleging that the appellant violated a previous order of protection. On July 13, 2010, the Family Court entered an order which, granted the petition and directed the appellant to stay away from Parrella and to refrain from communicating with or about Parrella for a period of two years. The Appellate Division reversed finding that the Family Court lacked subject matter jurisdiction over the proceeding. It observed that Family Court is a court of limited jurisdiction and, thus, it cannot exercise powers beyond those granted to it by statute. It held that where the Family Court has no jurisdiction to issue an order of protection or temporary order of protection initially, such an order is void ab initio for all purposes, including the power to hold a party in contempt (citing Matter of Robert B.- H. [Robert H.], 82 AD3d 1221, 1222; see Matter of Fish v. Horn, 14 N.Y.2d 905, 906). Pursuant to Family Court Act 812(1), the Family Court's jurisdiction in family offense proceedings is limited to certain proscribed criminal acts that occur among enumerated classes of people, including persons who share an "intimate relationship" with each other (Family Ct Act 812[1][e]. Here, there was no evidence in the record that the appellant and Parrella had a direct relationship. Instead, the evidence revealed that the parties had met personally only during the course of the court proceedings and that the appellant had never met Parrella's child. Therefore, there was no evidence that the parties' relationship was an "intimate relationship" within the meaning of Family Court Act 812(1)(e). Since the parties did not have an "intimate relationship" within the meaning of Family Court Act 812(1)(e), the Family Court lacked subject matter jurisdiction to issue the original order of protection or to issue the order appealed from.

Courts Will Not Require Children to Subsidize Parent's Financial Decision to Forgo Present Employment for Potential Future Income.

In Matter of Berrada,--- N.Y.S.2d ----, 2011 WL 6090172 (N.Y.A.D. 3 Dept.) the parties were married in 1996 and had three minor children. After they separated in 2006, the mother obtained custody of the children and petitioned for child support (Matter of Berrada v. Berrada, --- AD3d ---- [appeal No. 511629, decided herewith] ). Rejecting the father's claim that he was unable to find employment, a Support Magistrate determined that he had failed to conduct a thorough job search, imputed an annual earning capacity to him of $125,000, and directed him to pay $2,834 a month in child support. The father did not file objections to that order. He did, however, file modification petitions in 2009, again asserting that he was unable to find work. The Support Magistrate dismissed the petitions, finding that the father had not demonstrated a substantial change in circumstances. Family Court denied the father's objections and the Appellate Division affirmed. It held that in order to succeed upon his modification petitions, the father was required to establish a substantial change in circumstances since the entry of the child support order that warranted a modification of his obligation to pay child support. At the time of the hearing, the father remained unemployed, devoting his attention to various sales enterprises that paid on commission without producing consistent income. While he made an effort to find full-time employment within his narrow area of expertise, his search did not extend elsewhere. Moreover, the father was attempting to develop his own business and testified that he would only "jump on" a full-time job offer if it paid a substantial salary. Notwithstanding the father's argument that the new venture constitutes a substantial change of circumstances in that it may produce income in the future, the courts will not require the children to subsidize a parent's financial decision" to forgo present employment for potential future income.

Family Court Did Not Abuse Discretion by Terminating the Father's Child Support Obligation Where Mother Deliberately and Unjustifiably Frustrated Father's Visitation.

In Matter of Luke v Luke,--- N.Y.S.2d ----, 2011 WL 6090137 (N.Y.A.D. 3 Dept.) Petitioner (father) and respondent (mother) were the parents of one child (born in 2001). The parties separated prior to the child's birth. In 2003, the parties agreed to a stipulated order of joint custody, physical custody to the mother and visitation with the father on alternate weekends. These visits apparently only occurred for one or two months. Also in 2003, a support order was entered against the father. The father then moved to New Jersey. Each party claimed that he or she lacked contact information for the other after 2003. In 2004, Family Court issued a default order awarding the mother sole custody, with visitation to the father as agreed upon by the mother. In 2007, the father returned to Schuyler County. That same year, the mother apparently moved to New Jersey and then Pennsylvania. In 2009, the father sought Family Court's assistance to locate the mother and filed a petition seeking visitation with the parties' daughter. In October 2009, after these proceedings had commenced, the mother moved back to Schuyler County, but within a few months she moved to Steuben County. The father filed numerous petitions seeking visitation, custody and downward modification of support, and alleging that the mother violated the prior visitation order as well as temporary orders entered during these proceedings. Following a hearing Family Court awarded the parties joint custody with the child spending four days per week with the father and three days per week with the mother. The court also terminated the father's support obligation effective January 2010, the date he filed his support modification petition.

The Appellate Division held that Family Court's modification of custody has a sound and substantial basis in the record. The parties' numerous moves, the father trying to reestablish contact and the mother hindering those efforts all provided changed circumstances reflecting a need to modify the prior custody and visitation order. Although the father did not actively attempt to enforce his visitation rights and pursue his relationship with his daughter from 2003 to 2009, he testified that he had no vehicle in New Jersey, had no contact information for the mother or child and did not know how to find them. The mother stopped bringing the child to visitation after one or two months in 2003 and-despite having agreed to the visitation-filed unsubstantiated petitions to terminate the visitation soon after entering the stipulation. The mother moved numerous times, including four times during the pendency of these proceedings, and never informed the father. One was a safe house where she fled to escape domestic abuse by her paramour-abuse that was witnessed by the daughter and caused her to fear the paramour. The mother also violated almost every temporary visitation order entered during the pendency of these proceedings by failing to bring the child to visit with the father. When she did not have a suitable place to live, she wrote a letter assigning custody of her daughter and son to her paramour's adult daughter, without consulting the father. The paramour's daughter also deprived the father of his court-ordered visitation, and the mother passed blame to her. At the time of the Lincoln hearing, the child had not seen her mother for almost two months, and the mother testified that she called only when she had minutes on her phone. While the father had lost contact with his daughter for several years and did not adequately explain why he took so long to attempt to reestablish a connection, at the time of the hearing he had been working for a year to form a relationship with her. Those efforts were constantly thwarted by the mother and her paramour's daughter, who failed to bring the child to visits and even kept the child out of school on Fridays when the father was supposed to pick the child up for weekend visitation. Everyone agreed that the child should remain in the same school district; the father lived near the child's school, while the mother had moved to a different district. The father also agreed to open a preventative services file with the local social services agency and bring the child to mental health counseling. Family Court did not err in placing the child with the father for four days per week. While the law expresses a preference for keeping siblings together, the rule is not absolute and has become complicated by changing family dynamics and the presence of multiple half siblings the court must ultimately decide what is best for the child at issue. Here, the custody petitions regarding the mother's son-the half brother of the daughter involved in this appeal-were withdrawn or dismissed, leaving that child in the mother's custody. Evidence indicated that the son would have difficulty being separated from his half sister, but there was no evidence of ill effects to the daughter from any separation. In any event, Family Court's order left those children together for three days each week. Considering the totality of the circumstances, including the custodial interference by the mother, the record contained a sound and substantial basis for the court's custody determination.

The Appellate Division held that Family Court did not abuse its discretion by terminating the father's child support obligation. The court was authorized to suspend support payments for periods when the mother wrongfully interfered with or withheld visitation. The record supported the finding that the mother deliberately and unjustifiably frustrated the father's visitation by failing to produce the child, moving without notifying the father and attempting to informally transfer custody to another person who also did not produce the child for visitation-again without informing the father. Additionally, the court's custody determination placed the child in the father's care for the majority of each week, providing a basis to eliminate his support obligation. Hence, the court did not err in terminating the father's support obligation as of January 2010, the date he filed a petition seeking such relief.

Family Offense Petition is Sufficient if it Alleges specific acts committed at identified places and times, which, if proven, would constitute a family offense enumerated in Family Court Act 812(1)

In Matter of Little v Renz, --- N.Y.S.2d ----, 2011 WL 6224696 (N.Y.A.D. 2 Dept.) the Appellate Division observed that a proceeding pursuant to article eight of the Family Court Act is originated by the filing of a petition containing an allegation that the respondent committed an enumerated family offense. As a general matter, the factual allegations in a pleading must be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense" (CPLR 3013; Family Ct Act 165). It found that the petition in this case was not "a vague and conclusory repetition of the statutory language inasmuch as it alleged specific acts committed at identified places and times, which, if proven, would constitute a family offense . Accordingly, the allegations contained in the petition were sufficient to allege a family offense enumerated in Family Court Act 812(1), and the Family Court erred in denying the petition and dismissing the proceeding on the ground that the petition was insufficient.

Violation Petition Insufficient Where it Lacked Sufficient Specificity to Provide Respondent with Proper Notice of Alleged Violation and Failed to Outline How Petitioners Rights Prejudiced

In Miller v Miller, --- N.Y.S.2d ----, 2011 WL 6090163 (N.Y.A.D. 3 Dept.) the parties were the parents of two children, born in 2004 and 2005. A custody order entered in March 2008 granted sole legal custody to respondent (mother) with visitation to petitioner (father) as agreed between the parties. Among other provisions, it further required that the children be properly supervised at all times and that neither parent smoke or allow a third party to smoke in a vehicle in which the children are passengers. In June 2010, the father filed a violation petition alleging that the mother was in contempt of this order in that she failed to properly supervise and discipline the children, as she had permitted the older child to be violent towards others and to smoke. Finding that the petition lacked sufficient specificity to provide the mother with proper notice and failed to outline how the father's rights had been prejudiced, Family Court dismissed the petition without a hearing, but ordered a neglect investigation by the St. Lawrence County Department of Social Services. The Appellate Division affirmed. It held that the petition was subject to the requirements of CPLR 3013, and thus required to "be sufficiently particular" as to provide notice to the court and opposing party of the occurrences to be proved and the material elements of each cause of action (CPLR 3013; Family Ct. Act 165[a] ). The generalized allegations of the petition, even liberally construed, failed to provide the mother with notice of a particular event or violation such that she could prepare a defense (CPLR 3026). Further, the father failed to assert how the mother's alleged failings " 'defeated, impaired, impeded or prejudiced' " his rights, as required to sustain a civil contempt finding. Although Family Court properly ordered an investigation to determine whether a neglect or abuse proceeding should be initiated, this protective measure did not serve to remedy the defects in the father's petition. Accordingly, there was no error in the dismissal of the petition without a hearing.

Appeal Dismissed for Failure of Appellant to Include Transcripts

In Matter of Katz v Dotan, --- N.Y.S.2d ----, 2011 WL 6091334 (N.Y.A.D. 2 Dept.) the Appellate Division observed that it is the obligation of the appellant to assemble a proper record on appeal (see Family Ct Act 1118; CPLR 5525[a]). The failure to provide necessary transcripts inhibits the Court's ability to render an informed decision on the merits of the appeal. In this case, the full record of the proceedings in the Family Court had not been transcribed. The appeal was dismissed, as the papers provided were patently insufficient for the purpose of reviewing the issues the father has raised.

Appeal Dismissed for Failure to Full Trial Transcript in Record

In Clarke v Clarke, --- N.Y.S.2d ----, 2011 WL 6225188 (N.Y.A.D. 2 Dept.) the plaintiff appealed from a judgment of the Supreme Court which, after a nonjury trial, inter alia, failed to direct the defendant to pay child support arrears, failed to award her maintenance, and failed to equitably distribute the value of the defendant's medical license. The Appellate Division dismissed the appeal. It observed that an appellant is obligated to assemble a proper record on appeal, which must include any relevant transcripts of proceedings before the Supreme Court (CPLR 5525[a]; 5526). The record must also "contain all of the relevant papers that were before the Supreme Court, including the transcript, if any, of the proceedings" ( Matison v. County of Nassau, 290 A.D.2d 494, 494). Here, the plaintiff appealed from a judgment which failed to direct the defendant to pay child support arrears, failed to award the plaintiff maintenance, and failed to equitably distribute the value of the defendant's medical license. However, the plaintiff's failure to provide the Court with the full transcript of the nonjury trial conducted before the Supreme Court rendered the record on appeal inadequate to enable the Court to reach an informed determination on the merits. Thus, the appeal had to be dismissed.

Father's Failure to Properly File a Full Record on Appeal, Despite His Contrary Statement Made Pursuant to CPLR 5531, Warranted Imposition of Costs

In Haleniuk v. Persaud, 89 A.D.3d 601, 933 N.Y.S.2d 33 (1 Dept, 2011), in affirming the order of Family Court, the Appellate Division found that the evidence in the record sufficiently supported Family Court's finding that the father failed to meet his burden of showing that the child was constructively emancipated. Although the record reflected a strained relationship between the father and child, it did not support a finding that the child completely refused to have a relationship with the father. The Appellate Division held that the father's failure to properly file a full record on appeal, despite his contrary statement made pursuant to CPLR 5531, warranted the imposition of costs incurred in preparing and filing a respondent's appendix (CPLR 5528[e]; 22 NYCRR 600.10[c][1] ).

December 16, 2011

Child Denied the Meaningful Assistance of Appellate Counsel Where Attorney for Child Failed to Consult with and Advise Child in Manner Consistent with the Child's Capacities"

In Matter of Lamarcus E., --- N.Y.S.2d ----, 2011 WL 5984243 (N.Y.A.D. 3 Dept.)

Respondent was the father of the child (born in 2002). In August 2009, while under petitioner's supervision, the father told petitioner that he intended to relocate to Connecticut in October 2009 to work and live with his girlfriend, but that he would not be taking his son with him. Thereafter, petitioner filed a neglect petition against the father alleging that he planned to permanently relocate to Connecticut without his child and without any viable plan for the child's care in his absence, and that the father planned to place the child in foster care. Upon receipt of the petition, Family Court removed the child and placed him in the custody of petitioner. The father relocated to Connecticut the next day. Following a fact-finding hearing, the father was determined to have neglected his child and, after a dispositional hearing, Family Court directed that the child continue his placement with petitioner. The father appealed. No appeal was taken on behalf of the child. The Appellate Division observed that the attorney assigned to represent the child on this appeal was not the same attorney who continued to represent the child in Family Court. Although the child's appellate attorney had taken a position on this appeal that was consistent with that taken by the child's attorney in Family Court, she reported in her brief that she had not personally met with her client, who was now nine years old. She explained that the child's attorney in the ongoing proceedings in Family Court had been "able to provide me with continuing information on my client, his position and the status of the [proceedings in Family Court]." The child's appellate attorney provided the Appellate Division with no further explanation. Given the foregoing, the Appellate Division found that the child had been denied the meaningful assistance of appellate counsel. Counsel's failure to "consult with and advise the child to the extent of and in a manner consistent with the child's capacities" (22 NYCRR 7.2[d][1] ) constituted a failure to meet her essential responsibilities as the attorney for the child. Client contact, absent extraordinary circumstances, is a significant component to the meaningful representation of a child. Therefore, given the circumstances, and for the reasons clearly articulated in Matter of Mark T. v. Joyanna U. (64 A.D.3d 1092, 1093-1095 [2009] ) and Matter of Lewis v. Fuller, (69 A.D.3d 1142 [2010] ), the child's appellate counsel was relieved, the decision was withheld, and new counsel to be assigned to represent the child on the appeal.

Error to Dismiss Custody Case for Lack of Personal Jurisdiction Given Provision UCCJEA Providing That Physical Presence Of, or Personal Jurisdiction Over, a Party or a Child Not Necessary or Sufficient to Make a Child Custody Determination.

In Matter of Malek v Kwiatkowski, --- N.Y.S.2d ----, 2011 WL 5984260 (N.Y.A.D. 3 Dept.) Petitioner (father) and respondent (mother) were the unmarried parents of two daughters (born in 2004 and 2008). The father commenced the proceeding for joint custody and visitation in June 2010, alleging that the mother had relocated with the children in April 2010. The mother appeared pro se by telephone at Family Court's first two hearings, but she withheld her out-of-state address from the father because she alleged that she and the children were fearful of him. At the third appearance, the mother's counsel appeared on her behalf and claimed that she was financially unable to travel to New York at that time. Although the mother's counsel raised the issue of the lack of personal jurisdiction over his client, Family Court stated that the mother had submitted to the court's jurisdiction, set a trial date and told counsel that the mother's failure to appear on that date would result in a default. At the scheduled trial date, however, Family Court directed the mother's counsel to again make a motion to dismiss based on lack of jurisdiction, determined that the mother had not waived service by appearing and dismissed the petition with prejudice.

The Appellate Division reversed. It held that the Family Court erred in dismissing the case for lack of personal jurisdiction given the provision of the Uniform Child Custody Jurisdiction and Enforcement Act found at Domestic Relations Law 76(3), which provides that "[p]hysical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination." Further, under the circumstances, it was improper to dismiss the father's petition without first ordering service by an alternative method (see Domestic Relations Law 75-g [1][c] ). The mother had not revealed her address to the father, making normal service of process impractical. Additionally, the court had stated previously that the mother had submitted to its jurisdiction and ordered her to appear for a trial, thus giving the father no reason to believe that jurisdiction remained an issue. The court's peremptory resurrection of the issue when the mother did not appear on the trial date and its grant of the motion without affording the father an opportunity to serve the mother by alternative means was improper under these circumstances and it reversed and remitted for that purpose.

Support Order Which Fails to Comply with Family Ct Act 413(1)(H) Is Invalid and Unenforceable.

In Matter of McKenna v McKenna, --- N.Y.S.2d ----, 2011 WL 5984262 (N.Y.A.D. 3 Dept.) upon the oral stipulation of petitioner (mother) and respondent (father), an order was entered that set the father's basic monthly child support obligation for the parties' two children at $1,235. In March 2010, the father filed an application to vacate the order, claiming that it did not comply with Family Ct Act 413(1)(h). Family Court affirmed the Support Magistrate's denial of the father's motion.

The Appellate Division reversed. It found that the order was invalid and unenforceable because it failed to include, as required, " 'a provision stating that the parties have been advised of the provisions of [the Child Support Standards Act] and that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded' . While the parties acknowledged that they had agreed to the amount that the father would pay in basic child support-before any additional amount was added for child care and health insurance, no reference was made to the presumptive amount of child support under the Child Support Standards Act in their agreement or at the hearing, or in the order ultimately issued by Family Court. Because neither the agreement nor the order advised the parties in accordance with the nonwaiveable requirements of the Child Support Standards Act and the record contained no explanation as to whether or why there has been a deviation from the child support calculation provided by that statute, the support order at issue was invalid and unenforceable. The matter was remitted to Family Court to determine the amount of child support that the father was obligated to pay.

Mistrial Granted and New Attorney Assigned Based upon Failure of Attorney for the Child to Fulfill Attorney's Obligations under 22 NYCRR 7.2 (d) to Advocate Child’s Wishes

In Michael H v April H,--- N.Y.S.2d ----, 2011 WL 6015796 (N.Y.Fam.Ct.) on October 4, 1999, the Court issued an Order awarding April "H ("the mother") and Michael "H." ( "the father") joint legal custody of the subject child, Seth "H." with the mother having primary physical custody of the subject child subject to a schedule of visitation for the father. On August 3, 2011, the father filed a modification petition seeking sole legal and physical custody. The father alleged among other things, that the child has resided with the father since June 22, 2011, when the mother essentially kicked the child out of her home. During the trial, held on November 2, 2011, the Court conducted a Lincoln hearing to take the subject child's testimony under oath. See, Matter of Lincoln v. Lincoln, 24 N.Y.2d 270, 247 N.E.2d 659 [1969]. During the Lincoln hearing, the child, a mature fourteen year old, expressed a clear position to the Court and a reasonable basis for his position. During closing arguments, the Attorney for the Child advocated for a disposition that directly contradicted the wishes of the child as expressed in the Lincoln hearing.

As a result of the Attorney for the Child's closing arguments, the Court became concerned that the Attorney for the Child was not fulfilling her obligations under 22 NYCRR 7.2(d). This section requires the Attorney to zealously advocate for the child's position. See, Krieger v. Krieger, 65 AD3d 1350, 886 N.Y.S.2d 463 [2d Dept 2009]; and Mark T. v. Joyanna U., 64 AD3d 1092, 882 N.Y.S.2d 773 [3d Dept 2009]. Except in two circumstances, the Attorney for the Child must be directed by the wishes of the child even when the attorney believes that what the child wants is not in the child's best interest. The first exception applies when the child is not capable of knowing, voluntary and considered judgment.. The second exception applies when the child's wishes are likely to result in substantial risk of imminent, serious harm to the child.

After considering the events of the trial, the Court, sua sponte, moved for a mistrial and an order assigning a new Attorney for the Child to represent the child's interests going forward based upon the apparent failure of the Attorney for the Child to fulfill the attorney's obligations under 22 NYCRR 7.2 (d). In the Court's opinion the mother in effect stated that the child was capable of knowing, voluntary and considered judgment as those terms are used by 22 NYCRR 7.2(d). Neither the father nor the Attorney for the Child argued that the child was not capable of knowing, voluntary and considered judgment. The Attorney for the Child's credit frankly acknowledged that she failed to zealously advocate for her client during the closing argument. She acknowledged that although it was an honest mistake, it was a mistake.

The Court declared a mistrial. It found that counsel's error was not harmless. Reasonable minds could differ regarding what order served the best interest of the child and therefore, closing arguments were important in this case. If counsel elects to make a closing argument, the closing argument may not advocate for an outcome which directly opposed the child's position (except in the two circumstances described above). Second, if the Court were to ignore the Attorney for the Child's closing argument placed upon the record and make a decision in this case based upon the rest of the record, the legitimacy of the judicial process could be reasonably questioned. If the Court were to decide in the mother's favor, a reasonable mind may be suspicious that the Court was, in fact, not ignoring the Attorney for the Child's argument. If the Court were to decide in the father's favor, a reasonable mind may be suspicious that the Court was trying to manipulate the outcome in order to render this issue meaningless. Third, the Court could not be certain of the scope of the Attorney for the Child's error. If the error went beyond closing argument, the scope of the evidence admitted may have been effected. Given the Court's decision to declare a mistrial, it was consistent with the administration of justice and the best interest of the child to relieve the Attorney for the Child of any further responsibilities in the matter and to assign a new attorney to represent the child's interests going forward. The Court considered whether or not this issue should be raised sua sponte and acknowledged that neither parent nor the Attorney for the Child raised the issue or asked for any relief as a result of the issue. However, the trial judge was the only person present during the Lincoln hearing other than the child and the Attorney for the Child and thus, the parents and their counsel did not have an opportunity to evaluate the testimony of the child. Furthermore, the Court has an obligation to ensure that an individual's right to zealous advocacy is protected.

December 1, 2011

Billing Statements of Former Attorney Inadmissible in Counsel Fee Hearing

In Matter of Denton v Barr, --- N.Y.S.2d ----, 2011 WL 5922992 (N.Y.A.D. 1 Dept.) the Appellate Division modified an order of the Family Court which awarded petitioner attorney's fees of $110,000 and child support arrears of $11,000 to award petitioner $11,742 in child support arrears and $5,322 in interest on the arrears, and to remand the matter for clarification of the amount of attorney's fees awarded to and reversed an order which directed that the $110,000 in attorney's fees be paid to petitioner and mailed to the offices of her counsel. On a prior appeal, the Court found that pursuant to the parties' stipulation of settlement, petitioner was "entitled to attorney's fees and remanded for a hearing to determine the amount of those fees" (69 AD3d 24, 32 [2009] ). It found that the court, in determining the amount of fees due to petitioner, relied on documents that constituted inadmissible hearsay, namely, billing statements of respondent's former attorney (cf. Seinfeld v. Robinson, 300 A.D.2d 208, 209 [2002] ). The matter was remanded to the trial court for clarification of the basis for the amount of fees awarded.

Family Courts Jurisdiction is Limited to Family Offenses Committed Against Persons Listed in Family Court Act 812 Only

In Matter of Janet GG v Robert GG,--- N.Y.S.2d ----, 2011 WL 5083241 (N.Y.A.D. 3 Dept.) in March 2010, petitioner (mother) filed a Family Ct Act article 8 petition alleging that respondent (father) committed a series of family offenses against her and their two children (born in 1996 and 1998). Specifically, she alleged that on March 2, 2010, the father telephoned the children's school, spoke to a guidance counselor and demanded to see his children. Because the counselor believed that an order of protection was in place that barred the father from having such contact with his children, the counselor informed the father that he should not come to the school and, in any event, would not be allowed by school authorities to visit with his children. The father, despite this admonition, went to the school and, upon entering the premises, confronted the school superintendent demanding to see his children. After he became loud and boisterous and refused to leave the premises, the police were notified and the father was placed under arrest. The mother subsequently filed a petition claiming that this conduct qualified as a family offense and, on that basis, sought an order of protection for herself and the children. The father argued that what had occurred, even if true, did not constitute a family offense and, therefore, Family Court did not have jurisdiction. The court agreed and dismissed the petition with prejudice. The Appellate Division affirmed. It observed that Family Court's jurisdiction over family offense proceedings is limited to those acts between family members that 'would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, ...stalking, menacing in the second degree, menacing in the third degree, reckless endangerment, assault in the second degree, assault in the third degree or an attempted assault (Family Ct Act 812[1] ). Family Court determined that while the father's actions may have constituted disorderly conduct, they did not amount to a family offense because, when committed, the father was not in contact with the mother or either of their children. Instead, the father's actions were directed at school personnel and not any member of his family. The Appellate Division agreed. The father's actions were directed not at the mother or the children, but at school personnel, and what occurred did not constitute a family offense. As such, Family Court was without jurisdiction to entertain this petition (Family Ct Act 812).

Second Department Construes Parties' Stipulation Providing for the Distribution of "Any Pension," to Refer Only to the Portion of Pension Representing Deferred Compensation.

In Nugent-Schubert v Schubert, --- N.Y.S.2d ----, 2011 WL 5085506 (N.Y.A.D. 2 Dept.) the plaintiff former wife and the defendant former husband were divorced by judgment incorporating a stipulation of settlement. The stipulation of settlement provided for a 50% distribution to the plaintiff of the value of "any pension" received by the defendant. The plaintiff thereafter submitted to the Supreme Court a Qualified Domestic Relations Order ( QDRO), which included a provision entitling her to receive a share of any future disability pension, but limited to any portion thereof representing the defendant's earnings and years of credited service. However, the Supreme Court struck that provision of the QDRO. Subsequently, the defendant, who was employed by the New York City Police Department, retired on an accidental disability pension as a result of a line-of-duty injury. Pursuant to the QDRO in its current form, the plaintiff was receiving a portion of the defendant's accidental disability pension that represented compensation for personal injuries. The defendant moved to amend the QDRO so as to exclude this portion of his accidental disability pension from distribution to the plaintiff. The Appellate Division held that the motion should have been granted. It observed that where a QDRO is inconsistent with the provisions of a stipulation or judgment of divorce, courts possess the authority to amend the QDRO to accurately reflect the provisions of the stipulation pertaining to the pension benefits. A proper QDRO obtained pursuant to a stipulation of settlement can convey only those rights to which the parties stipulated as a basis for the judgment. Under controlling law, pension benefits, "except to the extent that they are earned or acquired before marriage or after commencement of a matrimonial action, constitute marital property" because they are "in essence, a form of deferred compensation derived from employment" during the marriage. However, any compensation a spouse receives for personal injuries is not considered marital property and is not subject to equitable distribution. Thus, to the extent [a] disability pension represents deferred compensation, it is subject to equitable distribution while to the extent that a disability pension constitutes compensation for personal injuries, that compensation is "separate property" which is not subject to equitable distribution. In Berardi v. Berardi, 54 A.D.3d at 984-985, 865 N.Y.S.2d 245 this Court concluded that, absent a provision in the stipulation specifically awarding the [wife] accident disability benefits, the Supreme Court had erred in amending the QDRO to award the wife a portion of the husband's pension representing compensation for personal injuries, as such a provision in the QDRO expanded the rights granted to the wife under the stipulation. Similarly, here, the parties' stipulation providing for the distribution of "any pension," which was entered into before the defendant became entitled to or applied for an accidental disability pension, must likewise be construed to refer only to the portion of the defendant's pension representing deferred compensation. The Appellate Division distinguished this case from its decisions in Rosenberger v. Rosenberger (63 A.D.3d 898, 882 N.Y.S.2d 426) and Pulaski v. Pulaski (22 A.D.3d 820, 820-821, 804 N.Y.S.2d 404). In those cases, the husbands had applied for disability benefits, based upon line-of-duty injuries, prior to execution of the stipulation such that they were "chargeable with knowledge of the prospect of [an] eventual disability retirement when [they] entered into the stipulation". Thus, in Pulaski and Rosenberger, where the husbands were aware, before entering into a stipulation, of the specific potential for receipt of pension benefits that they would be entitled to treat as separate property, the broad language in the stipulation referring to distribution of a pension generally, with no provision for separate-property treatment of the pension, was reasonably interpreted as intending to distribute the entire disability pension. Here, as in Berardi, where it was unknown and unanticipated that the defendant would qualify for a disability pension, there was no reason to conclude that a general provision providing for equal distribution of "any pension" was intended to opt out of the controlling law in order to distribute portions of any such pension that would not ordinarily be subject to equitable distribution. The fact that the plaintiff submitted a QDRO which would have limited the distribution of any future disability pension to that portion representing deferred compensation further evinced the parties' understanding that separate-property portions of "any pension" received by the husband would not be subject to distribution.

Third Department Affirms Initial Custody Award Made without Evidentiary Hearing

In Matter of Cole v Cole, --- N.Y.S.2d ----, 2011 WL 4975299, 2011 N.Y. Slip Op. 07328 (NYAD 3 Dept) Petitioner (father) and respondent (mother) were the parents of two sons (born in 2007 and 2008). In June 2010, the father filed a petition for custody of the children. He thereafter left the marital residence at the home of the maternal grandmother, and relocated to the paternal grandmother's home. In July 2010, the mother filed a petition seeking custody of the children. At the initial appearance, Family Court assigned an attorney for the children and temporarily ordered joint legal custody of the children with physical custody to the mother and, when the mother was working, childcare provided by the father at the maternal grandmother's home. At the next appearance, the father requested shared physical custody of the children and Family Court granted this as to weekends, when the mother was working. At the third and final appearance, in November 2010, Family Court issued a final order essentially based upon this same arrangement. The Appellate Division affirmed. It rejected the mother’s argument that Family Court erred by issuing a final order without conducting a hearing or engaging in other formalities such as placing stipulations or consent of the parties upon the record. An evidentiary hearing is generally necessary to determine custody matters, but it is not obligatory where, as here, no request is made and the court has sufficient information to undertake a comprehensive independent review of the [children's] best interests. Although no sworn testimony was taken, all three appearances before Family Court were attended by each of the parents, their respective attorneys, and both grandmothers, and the court invited and received input from all involved. The attorney for the children attended the two later appearances, and advocated a position based on interviews with the mother, her employer, the father and various service providers for the children. Further, the Chemung County Department of Social Services provided Family Court with a report assessing the needs of the children and the current family circumstances. The two parents, with the support of the two grandmothers, were essentially collaborating relative to the matters of sharing time and the responsibilities of caring for their children during the course of the proceedings, and Family Court found this structure in the best interests of the children. Although the mother was represented by counsel at all three appearances, at no time did she or her counsel request a hearing or other formalities. Upon review, it found that Family Court had sufficient information before it to support the determination.

Third Department Holds that In Neglect Proceeding Attorney for Children May Advocate a Different Position When the Children's Wishes Would Likely "Result in a Substantial Risk of Imminent, Serious Harm to the Children

In Matter of Alyson J, --- N.Y.S.2d ----, 2011 WL 5083950 (N.Y.A.D. 3 Dept.) a neglect proceeding, the Appellate Division disagreed with respondent's contention that the attorney for the children failed to adequately represent the children's interests. It pointed out that the duty of the attorney for the children is to advocate and express the children's wishes to the court, but on occasion it is acceptable for counsel to deviate from this obligation; the attorney is specifically allowed to advocate a different position when the children's wishes would likely "result in a substantial risk of imminent, serious harm to the child[ren]" (Citing (22 NYCRR 7.2 [d][3]; see Matter of Mark T. v. Joyanna U., 64 A.D.3d 1092, 1093-1094 [2009], lv denied 15 N.Y.3d 715 [2010] ). Here, counsel had been involved with the children for several years and was well aware of their conditions, and the Appellate Division accepted the contrary position as in the best interests of the children. At the fact-finding hearing, the attorney for the children did indicate his clients' wishes, and properly informed Family Court that he was deviating from them.

Child Support Provisions of So-ordered Stipulation Which Did Not Contain Recitals Mandated by the CSSA Not Enforceable, But Remaining Provisions Held Enforceable.

In Bushlow v Bushlow--- N.Y.S.2d ----, 2011 WL 5222909 (N.Y.A.D. 2 Dept.) the Appellate Division held that contrary to the plaintiff's contention, the parties' so-ordered stipulation of settlement dated January 26, 2009, which was incorporated, but not merged, into the judgment of divorce, did not comply with the requirements of the Child Support Standards Act (Domestic Relations Law 240[1-b][h]). The stipulation did not recite that the parties were advised of the provisions of the CSSA, and that the basic child support obligation provided for therein would presumptively result in the correct amount of support to be awarded. "[A] party's awareness of the requirements of the CSSA is not the dispositive consideration under the statute" (Lepore v. Lepore, 276 A.D.2d 677, 678, 714 N.Y.S.2d 343). Moreover, the parties' prorated shares of child care expenses and future reasonable unreimbursed health care expenses deviated from the CSSA guidelines, since they were not calculated based upon the parties' "gross (total) income as should have been or should be reported in the most recent federal income tax return" (Domestic Relations Law 240[1-b][b][5][I]; 240 [1-b][c][1]). Thus, the stipulation was required to contain the additional recitals setting forth, inter alia, the amount that the basic child support obligation would have been under the CSSA (see Domestic Relations Law 240[1-b][h]). Since the so-ordered stipulation of settlement did not contain the specific recitals mandated by the CSSA, its provisions, insofar as they concerned the plaintiff's basic child support payment and "add-ons" for child care and unreimbursed health care expenses, were not enforceable. Accordingly, the Supreme Court should not have incorporated them into the judgment of divorce. However, contrary to the plaintiff's contention, the remaining provisions of the so-ordered stipulation, and the parties' open-court stipulation entered into on September 9, 2008, continued to be enforceable. The record did not support a finding that these provisions were closely intertwined with the basic child support provisions. The matter was remitted to the Supreme Court, for a determination of the basic child support obligation, including the parties' prorated contributions towards child care and reasonable unreimbursed health care expenses, in accordance with the CSSA.

Appellate Division Explains Doctrine of Res Judicata and Collateral Estoppel. Incidents in Counterclaim Occurring More than 5 Years Before Commencement May Be Properly Included If Relevant to Evaluation of Party's Claim for Cruelty Divorce.

In Maybaum v Maybaum, --- N.Y.S.2d ----, 2011 WL 5244417 (N.Y.A.D. 2 Dept.) the defendant wife and the plaintiff husband were married on March 13, 1995. Two children were born of the marriage. In April 2010, the defendant commenced a proceeding pursuant to article 8 of the Family Court Act, alleging that the plaintiff committed certain family offenses. Thereafter, the plaintiff commenced the action for a divorce on the ground of cruel and inhuman treatment. On April 27, 2010, the parties appeared before the Family Court and entered into a stipulation on the record. The parties stipulated that the defendant was withdrawing the pending family offense petition, with prejudice, in exchange for the plaintiff giving the defendant exclusive use of the marital residence. The parties agreed that the stipulation was binding in the action for a divorce pending in the Supreme Court. Subsequently, the defendant answered the complaint in this action and asserted a counterclaim for a divorce and ancillary relief on the ground of cruel and inhuman treatment. In reply, the plaintiff asserted affirmative defenses, including, as a third affirmative defense, that the defendant's counterclaim was insufficiently specific to meet the requirements of CPLR 3016(c), and, as a fourth affirmative defense, that the counterclaim was barred, in whole or in part, by the doctrines of res judicata, collateral estoppel, and equitable estoppel, based on the stipulation between the parties. The parties made several motions and cross motions for relief.

The Appellate Division held that the Supreme Court erred in granting the plaintiff's motion to strike stated paragraphs of the defendant's counterclaim on the grounds of res judicata, collateral estoppel, and equitable estoppel. The allegations in the defendant's counterclaim for a divorce on the ground of cruel and inhuman treatment, and the allegations in the plaintiff's family offense petition, did not arise out of the same transaction or series of transactions. "It is not always clear whether particular claims are part of the same transaction for res judicata purposes. A 'pragmatic' test has been applied to make this determination-analyzing 'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage' " (Xiao Yang Chen v. Fischer, 6 N.Y.3d 94, 100-101). Applying this test, it concluded that the family offense petition and counterclaim for a divorce on the ground of cruel and inhuman treatment did not form a convenient trial unit. Thus, the defendant was not precluded from litigating her counterclaim for a divorce on the ground of cruel and inhuman treatment in the separate action in the Supreme Court.

The Appellate Division pointed out that collateral estoppel, or issue preclusion, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same. The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action. Collateral estoppel effect will only be given to matters actually litigated and determined in a prior action. An issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation. Here, the issue of whether the plaintiff committed certain acts against the defendant was never determined in the Family Court proceeding, and the defendant's participation in the stipulation to withdraw her family offense petition, with prejudice, could not be construed to be the kind of determination following a full and fair opportunity to litigate the issues that would be necessary to collaterally estop the defendant from establishing that the plaintiff committed the alleged acts. Further, the circumstances set forth by plaintiff simply did not rise to a level of unconscionability warranting application of equitable estoppel.

Since the doctrines of res judicata, collateral estoppel, and equitable estoppel did not preclude the defendant from litigating certain of the allegations in her counterclaim that were alleged in her family offense petition, the Supreme Court should have granted defendant's cross motion to dismiss the plaintiff's fourth affirmative defense alleging that the defendant's counterclaim was barred in whole or in part by the doctrines of res judicata, collateral estoppel, and equitable estoppel, as that defense has no merit.

The Appellate Division held that Supreme Court erred in granting plaintiff's motion to strike stated paragraphs of the defendant's counterclaim, in effect, as time-barred on the ground they alleged acts occurring more than five years prior to the commencement of the action. The allegations in the counterclaim relating to incidents occurring more than five years before the commencement of the action may be properly included to the extent that those allegations may be relevant to an evaluation of a party's claim for a divorce on the ground of cruel and inhuman treatment in the context of the entire marriage.

November 16, 2011

Party Who Accepts Benefits of Separation Agreement for Considerable Period of Time Deemed to Have Ratified it but Party Who Receives Virtually No Benefits from Agreement Cannot Be Said to Have Ratified It.

In Kessler v Kessler, --- N.Y.S.2d ----, 2011 WL 5241275 (N.Y.A.D. 2 Dept.) on June 10, 1980, after 25 years of marriage, the parties entered into a separation agreement, which provided that the plaintiff husband would make payments to the defendant wife for her support and maintenance and for the mortgage and carrying costs relating to the marital residence, where the defendant continued to reside. The plaintiff complied with the terms of the separation agreement and, in 2009, he commenced this action for a conversion divorce. In response to the plaintiff's motion for summary judgment, the defendant submitted an affidavit asserting that the plaintiff had procured the separation agreement through fraud and duress, and that the agreement was unconscionable. The defendant alleged that the plaintiff had concealed from her his vast wealth, and had induced her to enter into the separation agreement at a time when, unbeknownst to her, New York's equitable distribution law was about to be enacted. The Supreme Court granted the plaintiff's motion for summary judgment, and subsequently entered a judgment of divorce directed the parties to comply with the terms of the separation agreement which was incorporated, but not merged into, the judgment of divorce. The Appellate Division affirmed. It held that a party who accepts the benefits provided under a separation agreement for any considerable period of time is deemed to have ratified the agreement and, thus, relinquishes the right to challenge that agreement. By contrast, when a party received virtually no benefits from the agreement, he or she cannot be said to have ratified it. Assuming the truth of the allegations set forth in the defendant's affidavit, the benefits she received pursuant to the separation agreement were far less than those she likely would have received had there been an equitable distribution of the assets accumulated during the marriage. The record, however, did not support a finding that the defendant received "virtually no benefits" from the agreement. Moreover, while a spouse will not necessarily be held to have ratified an agreement if it is found to be the product of duress and overreaching, the disadvantage to the defendant created by the alleged fraud and duress in this case could not be deemed to have persisted throughout the 29-year period during which the defendant accepted the benefits of the separation agreement without challenging it. Thus, the plaintiff made a prima facie showing that the defendant ratified the separation agreement. In opposition, the defendant failed to raise a triable issue of fact. Accordingly, the Supreme Court properly granted the plaintiff's motion for summary judgment.

Factors Set Forth in Family Court Act 413(1)(F) Should Be Considered Only Where Court Is Able to Calculate Basic Child Support Obligation Pursuant to Family Court Act 413(1)(C), Not Where Calculated Pursuant to Family Court Act 413[1][K]

In Salvatore D. V Shyou H., --- N.Y.S.2d ----, 2011 WL 4975542 (N.Y.A.D. 1 Dept.), the Appellate Division affirmed an order which directed respondent to pay $950 a month for the support of the parties' child. It held that the Support Magistrate properly ordered child support based on the needs of the child, since respondent presented insufficient evidence to determine her gross income ( Family Court Act 413[1][k]). Respondent's stated expenses were more than twice the income reflected on her tax return. The Support Magistrate found incredible respondent's testimony regarding her employment, her living situation and loans from her employer and brother. The Support Magistrate properly declined to consider the factors set forth in Family Court Act 413(1)(f), including the child's receipt of Social Security disability benefits. Such factors should be considered only where, unlike here, the court is able to calculate the basic child support obligation pursuant to Family Court Act 413(1)(c). Respondent's testimony, including that she was a well-known esthetician with celebrity clients and 22 years of experience, supported the Support Magistrate's determination that she is able to pay the child support obligation. The Support Magistrate was not required to rely on respondent's account of her finances.

Third Department Holds That Emancipation by Employment Occurs Only When Child Attains Economic Independence. Fact That Child May Work Full Time Is Not Determinative Even Where Child Lives on His/her Own.

In Drumm v Drumm, --- N.Y.S.2d ----, 2011 WL 4975452 (N.Y.A.D. 3 Dept.) Petitioner ( mother) and respondent (father) were the divorced parents of three children, Miranda, Nicholas and Matthew (born in 1990, 1994 and 1997, respectively). In May 2006, the parties entered into a separation agreement, pursuant to the terms of which they agreed to share physical custody of their children and to divide equally, among other things, the cost of the children's health insurance and any uncovered medical expenses. In apparent contemplation of that arrangement, the parties agreed to waive any child support "at [that] time." Although not entirely clear from the record, it appeared that Miranda and Nicholas thereafter elected to reside primarily with the mother, prompting the parties to enter into stipulations of settlement that referred various issues to Family Court, including child support for Miranda and Nicholas and the parties' respective obligations for the children's health care costs. The separation agreement, as modified, was incorporated but not merged into the parties' May 2009 amended judgment of divorce. In September 2009, the mother and the father entered into an order on consent wherein they agreed to, among other things, grant each other a "right of first refusal" during any period of time when the parent having physical custody of Matthew would be absent for five hours or longer. As the father often was required to work on weekends, he offered--and the mother frequently accepted-- the additional parenting time with Matthew. Shortly after entering into this stipulation, the mother commenced s modification proceeding contending that, having availed herself of the opportunity to spend more time with Matthew, she now had physical custody of him more than 50% of the time and, as such, was entitled to child support. Following a hearing, the Support Magistrate found that the mother's decision to exercise her right of first refusal did not alter the parties' shared custody arrangement as to Matthew and, therefore, the mother was not entitled to child support for him. The Support Magistrate further determined that Miranda became emancipated in June 2008 when she graduated from high school and obtained full-time employment and limited any award of support for Miranda accordingly. Family Court, sua sponte, dismissed the mother's subsequent objections to the Support Magistrate's order as untimely and, upon reargument, adhered to its prior decision. The Appellate Division reversed. It found that the record did not support Family Court's finding that the mother's objections were filed outside the 35-day window set forth in Family Ct Act 439(e) and held that Family Court erred in refusing to entertain the mother's objections on the merits. The Appellate Division held that with regard to the mother's request for child support for Matthew, the mere fact that the mother elected to exercise her right of first refusal with respect to this particular child did not fundamentally alter the parties' shared custody arrangement. At best, the mother's election resulted in her choosing to spend an additional three or four days each month with her son. In its view, regardless of the burden of proof employed, this minor and entirely voluntary "change in circumstances" was insufficient to warrant the mother's request for child support as to this child.

However, it found merit to the mother's objection regarding Miranda's alleged emancipation. A parent is statutorily obligated to support his or her child until the age of 21 (see Family Ct Act 413[1] ) unless the child is sooner emancipated, which occurs, insofar as is relevant here, when the child attains economic independence through employment. The fact that a child may work full time is not determinative, as a child cannot be deemed economically independent if he or she still relies upon a parent for significant economic support. This remains true even where, as here, the child in question no longer resides with one of the parties, for long as the child is still dependent on one of them for a significant portion of his or her support. Here, although the father testified that Miranda went to work full time after graduating from high school, the record fell short of establishing that she had achieved economic independence. Notably, there was no documentation of Miranda's salary or expenses or the degree to which she continued to receive financial support from her mother. Accordingly, the Support Magistrate's determination in this regard could not stand. The Court was also persuaded that the Support Magistrate erred in failing to achieve some level of parity between the parties by consistently using their respective projected incomes for 2009 in computing child support. Although the Support Magistrate's decision to utilize the mother's projected income for 2009 instead of her actual income for 2008 was well founded (due to nonrecurring income that the mother received in the prior year), no similar explanation was offered for electing to use the father's actual 2008 income instead of his projected--and presumably higher--income for 2009. The record failed to disclose a valid reason for failing to utilize similar income valuations for both parties when computing their respective support obligations for Miranda and Nicholas. The orders were reversed, on the law and the matter remitted to the Family Court for further proceedings not inconsistent with the Court's decision.

In a footnote the Court pointed out that to the extent that the parties' separation agreement defined emancipation as, among other things, a "child establishing a permanent residence away from his or her custodial parent," it noted that "the parties cannot contract away the duty of child support" (Matter of Thomas B. v. Lydia D., 69 A.D.3d 24, 30 [2009] ).

Ineffective Assistance of Counsel Requires Reversal of Neglect Orders

In Matter of Jaikob O., --- N.Y.S.2d ----, 2011 WL 4974840 (N.Y.A.D. 3 Dept.) the Appellate Division reversed an order which granted petitioner's application to adjudicate the children to be neglected. The Appellate Division held that as a result of deficiencies in the representation provided by his assigned trial counsel at the fact-finding hearing, he was denied meaningful representation. It found that counsel's ineffectiveness permeated the proceedings. At the fact-finding hearing, counsel failed to make an opening statement or to cross-examine petitioner's witnesses on relevant matters such as the children's exposure to respondent's allegedly neglectful conduct during the relevant time period (i.e., February to June 2008). Counsel's cross-examination of the mother and the wife, both clearly young victims of disturbing domestic violence, was at points tasteless and irrelevant, even prurient. Counsel made no motions at the close of petitioner's case and no closing arguments, stating only, "I think everything's been said." Counsel never submitted, as directed by Family Court, proposed findings of fact and conclusions of law. Likewise, petitioner submitted no findings or conclusions of law. Notably, at the close of the fact-finding hearing, Family Court merely stated that it found petitioner's witnesses to be "credible," but made no finding of neglect, deferring its decision thereon. Surprisingly, counsel then consented to immediately proceeding to a dispositional hearing. Particularly disturbing on the issue of whether counsel provided meaningful representation was a letter sent by counsel to respondent in prison after the fact-finding hearing, but before a neglect determination was issued, in response to his request for a new attorney. The letter contained a not-so-subtle threat that counsel would not send respondent anything, or convey any information to or cooperate with his next attorney, if he pursued a change of attorneys; counsel also flaunted that he had achieved financial success, upon which he elaborated, with his "clients who have money" and essentially did not need this assignment. The Appellate Division found that the letter was inappropriate and served to undermine any confidence respondent might have had in counsel effectively representing him. Accordingly, the fact-finding order was reversed. In light of the foregoing, all proceedings at which counsel represented respondent subsequent to the fact-finding hearing and order were invalid.

It also deemed it important to point out that, with regard to the dispositional hearing, counsel failed to object to petitioner's oral motion to dispense with its duty to make diligent reunification efforts for respondent and the children based upon the termination, years earlier, of respondent's (and the wife's) parental rights to their three oldest children. Such a motion by petitioner was required to be "in writing " and on notice to respondent, allowing him "the opportunity to gather evidence and raise issues of fact in answering papers and prepare for an evidentiary hearing". Moreover, absolutely no proof was offered by any party at the dispositional hearing addressing the children's "best interests" either on the propriety of terminating reasonable reunification efforts (see Family Ct. Act 1039-b[b][6] [last paragraph] ) or on the ultimate disposition upon the neglect finding (see Family Ct. Act 1045, 1052); the current status and placement of the children was not disclosed at the hearing or in the dispositional order. Counsel filed no notice of appeal from the resulting dispositional order. As respondent was denied meaningful representation by trial counsel at the fact-finding hearing, the fact-finding order, as well as the subsequent resulting orders of Family Court, could not stand.

Third Department Holds That Evidence of Child’s Needs Not Necessary in Fixing Child Support. CSSA Creates Rebuttable Presumption Guidelines Contained Will Yield Correct Amount of Child Support.

In Matter of Marcklinger v Liebert, --- N.Y.S.2d ----, 2011 WL 4975510 (NYAD 3 Dept) in a prior appeal in this child support case, the Appellate Division rejected petitioner's contention that the Support Magistrate improperly considered the parties' combined income exceeding $80,000 in the calculation of the basic child support obligation for their unemancipated child, but remitted the matter to Family Court for an articulation of a rationale for using the statutory percentage rather than the so-called "paragraph (f)" factors or a combination of both (72 A.D.3d 1431 [2010] ). Upon remittal, the Support Magistrate recalculated petitioner's support obligation, using a higher adjusted gross income for respondent as petitioner had previously requested and in accordance with Family Court's prior order, which reflected respondent's receipt of maintenance payments from petitioner. This resulted in petitioner's pro rata share being decreased to 57.65% and respondent's share being increased to 42.35%. The Support Magistrate then applied the statutory percentage set forth in the Child Support Standards Act to the parties' total combined income--first to the portion up to $80,000 and then to the portion that exceeds that amount--and determined that petitioner's pro rata share amounted to $256 per week. The Appellate Division affirmed. It noted that in his amended order, the Support Magistrate reasoned that the application of the statutory percentage yielded an amount that was "neither unjust nor inappropriate" considering that (1) the child would have enjoyed an enhanced standard of living had the parties remained married, (2) the $80,000 cap had not been adjusted for inflation since 1989, (3) the income disparity between the parties, and (4) petitioner did not offer any reason for a contrary finding. This articulation of reasoning indicated that the Support Magistrate carefully considered the parties' circumstances and found no reason to depart from the prescribed percentage. Although petitioner faulted respondent for not submitting evidence of the child's needs, application of the CSSA "creates a rebuttable presumption that the guidelines contained therein will yield the correct amount of child support" and, if petitioner believed that his presumptive pro rata share was unjust or inappropriate, it was his burden to establish such.

Appellate Division Holds Family Court Has Jurisdiction to Determine Paternity of Child Born to Married Woman Rejecting Argument Based upon Statutory Definitions of "Child," "Mother" and "Father" Limiting Those Terms to Situations Involving "A Child Born out of Wedlock"

In Matter of Nathan O v Jennifer P, --- N.Y.S.2d ----, 2011 WL 4975692 (N.Y.A.D. 3 Dept.) up until at least April 6, 2009, petitioner and respondent Jennifer P. (mother) engaged in a sexual relationship, although they disputed when that relationship ended. In mid-April 2009, the mother engaged in a sexual relationship and began cohabiting with respondent Uwe P. The mother married Uwe P. in June 2009 and gave birth to a child on December 6, 2009. At the time of the birth, Uwe P. was listed as the child's father on the birth certificate. Shortly after the child's birth, petitioner filed two petitions seeking a declaration of paternity and either custody or visitation. Uwe P. cross-petitioned for a declaration of paternity. Family Court denied the mother's motion to dismiss the petitions and ordered the parties and child to submit to DNA testing, with the results sealed pending further proceedings. During a hearing to address whether the presumption of legitimacy should preclude DNA testing (see Family Ct Act 532 [a] ), the parties consented to unsealing the DNA test results, which revealed a high likelihood that petitioner was the biological father. The parties then stipulated to an order of parenting time for petitioner, subject to respondents' right to appeal the court's ruling on jurisdiction and standing. Over respondents' objections, Family Court declared that petitioner was the father of the child, entered an order of filiation to that effect, and dismissed Uwe P.'s paternity petition. The Appellate Division affirmed. Respondents argued on appeal that the court had no jurisdiction to determine paternity of a child born to a married woman. The argument was based upon statutory definitions of "child," "mother" and "father" limiting those terms to situations involving "a child born out of wedlock" (Family Ct Act 512). The Appellate Division held that Respondents' interpretation could not be harmonized with other aspects of Family Ct Act article 5. For example, their interpretation is belied by the statutory phrase "presumption of legitimacy of a child born to a married woman" (Family Ct Act 532[a] ); the use of the word "married" would be unnecessary and superfluous under respondents' view. Considering the broad grant of jurisdiction in the N.Y. Constitution and in Family Ct Act 511, along with the numerous cases where courts have addressed paternity of children born to married mothers and the conflict between the definitions in Family Ct Act 512 and other aspects of Family Ct Act article 5, it held that Family Court has subject matter jurisdiction to address the paternity of a child born to a married woman. As a "person alleging to be the father," petitioner had standing to commence a paternity proceeding (Family Ct Act 522). Family Ct Act 523 only requires the petition to allege that a certain individual is the father of the subject child. A party seeking paternity testing under the Family Ct Act need not provide factual support for the allegations of paternity or nonpaternity; he or she need only articulate some basis for them," sufficient to show that a nonfrivolous controversy exists regarding paternity. In his application filed less than a month after the child's birth, petitioner alleged that he engaged in a sexual relationship with the mother during the probable time of conception, that the mother was not married at that time, and that he was the child's father. This information was sufficient to commence the paternity proceeding. Respondents consented--during the middle of a hearing--to Family Court unsealing the DNA test results. Upon learning of those results, the parties stipulated to the entry of an order of visitation to petitioner, subject to respondents' reservation of the right to appeal based on the court's ruling regarding jurisdiction and standing. In light of their consent, with this limited reservation of rights, respondents waived their argument that Family Court was required to conduct a full hearing concerning the child's best interests (see Family Ct Act 532[a] ) before issuing an order of filiation. Hence, it did not address that argument.

November 1, 2011

Family Court Lacks Subject Matter Jurisdiction over Article 8 Proceeding Where There Is No Intimate Relationship Between Parties

In Matter of Riedel v Vasquez, --- N.Y.S.2d ----, 2011 WL 4600481 (N.Y.A.D. 2 Dept.), the Appellate Division affirmed an order of the Family Court which, without a hearing, granted Respondents motion to dismiss the petition for lack of subject matter jurisdiction. On August 10, 2010, the petitioner commenced an Article 8 proceeding seeking an order of protection against Milagros Carranza Vasquez (respondent), who was the estranged wife of the petitioner's live-in boyfriend. The petitioner had two children with the boyfriend, and the respondent had one child with him. The petitioner alleged that she and the respondent, who did not reside together, had an "intimate relationship" within the meaning of Family Court Act 812(1). The Family Court, without a hearing, dismissed the petition on the ground of lack of subject matter jurisdiction. The Appellate Division affirmed. It pointed out that the Family Court is a court of limited subject matter jurisdiction, and "cannot exercise powers beyond those granted to it by statute" (Matter of Johna M.S. v. Russell E.S., 10 N.Y.3d 364). Pursuant to Family Court Act 812(1), the Family Court's jurisdiction in family offense proceedings is limited to certain prescribed acts that occur "between spouses or former spouses, or between parent and child or between members of the same family or household". Members of the same family or household include, among others, "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time" (Family Ct Act 812[1])(e). Expressly excluded from the ambit of "intimate relationship," are "casual acquaintance[s]" and "ordinary fraternization between two individuals in business or social contexts". Beyond those delineated exclusions, what qualifies as an "intimate relationship" within the meaning of Family Court Act 812(1)(e) is determined on a case-by-case basis. Relevant factors include the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Here, the parties had no direct relationship and were only connected through a third party, who was the biological father of the parties' respective children. The parties never resided together and did not take care of each other's children. The respondent's contact with the petitioner and/or her children had been minimal. Given these undisputed facts, no hearing was required, as the Family Court possessed sufficient information to determine that the parties were not and never had been in an "intimate relationship" as defined by Family Court Act s 812(1)(e).

Family Court Lacked Exclusive, Continuing Jurisdiction to Modify Custody Order Where Neither the Child Nor the Father Maintained a Significant Connection with New York, and Substantial Evidence Regarding the Child's Present and Future Welfare Was No Longer Available in this State.

In Knight v Morgan, --- N.Y.S.2d ----, 2011 WL 4600549 (N.Y.A.D. 2 Dept.) the Family Court issued an order of custody on consent, on August 24, 2009, in connection with the father's petition seeking joint custody of the subject child with the mother, awarding joint legal custody to both parents, with primary residential custody to the father. Accordingly, the child, who was born in 2000, and had resided with his mother in New York since his birth, moved to California in September 2009 to live with his father. After moving to California with the father, the child was diagnosed by a psychologist in California with attention deficit hyperactivity disorder, oppositional defiant disorder, post-traumatic stress disorder and, possibly, a bipolar disorder. The child received treatment from healthcare providers in California, and was not permitted to travel until his condition was stabilized. The child had not returned to New York since moving to California. In December 2009 the mother filed a cross petition in the Family Court, to modify the prior order of custody so as to award her sole custody of the child, in which she alleged that the father had falsely accused her of abusing the child. In January 2010 the father separately cross-petitioned to modify the prior custody order so as to award him sole custody of the child. Subsequently, in May 2010, while both cross petitions were pending, the father moved, inter alia, to dismiss the mother's cross petition for lack of subject matter jurisdiction. After a hearing on the issue of jurisdiction, the Family Court granted that branch of the father's motion which was to dismiss the mother's cross petition on that ground. The Family Court did not address the father's separate cross petition. The Appellate Division reversed. It held that the Family Court correctly determined that it lacked exclusive, continuing jurisdiction pursuant to Domestic Relations Law 76-a(1), since neither the child nor the father maintained a significant connection with New York, and substantial evidence regarding the child's present and future welfare was no longer available in this State (Domestic Relations Law 76-a[1][a]). However, the Family Court had jurisdiction to hear the mother's cross petition for modification pursuant to Domestic Relations Law 76-a(2) since it would have had jurisdiction for an initial child custody determination under Domestic Relations Law 76(1)(a). New York was the child's "home state" within the six months immediately preceding the commencement of this proceeding, and the mother continued to reside in this State. The matter was be remitted to the Family Court for further proceedings on the cross petitions.

New York Does Not Have Subject Matter Jurisdiction Where it Is Not State in Which Child Lived for at Least Six Consecutive Months Before Commencement of Custody Proceeding

In Jablonsky-Urso v Urso, --- N.Y.S.2d ----, 2011 WL 4600550 (N.Y.A.D. 2 Dept.) the Appellate Division held that Family Court properly granted the father's motion to dismiss the mother’s petition for custody of the parties' son for lack of subject matter jurisdiction. Domestic Relations Law 75-a (7) defines a child's home state as "the state in which a child lived with a parent ... for at least six consecutive months immediately before the commencement of a child custody proceeding". Under the Uniform Child Custody Jurisdiction and Enforcement Act, "[h]ome state jurisdiction is paramount and whether to accept jurisdiction is a home state prerogative" (Matter of Navarrete v. Wyatt, 52 A.D.3d at 836, 861 N.Y.S.2d 393). Here, the Family Court properly determined that New York was not the child's home state and, therefore, that New York did not have jurisdiction over this custody dispute (see Domestic Relations Law 76). However, it held that the Family Court erred in refusing to exercise temporary emergency jurisdiction over the family offense petition (see Domestic Relations Law 76-c) and in summarily dismissing the family offense petition upon its finding that the allegations contained in the mother's family offense petition were insufficient to sustain a family offense. The determination of whether a family offense was committed is a factual issue to be resolved by the hearing court and the allegations asserted in a petition seeking the issuance of an order of protection must be supported by a fair preponderance of the evidence. The Family Court improperly determined that the mother failed to demonstrate that the father possessed the intent required to sustain any of the family offenses alleged in the petition, as it did so without the benefit of a hearing. Based on the foregoing, that branch of the father's motion which was to dismiss the family offense petition had to be denied and the matter remitted to the Family Court, for a fact-finding hearing and a determination of the family offense petition with respect to the allegations contained therein.

Supreme Court Properly Declined to Imply a Term Which the Parties Did Not Insert into Their Stipulation, for the Purpose of Determining the Contempt Motion. Court Has Discretion to Decide If it Will Consider New Argument in Reply Papers.

In Penavic v Penavic, --- N.Y.S.2d ----, 2011 WL 4600442 (N.Y.A.D. 2 Dept.) the plaintiff moved, pursuant to Judiciary Law 756 to hold the defendant in civil contempt. Supreme Court denied the motion. The Appellate Division affirmed. It held that to prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the party charged with contempt willfully violated a clear and unequivocal mandate of a court's order, with knowledge of that order's terms, thereby prejudicing the movant's rights. Supreme Court providently exercised its discretion in denying her motion to hold the defendant in contempt for failing to remove her name from a home equity line of credit ( HELOC) or closing it. While the plaintiff was aware of the HELOC at the time that she executed the stipulation, no provision was included in the stipulation requiring that her name be removed from it or that it be closed, even though the defendant was precluded from continuing to use the HELOC pursuant to the provision which prohibited him from incurring additional debt upon the plaintiff's credit. Since the terms of the stipulation with respect to whether the HELOC had to be closed were unambiguous, the Supreme Court properly declined to imply a term which the parties did not insert into the stipulation, for the purpose of determining the contempt motion. The plaintiff raised, for the first time in her reply papers, the argument that the defendant was also in contempt of the judgment by increasing the balance of the HELOC from $25,000, the amount of the balance at the time that the parties executed the stipulation, to $750,000, which he disclosed in his affidavit opposing the plaintiff's motion. The Appellate Division held that it was within the Supreme Court's discretion to decide if it would consider this new argument. Inasmuch as the plaintiff did not address this provision in her motion papers and relied solely upon the provisions concerning the acknowledgment that the bills or accounts for the former marital residence were solely in the husband's individual name as the basis for her motion, Supreme Court properly exercised its discretion to disregard that argument in connection with the motion before it (citing Matter of Allstate Ins. Co. v. Dawkins, 52 AD3d 826, 827).

Authors Note: In Matter of Allstate Ins. Co. v. Dawkins, the Appellate Division said: “The function of reply papers is to address arguments made in opposition to the position taken by the movant, not to permit the movant to introduce new arguments or new grounds for the requested relief (see Matter of Harleysville Ins. Co. v Rosario, 17 AD3d 677 [2005]; Matter of TIG Ins. Co. v Pellegrini, 258 AD2d 658 [1999]). Further, Dawkins was not afforded an opportunity to address the new argument (see Matter of Harleysville Ins. Co. v Rosario, 17 AD3d 677 [2005]; Matter of TIG Ins. Co. v Pellegrini, 258 AD2d 658 [1999]).”

Maintenance Award Should Not Provide for an Automatic Increase upon the Prospective Emancipation of Each of Parties' Children

In O’Brien v O’Brien, --- N.Y.S.2d ----, 2011 WL 4839062 (N.Y.A.D. 2 Dept.) the Supreme Court found that the plaintiff former wife had an annual income of $33,262 from all sources, and the defendant former husband had an annual income of $115,747 from all sources. The parties were divorced by judgment dated November 30, 2009. In addition to child support of $2,625 per month, plus support arrears, the Supreme Court awarded the plaintiff maintenance in the amount of $1,375 per month over a period of 10 years, to increase as each of the parties' six children becomes emancipated, so that the plaintiff would receive the total sum of $4,000 per month in combined child support and maintenance for a period of 10 years, plus maintenance arrears. The Supreme Court also awarded the plaintiff an attorney's fee in the amount of $10,000. The plaintiff was to remain in the marital residence and pay all carrying costs.

The Appellate Division pointed out that the awards of child support, maintenance, arrears, and an attorney's fee were based upon the Supreme Court's calculation of the parties' respective incomes. It found that Supreme Court made a mathematical error in calculating the plaintiff's income. The numbers reflecting the various components of the plaintiff's annual income, as set forth by the Supreme Court in its decision, added up to a total of $54,163, not $33,262, as erroneously stated by the Supreme Court. It pointed out that a court has the inherent power to relieve a party from judgments taken through mistake or inadvertence in the interest of justice, and directed that the awards of child support, maintenance, arrears, and an attorney's fee had to be recalculated based on the correct figures. It also found that with respect to one of the components of the defendant's annual income, the Supreme Court attributed an incorrect amount. Three of the components were supported by the record. However, the record did not support the Supreme Court's calculation and imputation of $15,376 in annual benefits from the defendant's employer for use of an automobile and cell phone, along with the employer's payment of expenses attributable to the use of those items. It observed that Domestic Relations Law 240(1-b)(b)(5)(iv)(B) provides that the Supreme Court may, in its discretion, "attribute or impute income from ... automobiles or other perquisites that are provided as part of compensation for employment to the extent [they] constitute expenditures for personal use, or ... directly or indirectly confer personal economic benefits." Here, although the defendant's employer expended the sum of $15,376 in 2007 for the defendant's use of an automobile and cell phone and related expenses, the amount attributable to income was considerably smaller in light of the defendant's testimony that only 10% of his use of the automobile, and only a "portion" of his use of the cell phone, were personal uses.

The Appellate Division observed that upon remittal for recalculation, the discrepancy between the parties' incomes would necessarily be smaller than previously calculated, and, the defendant's pro rata share of the basic child support obligation had to be recalculated. It also directed that upon remittal, the Supreme Court had to recalculate the award of maintenance based upon factors including the parties' respective incomes as recalculated, their pre-divorce standard of living, and the financial resources of each, considered separately, balancing the plaintiff's needs with the defendant's ability to pay. The Appellate Division held that the maintenance award should not provide for an automatic increase upon the prospective emancipation of each of the parties' children. Maintenance is designed to give the spouse economic independence and should continue only as long as necessary to render the recipient self-supporting. The award should meet the recipient spouse's reasonable needs while providing an appropriate incentive for the recipient to become financially independent. The amount of the maintenance award is a discretionary determination based upon a number of interrelated facts then in existence; unless a future event is imminent and measurable, an award of maintenance should not include a provision for increase or decrease upon the happening of a particular future event. Here, the provision for automatic increase of maintenance upon the emancipation of each of the parties' children ignored other factors which may come into existence at the time of each child's emancipation. Therefore, the parties' changing needs are best addressed in a future application for modification of the amount of maintenance. The Appellate Division found, based upon the apparent discrepancy between the parties' income and other circumstances, that Supreme Court did not improvidently award the plaintiff an attorney's fee. However, the amount of the award was premised upon an erroneous calculation of the parties' respective incomes. It directed that upon remittal, the Supreme Court should recalculate an appropriate award to the plaintiff of an attorney's fee.

Deprivation of Right to Counsel In a Custody or Visitation Proceeding is Denial of a Fundamental Right Which Requires Reversal

In Matter of Rosof v Mallory, --- N.Y.S.2d ----, 2011 WL 4839081 (N.Y.A.D. 2 Dept.) at the commencement of a hearing to determine whether the father should have only supervised visitation with his daughter, the father's attorney asked to be relieved, and the father consented to her discharge. The father asked that new counsel be appointed, but the Family Court declined to do so, and the father represented himself. The Appellate Division held that the father, as a respondent in a proceeding pursuant to Family Court Act article 6, had the right to be represented by counsel. To determine whether a party is validly waiving the right to counsel, the court must conduct a "searching inquiry" in order to be reasonably certain that the party understands the dangers and disadvantages of giving up the fundamental right to counsel. Here, the Family Court conducted no inquiry at all to determine whether the father was waiving the right to counsel. Requiring the father to try the matter without the benefit of counsel impermissibly placed the Family Court's interest in preventing delay above the interests of the parents and the child, and violated the father's right to be represented by counsel. The deprivation of a party's fundamental right to counsel in a custody or visitation proceeding is a denial of due process which requires reversal, regardless of the merits of the unrepresented party's position . The matter was remitted to the Family Court for a new hearing on the mother's petition and a new determination.

Supreme Court Finds No Basis for a Presumption That a Parent's Obligation to Pay for College Is to Be Limited to the Cost of a Suny Education Unless Proven Otherwise

In Pamela T v Marc B., --- N.Y.S.2d ----, 2011 WL 4861584 (N.Y.Sup.) the Supreme Court concluded that the proposition that before a parent can be compelled to contribute towards the cost of a private college there must be a showing that a child cannot receive an adequate education at a state college is a doctrine that in many cases is harmful to the children of divorced parents, acts to discriminate against them, and is largely unworkable. The parties were divorced on December 23, 2008. They had two sons, one who was 18 and one who was 16. The judgment of divorce incorporated a custody agreement and a stipulation of settlement by which the parties had resolved all issues of the divorce except for those concerning child support. No mention was made in either the decision, the custody agreement or the stipulation of settlement as to the payment of the children's college tuition and expenses. In 2007, the elder child was diagnosed with "moderate emotional difficulty" and learning/anxiety disorders, which necessitated certain educational accommodations. Despite this diagnosis, he graduated in 2011 from Beacon High School, a selective public high school in Manhattan. He was accepted at Syracuse University, SUNY Binghamton and SUNY Buffalo, along with a number of other schools. Syracuse, which awarded him $3,000 in financial aid, cost approximately $53,000 a year to attend as an undergraduate, while SUNY Binghamton and SUNY Buffalo cost only about $18,000 a year. Although the child visited Binghamton and gave serious consideration to going there, he ultimately decided to attend Syracuse. He was now a freshman there studying computer engineering and computer graphics. The parties were both practicing attorneys in New York City. Plaintiff worked for the Metropolitan Transit Authority Inspector General's Office and defendant was self-employed as a solo practitioner. Plaintiff's 2010 federal income tax return reported adjusted gross income of $109,896. Defendant's 2010 federal income tax return reported adjusted gross income of $105,135. Plaintiff's net worth statement showed she had assets of approximately $1,230,000. Defendant's net worth statement showed he had approximately $580,000. Both plaintiff and defendant went to private undergraduate colleges and law schools, with plaintiff graduating from Northwestern University and New York University School of Law, and defendant graduating from Columbia University and Benjamin N. Cardozo School of Law.

Defendant did not oppose an order directing him to contribute to his older child's college education, but he asked the court to apply the SUNY cap and limit his responsibility to a percentage of the costs of a state university education rather than to a percentage of a private college education. Defendant's position was based on his claim that he was unable to meet the financial demands of paying for private college and on his belief that his son could receive as good an education at SUNY Binghamton as he could at Syracuse.

Supreme Court observed that Domestic Relations Law 240(1- b)(c)(7) conferred upon the courts of this state the authority to "direct a parent to contribute to a child's private college education, even in the absence of special circumstances or a voluntary agreement. The statute provides that when a court exercises its discretion to direct such a contribution from a parent, it is to do so "having regard for the circumstances of the case and the parties, the best interests of the child, and the requirements of justice." Case law augmented the provisions of DRL 240(1-b)(c)(7) by setting forth specific factors that are to be considered in determining whether to award college expenses. These factors include the educational background of the parents and their financial ability to provide the necessary funds, the child's academic ability and endeavors, and the type of college that would be most suitable for the child. (See Rosado v. Hughes, 23 AD3d 318 (1st Dept 2005); Naylor v. Gastler, 48 AD3d 951 (3d Dept 2008); Reiss v. Reiss, 56 AD3d 1293 (4th Dept 2008).

The Court observed that DRL 240(1-b)(c)(7) does not provide for is a SUNY cap. The SUNY cap is a concept that has been judicially created by way of a string of decisions rendered since the enactment of the statute. The problem with these cases was that they provided little in the way of instruction as to when a SUNY cap might be properly applied over the objection of the parent who is seeking an award for college expenses. The Supreme Court found that Berliner v. Berliner, 33 AD3d 745, 749 (2d Dept 2006) was instructive because the Second Department’s statement that there "is no basis in this record" for imposing the SUNY cap implied that the burden falls on the proponent of the cap to demonstrate that it is warranted. The inference to be drawn is that there is no presumption that a parent's obligation to pay for college is to be limited to the cost of a SUNY education unless proven otherwise; if anything, the presumption goes the other direction. It was also instructive because the decision's reference to the "so-called SUNY cap' "can be seen as an indication that even the Second Department views the SUNY cap as something less than an established doctrine firmly ensconced in the fabric of family law.

Supreme Court rejected defendants argument that plaintiff be required to prove that Syracuse was a better school than SUNY Binghamton in order for him to be required to pay Syracuse's higher expenses. He noted that it is difficult to conceive of a workable procedure, let alone a methodology, for a court to make a finding that one college is "better" than another. He stated that the real issue is what college or university is the best for the individual child in question in the ways that matter most to that particular child. The Court found that it had been shown that there was ample reason to support the child's choice of Syracuse, irrespective of whether it is ranked lower, higher or the same as SUNY Binghamton or any other SUNY school. Provided that the funds are available to finance the child's education, the fact that Syracuse was a private school and cost more than a public school was not a reason to interfere with the child going to the school he chose and he wanted to attend. This was particularly so in light of the fact that both his parents went to private colleges. One of the factors to be considered when making a determination under DRL 240(1-b)(c)(7) is the parents educational background. Inasmuch as plaintiff attended Northwestern and defendant attended Columbia, it could reasonably be assumed that there would exist an expectation in the family, and in the child himself, that he too could attend a private college.

Having found that the child's academic ability and endeavors, the type of college that would be most suitable for him, and the educational background of the parents were all factors that called for plaintiff to contribute to his son's education at Syracuse University, the court had to consider the defendant's ability to pay. It was defendant's position that even though plaintiff may have the means to pay the high cost of their son attending Syracuse, he lacked the means to do so. Consequently, he contended that he should have to pay no more than $9,000 a year towards his son's education, an amount that is roughly 50% of the present annual cost of a SUNY school.

The court rejected defendant's contention as to his inability to pay a significant share of the child's actual educational expenses being incurred at Syracuse. It was true that plaintiff has considerable more savings than defendant and that she had a pension plan through her employment. But it was equally true that defendant's net income the past year was over $100,000, which was only about $5,000 less than plaintiff's net income for the same period, and that he benefitted from the substantial tax deductions and write offs that come from being self-employed. Also, defendant, although remarried for a number of years, had chosen to keep a second apartment in addition to the residence he shared with his new wife. Defendant had paid and continued to pay a very small amount in basic child support and child support add-ons. If defendant's child support obligation were to be recalculated using his 2010 income, it would be far higher than the $686 monthly that he paid.

Supreme Court held that there was no basis to impose the SUNY cap, to the extent that it should be imposed at all, where the party seeking to invoke the cap has the financial ability to contribute towards the actual amount of his or her child's college expenses. (Citing R.E. v. S.E., 27 Misc.3d 1216(A); Bonnie B. v. Michael B., 6 Misc.3d 1004(A), 2004 WL 3050804 (Sup Ct, Suffolk County 2004). It found that the defendant had the income and the assets, as well as the ability to keep producing substantial income through his law practice, to make a significant contribution to his sons's college education. Although defendant's contribution should be less than plaintiff's, based on the difference between their net assets, and in particular what each of them had available for eventual retirement, that contribution should not be subject to some artificial construct like the SUNY cap. Rather, it should be based, as with all other child support obligations, on the respective finances of the parties. On this basis, the court concluded that defendant shall be obligated to contribute 40% of the total cost of the elder child attending Syracuse University, with those costs to include tuition, room and board, fees and books.

The Court observed that it has the discretion to direct parents to pay the costs of their children's college expenses when the separation agreement or other stipulation between the parents is silent in this respect. However, such a directive is premature when college is several years away, the choice of college and the cost of tuition are uncertain, and the child's academic interests and abilities are not supported by evidence. (Citing Gilkes v. Gilkes, 150 A.D.2d 200, 201 (1st Dept 1989); see also LaBombardi v. LaBombardi, 220 A.D.2d 642, 644 (2d Dept 1995). Here, college was more than a year and a half away for the younger child. It was therefore premature and unduly speculative to attempt to assess what the child's plans are with regard to college and the what the costs will be. As a result, plaintiff's application for this relief was denied without prejudice to renew at a subsequent date when the child has committed to attend college and the costs of attendance are supported by evidence.

October 17, 2011

First Department Establishes Rules Related to Obligation of Nonparty to Produce Electronically Stored Information Deleted Through Normal Business Operations

In Tener v Cremer, --- N.Y.S.2d ----, 2011 WL 4389170 (N.Y.A.D. 1 Dept.) the First Department addressed the obligation of a nonparty to produce electronically stored information (ESI) deleted through normal business operations. The action underlying this discovery dispute concerned a statement about plaintiff that someone posted on a website known as Vitals.com on April 12, 2009. Plaintiff claimed this statement defamed her. Plaintiff claimed that through discovery she managed to trace the Internet protocol (IP) address of the computer from which the allegedly defamatory post originated "to a computer in the custody and control of New York University." This computer had accessed the Internet through a portal located at Bellevue Medical Center and registered to nonparty New York University Langone Medical Center. According to NYU's Chief Information Security Officer, NYU had installed the Internet portal at Bellevue for the convenience of its residents who trained there. The portal is a network address translation (NAT) portal that is essentially a switchboard through which a person can access the Internet. While only NYU personnel with proper security codes can gain access to NYU's computer system and medical records, anyone using a computer plugged into an ethernet outlet at Bellevue can access other web sites through the NYU portal. On April 30, 2010, plaintiff served a subpoena on NYU seeking the identity of all persons who accessed the Internet on April 12, 2009, via the IP address plaintiff previously identified. With the subpoena, plaintiff served a preservation letter advising NYU that the identity of the person who posted the remarks was at issue and that NYU should halt any normal business practices that would destroy that information. When NYU did not produce the information, plaintiff moved for contempt. In opposition to plaintiff's contempt motion, NYU's Chief Information Security Officer stated that "[c]omputers that simply access the web through NYU's portal appear as a text file listing that is automatically written over every 30 days. NYU does not possess the technological capability or software, if such exists, to retrieve a text file created more than a year ago and 'written over' at least 12 times." Plaintiff, in reply, submitted an affidavit from a forensic computer expert opining that NYU could still access the information using software designed to retrieve deleted information. The expert stated that "the term 'written over' is deceptive" because what really occurs is that " 'old' information or data is typically allocated to 'free space' within the system." Plaintiff's expert suggested using "X-Rays Forensic" or "Sleuth Kit" to retrieve the information from unallocated space. Supreme Court denied the contempt motion in part because it found that NYU did not have the ability to produce the materials plaintiff demanded and that "this allegation is unrefuted as a reply affidavit contradicting such allegation has not been supplied." The Appellate Division held that Supreme Court was incorrect. In its papers in opposition to the motion, NYU offered no evidence that it made any effort at all to access the data, apparently because it believed it could not, as a nonparty, be required to install forensic software on its system. However, the cases that NYU cites to support its assertion that it need not install forensic software were outdated. The most recent was from 1993, nearly 20 years ago (see Carrick Realty Corp. v. Flores, 157 Misc.2d 868, 598 N.Y.S.2d 903 (Civ Ct, New York County 1993). Thus, there were several unanswered questions regarding NYU's ability to produce the requested documents.

The Appellate Division held that the party moving for civil contempt arising out of noncompliance with a subpoena duces tecum bears the burden of establishing, by clear and convincing evidence, that the subpoena has been violated and that "the party from whom the documents were sought had the ability to produce them" (Yalkowsky v. Yalkowsky, 93 A.D.2d 834, 835 [1983]; see also Gray v. Giarrizzo, 47 A.D.3d 765, 766 [2008] ). In this day and age the discovery of ESI is commonplace. Although the CPLR is silent on the topic, the Uniform Rules of the Trial Courts and several courts have addressed the discovery of ESI and have provided working guidelines that are useful to judges and practitioners. The Commercial Division for Supreme Court, Nassau County publishes in depth guidelines for the discovery of ESI (the Nassau Guidelines). While aimed at parties, the Nassau Guidelines are appropriate in cases, such as this, where a nonparty's data is at issue. ESI is difficult to destroy permanently. Deletion usually only makes the data more difficult to access. Based on the specific facts of this case, the Court found that the Nassau Guidelines provided a practical approach. To exempt inaccessible data presumptively from discovery might encourage quick deletion as a matter of corporate policy, well before the spectre of litigation is on the horizon and the duty to preserve it attaches. A cost/benefit analysis, as the Nassau Guidelines provide, does not encourage data destruction because discovery could take place regardless. Plaintiff had variously described the information it seeks as stored in a "cache" file, as "unallocated" data or somewhere in backup data. Data from these sources is difficult to access. But, plaintiff's only chance to confirm the identity of the person who allegedly defamed her may lie with NYU. Thus, plaintiff thus demonstrated "good cause"necessitating a cost/benefit analysis to determine whether the needs of the case warrant retrieval of the data.

As the record was insufficient to permit the court to undertake a cost/benefit analysis it remanded to Supreme Court for a hearing to determine at least: (1) whether the identifying information was written over, as NYU maintained, or whether it is somewhere else, such as in unallocated space as a text file; (2) whether the retrieval software plaintiff suggested can actually obtain the data; (3) whether the data will identify actual persons who used the internet on April 12, 2009 via the IP address plaintiff identified; (4) which of those persons accessed Vitals.com and (5) a budget for the cost of the data retrieval, including line item(s) correlating the cost to NYU for the disruption. It observed that some of these questions (particularly [1] and [2] ) may involve credibility determinations. Until the court has this minimum information, it cannot assess "the burden and expense of recovering and producing the ESI and the relative need for the data" (Nassau Guidelines) and concomitantly whether the data is so "inaccessible" that NYU does not have the ability to comply with the subpoena. That NYU is a nonparty should also figure into the equation. In the event the data is retrievable without undue burden or cost, the court should give NYU a reasonable time to comply with the subpoena.

Supreme Court May Not Determine Whether the Marriage Is Irretrievably Broken until All Ancillary Issues Are Resolved.

In Schiffer v Schiffer, --- N.Y.S.2d ----, 2011 WL 4790060 (N.Y.Sup.) plaintiff husband moved for an order directing that summary judgment be granted in his favor of divorce under Domestic Relations Law 170 (7). The defendant wife opposed the application and cross-moved for summary judgment dismissing the complaint. The parties were married in Massachusetts on March 25, 1990 and had three unemancipated children of the marriage. On November 29, 2010, Mr. Schiffer commenced the action for divorce, claiming irretrievable breakdown of the marriage for a period of more than six months prior to the commencement of the action. On December 21, 2010, Mrs. Schiffer served her verified answer, contesting these allegations, specifically claiming that Mr. Schiffer's actions belied his claims that the marriage was irretrievably broken. The Supreme Court observed that Domestic Relations Law § 170 [7] allows parties to seek a judgment of divorce when "the relationship between the husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath" also provides that "no judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts'

fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into this judgment of divorce" .

The Supreme Court agreed with the wife’s argument that the husband was not entitled to summary judgment since no judgment of divorce can be made unless and until the economic and custodial issues are determined or resolved by the parties. The statute clearly states that a judgment may only be granted after economic and custodial issues were resolved. In this case, all of the conditions of the statute had not been met since the economic and custodial issues were yet to be addressed. Mr. Schiffer had failed to meet his prima facie burden, and his motion for summary judgment was denied.

Mrs. Schiffer's motion for summary judgment was also denied, but for a different reason. Supreme Court observed that in Strack v. Strack (31 Misc.3d 258 [Sup Ct, Essex County 2011] ), Justice Muller held that the "determination of whether a breakdown of a marriage is irretrievable is a question to be determined by the finder of fact." This holding demonstrably agreed with fundamental concepts of due process and comported with similar interpretations of no-fault statutes from our sister states. Since the sole means of procuring a divorce in New York is by judicial process (N.Y. Const, art I, s 9), precluding a party from contesting a ground for divorce "must be regarded as the equivalent of denying [him or her] an opportunity to be heard ...and in the absence of a sufficient countervailing justification for the State's action, a denial of due process". A contrary finding would merely reduce the court to a rubber stamp whenever presented with an action for divorce under Domestic Relations Law 170 (7). While Mrs. Schiffer had established that the ancillary issues were not resolved and that her marriage to Mr. Schiffer had not broken down irretrievably, Mr. Schiffer raised a triable issue of fact that the marriage was irretrievably broken for at least six months. The proof bared by the parties sufficed to establish a true issue of fact as to whether this marriage was irretrievably broken, which the finder of fact would undoubtedly resolve after the other issues were resolved.

Family Court Finds Irrebuttable Presumption of Unfitness in SSL 378-a(2)(e)(1) and 378-a(2)(h) Violates Due Process Clauses of the New York State and United States Constitutions

In the Matter of the Adoption of Abel,--- N.Y.S.2d ----, 2011 WL 4436127 (N.Y.Fam.Ct.), Cheryl and Derrick Adamson filed a petition to adopt Abel. Abel was born on August 9, 2004. Since September 22, 2004 when Abel was discharged from the hospital, on the basis of a petition that had been filed alleging that his biological mother had neglected him, Abel resided in the home of his maternal cousin, Cheryl Adamson, and her husband, Derrick Adamson. On April 20, 2009, the court terminated Abel's biological mother's parental rights.. The evidence submitted provided incontrovertible support for the proposition that it was in Abel's best interest to be adopted by the Adamsons and clearly militated in favor of this court approving the Adamsons' petition to adopt Abel. Mr. Adamson's criminal history, however, created an issue as to whether there existed a statutory bar to such approval. Mr. Adamson had a 1987 Washington D.C. conviction for simple assault and a 1992 Kings County (New York State) conviction for Robbery in the Third Degree. On November 24, 2009, pursuant to Social Services Law 378-a(2)(h), New York Foundling conducted a safety assessment of the conditions of the Adamson household. Based on the remoteness in time of his criminal convictions and the fact that in the years since the 1992 robbery conviction, Mr. Adamson had reformed his behavior and has led a productive life, the safety assessment reported that Mr. Adamson did not pose a safety concern to Abel. The assessment concluded that because "Mr. Adamson has been the sole father figure in Abel's life, [New York Foundling] strongly believes that it is in the best interest of the child to be adopted by Mr. and Mrs. Adamson."

In order to gain further understanding of the facts underlying Mr. Adamson's 1992 robbery conviction, the court obtained the criminal court complaint and a transcript of Mr. Adamson's guilty plea. The criminal complaint alleged that on November 27, 1991, in Kings County, Mr. Adamson hit the victim with an unknown blunt object about his head and face and took a bag containing money that the victim had been carrying. The blows allegedly knocked out the victim's front teeth, caused his nose to bleed, and resulted in his sustaining a separated shoulder. On February 3, 1992, having been promised a sentence of one and one-third to four years imprisonment, Mr. Adamson pled guilty to one count of Robbery in the Third Degree and admitted that, on November 27, 1991, when the owner of a store came out [of the store], he hit him, caused him to fall, took his bag containing money, and fled. The Family Court observed that prior to the 2008 amendment of SSL 378-a(2)(e), the court would have found that Mr. Adamson's 1992 robbery conviction did not automatically disqualify him from adopting Abel because denial of Mr. and Mrs. Adamson's petition to adopt would have created an unreasonable risk of harm to Abel's mental health and granting said petition would have been in Abel's best interest and would not have placed his safety in jeopardy. However, in 2008, in order to comply with the federal Adam Walsh Child Protection Act of 2006, see Public Law 109-248, New York State eliminated the language in SSL 378--a which only presumptively disqualified from becoming foster or adoptive parents those who had been convicted of certain felonies, and by doing so made automatic the disqualification of those prospective foster or adoptive parents who had been convicted of certain felonies. The Court held that Mr. Adamson's conviction in 1992 for Robbery in the Third Degree fell within the category of convictions which would automatically disqualify him from adopting Abel. SSL 378-a(2)(e)(1)(A) reads, in pertinent part, "an application for certification or approval of a prospective foster parent or prospective adoptive parent shall be denied where a criminal history record of the prospective foster parent or prospective adoptive parent reveals a conviction for: (A) a felony conviction at any time involving: (i) child abuse or neglect; (ii) spousal abuse; (iii) a crime against a child, including child pornography; or (iv) a crime involving violence, including rape, sexual assault, or homicide, other than a crime involving physical assault or battery. See also 18 NYCRR 421.27(d)(1); 42 USCA 671(a)(20)(A)(I); 45 C.F.R. 1356.30(b)(4). Since assault was specifically excluded from the above-cited provision and since Mr. Adamson's assault conviction was both a misdemeanor and occurred over five years ago, there was no doubt that, unlike the robbery conviction, the assault conviction fell within the category of convictions for which the court had discretion to approve or deny the petition to adopt. See SSL 378-a(2)(e)(3(A). Because robbery was not specifically mentioned in this provision, the court, therefore, found that Mr. Adamson's 1992 robbery conviction constituted a "crime involving violence. The fact that robbery is not specifically included in Social Services Law 378-a(2)(e)(1)(A)(iv) is not dispositive. Although this provision specifically includes rape, sexual assault and homicide and specifically excludes assault as crimes involving violence, there is nothing in either the legislative history of this provision or the state or federal regulations promulgated thereunder that would indicate that the listed crimes are exhaustive, and not merely illustrative, of crimes involving violence.

It was beyond cavil that Mr. Adamson had rehabilitated himself and that removal of Abel from this home would have a devastating impact upon Abel. Under the circumstances of this case, it was clear that to follow the strict mandate of the statute and deny Mr. and Mrs. Adamson's petition to adopt Abel and to remove Abel from the home of his maternal cousin and her husband-the only home he has ever known-based solely upon Mr. Adamson's 1992 robbery conviction, would deprive both Abel and the Adamsons of their due process right to an individualized determination of whether this adoption is in Abel's best interest. That right, to a case-specific determination, was firmly established almost forty years ago in Stanley v. Illinois, 605 U.S. 645(1972) when the United States Supreme Court struck down as violative of the Fourteenth Amendment, Illinois' irrebuttable statutory presumption that all unmarried fathers are unqualified to raise their children. The Court held that a hearing was required by the due process clause, upon the death of the mother and prior to the removal of the children, to determine whether the father was fit to raise the children. In so ruling, the Court opined, "procedure by [irrebuttable] presumption is always cheaper and easier than individualized determination. But when ... the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to fast formalities, it needlessly risks running roughshod over the important interests of both parent and child ... [and] therefore cannot stand." Based upon the due process clauses of the New York State and United States Constitutions, this court found that SSL 378-a(2)(e)(1) and 378-a(2)(h), as applied to the facts of this matter, violated Mr. and Mrs. Adamson's and Abel's right to a determination, based on the totality of the circumstances, as to whether the adoption of Abel by the Adamsons is in Abel's best interest. The court examined the totality of the circumstances presented and notwithstanding Mr. Adamson's criminal past, held that it was in Abel's best interest to be adopted by Mr. and Mrs. Adamson and granted the petition.

A Court May Not Delegate to a Parenting Coordinator the Authority to Resolve Issues Affecting the Best Interests of the Children

In Silbowitz v Silbowitz, --- N.Y.S.2d ----, 2011 WL 4599852 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order of the Supreme Court which, in effect, granted the defendant former husband's motion to appoint a parenting coordinator to assist the parties in implementing the terms of their existing child custody and visitation arrangement provided for in the parties' stipulation dated October 22, 2007. It observed that although a court may properly appoint a parenting coordinator to mediate between parties and oversee the implementation of their court-ordered parenting plan a court may not delegate to a parenting coordinator the authority to resolve issues affecting the best interests of the children. Here, despite the expansive scope of the issues entrusted to the parenting coordinator by the Supreme Court's order, his power was properly limited to implementing the terms of the existing child custody and visitation arrangement provided for in the parties' stipulation dated October 22, 2007, subject to the Supreme Court's oversight. Although the parenting coordinator was empowered to issue a written decision resolving a conflict where he was unable to broker an agreement between the parties, the Supreme Court's order also provided that the parties may seek to have the parenting coordinator's decision so-ordered by the Supreme Court and that they "retain their right to return to Court and seek a modification of their parenting plan at any time." Accordingly, the Supreme Court properly limited the role of the parenting coordinator and properly provided that his resolutions remained subject to court oversight. The plaintiff also contended that the order insufficiently protected the confidential and privileged information of the parties and the children because it required the parties to execute authorizations and releases allowing the parenting coordinator to obtain information which was otherwise confidential or privileged. However, the order required that the parenting coordinator maintain the confidentiality of the information and when read as a whole, clearly limited his authority to request authorizations or releases and use information only in furtherance of his duty to mediate between the parties in the implementation of their parenting plan. Accordingly, no further limitation was necessary.

Court May Not Order a Parent Undergo Counseling or Treatment as a Condition of Future Visitation or Re-application for Visitation Rights but May Direct a Party to Submit to a Mental Health Evaluation for Use in Any Future Determination of Visitation.

In Matter of Smith ex rel Hunter v Dawn F.B., --- N.Y.S.2d ----, 2011 WL 4600469 (2d Dept 2011) Family Court granted the petition of the attorney for the child alleging that the mother violated an order of custody and visitation, prohibited her from having any contact with her son, directed that she submit to a mental health evaluation, directed her to follow treatment recommendations resulting from that evaluation, and conditioned her application for resumption of visitation upon her compliance with treatment, including medication, recommended by a mental health professional.

The Appellate Division modified the order by deleting the provision conditioning the mother's application for resumption of visitation upon her compliance with treatment, including medication, recommended by a mental health professional. It found that Family Court's determination that it was in the child's best interest to suspend supervised visitation and prohibit all contact with the mother had a sound and substantial basis in the record. The mother, by her own admission, violated the express terms of the Family Court's previous order, which only permitted visitation supervised by designated individuals, by having unsupervised contact with the child at two separate little league baseball games. Moreover, the mother contributed to certain events at a recent therapeutic visit which adversely affected the child and undermined the progress of the therapeutic visitation. The Appellate Division pointed out that a court may not order that a parent undergo counseling or treatment as a condition of future visitation or re-application for visitation rights, but may only direct a party to submit to counseling or treatment as a component of visitation. Here, the Family Court improperly conditioned the mother's application for resumption of visitation upon her compliance with treatment, including medication, recommended by a mental health professional. However, the Family Court properly directed the mother to submit to a mental health evaluation for use in any future determination of visitation.

October 3, 2011

Method of Service Provided for in Order to Show Cause Is Jurisdictional

In Matter of Sharma v New, --- N.Y.S.2d ----, 2011 WL 4389744 (N.Y.A.D. 2 Dept.), in March 2010 the mother filed a petition and order to show cause to modify the overnight visitation provisions contained in an order dated January 14, 2010, alleging that the father violated that order by taking the subject child "to a different hotel than the one ... which he informed [the social worker] he would be using." In an order dated July 9, 2010, the Family Court, inter alia, granted the mother's petition so as to suspend the father's overnight visitation. The Appellate Division reversed. It observed that the method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with. Moreover, where the court orders service by a particular date, all components of service must be accomplished by that date. Here, the record did not contain any evidence establishing that the father was properly or timely served in compliance with the provisions of the order to show cause. Moreover, contrary to the contention of the attorney for the child, the father asserted the defense of lack of personal jurisdiction in his answer and did not waive the defense (see CPLR 3211[e]). Since personal jurisdiction was not obtained, the Family Court should have dismissed the proceeding.

Father Did Not Implicitly Consent to Referee by Merely Participating in Custody Proceeding. Referee Had No Jurisdiction

In Gale v Gale, --- N.Y.S.2d ----, 2011 WL 4090031 (N.Y.A.D. 2 Dept.) the Appellate Division reversed on the law and remitted for a new hearing, an order of the Family Court which, after a hearing, granted the mother's petition to modify the custody provisions of a judgment of divorce so as to award her sole custody of the parties' children, and denied the fathers petitions for sole custody of the children. It pointed out that a referee derives authority from an order of reference by the court (see CPLR 4311), which can be made only upon the consent of the parties, except in limited circumstances not applicable here. It found that the parties did not stipulate to a reference in the manner prescribed by CPLR 2104. In any event, there was no indication that there was an order of reference designating the referee who heard and determined the petitions at issue here. It observed that contrary to the mother's contention, the father did not implicitly consent to the reference merely by participating in the proceeding without expressing his desire to have the matter tried before a judge (see McCormack v. McCormack, 174 A.D.2d at 613). The Court held that “...to the extent that certain dicta in Chalu v. Tov-Le Realty Corp. (220 A.D.2d 552, 553) may suggest a different conclusion, it is not to be followed.” Furthermore, a stipulation consenting to a reference to a specified referee, executed by the parties in connection with the father's previous petition to modify the visitation schedule, expired upon completion of that matter and did not remain in effect for this matter. Accordingly, the referee had no jurisdiction to consider the father's petitions related to custody and visitation and the mother's petition to modify custody, and the referee's order determining those petitions had to be reversed.

Mootness Doctrine Explained By Second Department in Opinion Dismissing Visitation Appeal as Academic

In Matter of Cissee v Graham, --- N.Y.S.2d ----, 2011 WL 4090037 (N.Y.A.D. 2 Dept.), the mother, who was Muslim, and the father, who was Roman Catholic, had one child together, a daughter born on March 24, 2001. In an order dated June 30, 2004 Family Court awarded custody of the child to the mother and visitation to the father, with such visitation to occur pursuant to a stipulation signed by the parties. In a separate order, also dated June 30, 2004, made pursuant to the aforementioned stipulation, the Family Court provided, among other things, that the child was "to be exposed to the Catholic traditions and Muslim traditions." In an order dated August 31, 2005, the parties stipulated to the father having additional visitation time in 2005. Subsequently, the mother filed a petition, in effect, to modify the visitation provisions of the aforementioned orders and the father filed a petition to modify the custody order by awarding him custody of the child. During the pendency of those proceedings, the Family Court issued an order dated August 7, 2009, which modified the June 30, 2004, order made upon the parties' stipulation by directing that "either or both parents may enroll the child in religious instruction in their faith." When the parties appeared before the Family Court on March 15, 2010, for a continued hearing on the petitions, the father, through counsel, requested a temporary change in the visitation schedule to allow the child, in May 2010, to attend rehearsal for her first communion, the ceremony for her first communion at the father's Roman Catholic church, and any associated celebrations. Despite the mother's objection, in an order dated March 18, 2010, the Family Court granted the father's application. The Appellate Division dismissed the mothers appeal as academic. It observed that it is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal (Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707, 713). In general an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment. Contrary to the opinion of the dissent, the rights of the parties would not be directly affected by a determination of this appeal because the events associated with the temporary modification of the father's visitation schedule had already occurred, as conceded by the mother in her brief. Accordingly, the appeal was moot and could not properly be decided by the Court unless the exception to the mootness doctrine applied. The exception to the mootness doctrine occurs where the controversy or issue involved is "likely to recur, typically evades review, and raises a substantial and novel question" (Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 811). Here, no exception to the mootness doctrine was argued or present, and the courts are prohibited from rendering purely advisory opinions absent an exception to the mootness doctrine. Justice Hall dissented and voted to decide the appeal on the merits.

Liability for the Payment of Marital Debt May Be Distributed in Accordance with the Equitable Distribution Factors

In DiFiore v DiFiore,--- N.Y.S.2d ----, 2011 WL 4090241 (N.Y.A.D. 2 Dept.) the Appellate Division observed that the Supreme Court has broad discretion in allocating marital debt. In addition, "liability for the payment of marital debt[ ] need not be equally apportioned but may be distributed in accordance with the [equitable distribution] factors set forth in Domestic Relations Law 236(B)(5)(d)" (Lewis v. Lewis, 6 AD3d 837, 839-840). It agreed with the husband's contention that the remaining balance of a loan from his father to the parties toward the purchase of an apartment building should be repaid out of the wife's share of the proceeds of the sale of the apartment building in the principal amount of $48,388.99, plus 5% monthly interest from April 1, 2008, to the date of payment. Pursuant to the pendente lite order dated April 2, 2004, the wife was to receive the rental income from the apartment building, and pay the loan from these proceeds. She failed to do so. The prior decision and order of the Court dated June 7, 2011 (DiFiore v DiFiore, 85 AD3d 714), was recalled and vacated.

Dismissal of Counterclaims for Partition and Recoupment Warranted Pursuant to CPLR 3211(a)(4) Because There Was Already an Action Pending Between the Parties That Sought, in Essence, the Same Relief.

In L.L. v B.H.,--- N.Y.S.2d ----, 2011 WL 4007741 (N.Y.Sup.) the parties and their son resided together at XXX Ascan Road, Franklin Square, New York. The residence was purchased for $178,000.00 on November 13, 1991, thirty (30) days prior to the parties marriage. Title was in the names of the husband and wife, as joint tenants with rights of survivorship. There appeared to be no mortgages on the residence. The wife moved to dismiss the husbands counterclaims for partition and recoupment. In support of the motion, counsel for the wife alleged, among other things, that because disposition of the marital residence was an issue to be decided in the matrimonial action as part of equitable distribution, actions for partition and recoupment were improper as they sought to divest the court of its right to determine equitable distribution of the assets and obligations of the parties and exclusive occupancy of said residence. Counsel for the wife argued that this matrimonial action is regulated by Domestic Relations Law (DRL) 236(B)(5), and not Real Property Actions and Proceedings Law (RPAPL) 901 which permits partition, and that partition and recoupment are not cognizable legal theories in the context of a division of property between divorcing parties. In opposition to the motion, counsel for the husband alleged, among other thing, that the counterclaims for partition and recoupment stated legally cognizable causes of action and that the existence of a matrimonial action did not bar the husband from commencing an action for partition and recoupment.

Justice Falanga framed the issue presented as whether the husband was barred from bringing counterclaims for partition and recoupment when a matrimonial action has been commenced, in which equitable distribution of the marital residence is being sought as well as possible exclusive occupancy of same and a division of all other assets and obligations of the parties. He observed that in the case at bar, the parties acquired title to the property before they were married, as joint tenants with rights of survivorship, and their marriage did not transform the joint tenancy into one by the entirety, which could be created only by a conveyance to a husband and a wife. As such, the marital residence was not "marital property" subject to equitable distribution, as the residence constituted separate property of each of the parties acquired prior to the marriage. In Novak v Novak, 135 Misc.2d 909, 516 N.Y.S.2d 878 [Sup. Dutchess Co.1987] ) the court was faced with the same issue. The Novaks acquired a home as joint tenants ten (10) days before their marriage but they cohabited for only 2 ½ months before the action for divorce was commenced. The court there rejected the wife's argument that the joint tenancy created an undivided one-half interest in each party and that said interests were not subject to equitable distribution. The court found that the property was not subject to equitable distribution because it was acquired prior to the marriage and because there could be little or no passive appreciation due to the briefness of the marriage, The Novak court allowed a claim for partition to stand because substantial improvements had been made to the residence and the equities of the parties had changed with the contributions that each had made to the improvements. The Novak court found that, within the partition action, it was authorized to adjust all the equities arising out of the parties' relationship with respect to the property to be divided and, found that partition gave the court more flexibility to do equity than DRL 236 (B), given the unique circumstances of that case. In contrast, in the case at bar, the parties had been married and had resided in the subject residence for nearly twenty (20) years and raised their son there since he was born. Case law interpretation of DRL 236(B) had evolved since Novak to take into account the appreciation of separate property from the active contributions of the parties to the marriage, as spouse, parent, wage earner or homemaker.

It was the court's view that, in a matrimonial action, Domestic Relations Law 234 gives to the court broad authority to determine issues that arise between the parties with respect to title and possession of property and, when read in conjunction with DRL 236(B), which authorizes the court to distribute marital and separate property and to adjust debits and credits between the parties as equity would find just and proper given the circumstances of the case, each of the parties have sufficient remedies in the instant matrimonial action so that references to separate causes of action for partition and recoupment were duplicative and unwarranted. Neither party would receive any lesser or greater relief from a separate cause of action for partition or recoupment, when all of the relief that may be had in said actions were within the power of the court in the existing statutory scheme (cf., Chen v. Fischer, 6 N.Y.3d 94, 810 N.Y.S.2d 96, 843 N.E.2d 723 [C.A.2005]; Boronow v. Boronow, 71 N.Y.2d 284, 525 N.Y.S.2d 179, 519 N.E.2d 1375 [C.A.1988] ). The matrimonial forum is a convenient forum for transactions between these parties relating to pre-marital and post-marital property claims and form a convenient trial unit for the purposes of this litigation. (see, Chen v. Fischer, supra.) The court was unconvinced that the husband could obtain any relief in a partition or recoupment action that was different from what the court does in every case involving the equitable disposition and possession of property, some of which may be separate, and the distribution of assets and debts. It was the court's view that dismissal of the counterclaims was warranted, pursuant to CPLR 3211(a)(4), because there was already an action pending between the parties that sought, in essence, the same relief. The court found as a matter of law, that the partition and recoupment action were unwarranted and that the rights and remedies of the parties could be decided and granted in the matrimonial action. (cf. Boronow v. Boronow, supra.) As partition is an equitable remedy, a 50/50 split of the equity in the residence was not mandated, for the court may partition the property unevenly, in accordance with the contributions of the parties. That is the same exact remedy that is available in the matrimonial action and the court found that the issues raised in the counterclaims were subsumed into the matrimonial action where the court is given statutory powers to do equity. The court found the previous lower court cases holding to the contrary to be unpersuasive under the facts of this case. It was the court's view that, even when a property is acquired prior to the marriage and title is in both names of the parties, the matrimonial court has jurisdiction and authority to prevent unjust enrichment to either party. The wife's motion for an order dismissing the husband's counterclaims for partition and recoupment was granted and the counterclaims were dismissed.

First Department Emphasizes Policy of Broad Pretrial Disclosure Regarding Corporate Interests

In Jaffe v Jaffe, --- N.Y.S.2d ----, 2011 WL 4089440 (N.Y.A.D. 1 Dept.) defendant served 37 nonparty subpoenas on the business office maintained by plaintiff's father. Each subpoena was addressed to a different entity closely held by, or affiliated with, plaintiff's family, which had many real estate holdings. Plaintiff acknowledged that, before the marriage, she had minority interests in many of the entities and that during the marriage she transferred the interests in those companies to a single holding company in exchange for a 25% interest in the holding company. Unlike two of her siblings, plaintiff was given no current or future managerial authority in the holding company. Defendant also addressed subpoenas to SC Management, the company that managed the real estate holdings of the various LLC's. Plaintiff claimed to have no interest in SC Management or six other entities that received subpoenas. In addition to the entities affiliated with plaintiff's family, defendant served a subpoena on Bank of New York Mellon, seeking documents related to accounts maintained there by all of the entities in which plaintiff held an interest, as well as SC Management and the six other entities in which plaintiff denied having any interest. The subpoenas addressed to the entities in which plaintiff had transferred her interest to the holding company differed from each other in some respects, but they uniformly sought financial statements; tax returns; detailed fixed asset registers and depreciation schedules for all assets held; building permits filed between 1996 and 2000; rent rolls identifying all tenants, their apartment numbers, their leases, the square footage of their apartment, and a calculation of their rent per square foot; documents reflecting "in kind" payments or barter transactions with any entity owned by the Hakim Organization, or with any employee, partner or shareholder of such entity; board meeting or other entity meeting minutes; business plans and projections; 1099's with copies of cancelled checks; ownership, operating, management, or subscription agreements; agreements of understanding signed by plaintiff; ownership schedules and stock transfer ledgers, including copies of front and back of all shares issued; copies of credit applications made to a bank or to other creditors; and outside accountants' working paper files and business evaluations or real estate appraisals conducted during the marriage.

Plaintiff moved to quash the subpoenas. She argued that the subpoenas were duplicative of discovery demands defendant had served on her directly (to which she also objected), and that they were intended solely to harass her parents. Plaintiff asserted, the subpoenas were served on the eve of Rosh Hashanah and immediately after defendant threatened to establish that plaintiff's parents were tax evaders. She further contended that, to the extent she had interests in the entities to which the subpoenas were addressed, it was separate property and had no bearing on the distribution of the parties' marital assets. She claimed to have no active role in the companies that would have caused any appreciation in their value to become marital property. In opposition to the motion, defendant argued that the documents and information sought by the subpoenas were necessary to determine whether a portion of plaintiff's family assets is marital property and because the documents bear on maintenance and child support. Pointing to documents he had already discovered during the litigation, defendant submitted that "[m]onies flow[ed] freely" among the subpoenaed entities and that plaintiff was active in the management and development of her family's real estate holdings. Defendant further asserted that the subpoenaed entities regularly made loans to various management companies controlled by the family, particularly SC Management, and used the management companies to pay for family members' personal expenses. Defendant stated that the discovery he sought was relevant to the issue whether plaintiff's actions caused appreciation to the separate property which should then be included in the marital estate. He also argued that, even if plaintiff's interests in the entities were non-marital, they were still relevant under Domestic Relations Law s 236(5)(d)(9), which requires the court, in determining equitable distribution, to consider "the probable future financial circumstances of each party ." The court granted the motion in part and denied it in part. It held that nonparty discovery was appropriate as to those entities in which plaintiff conceded having interest. However, it quashed the subpoenas for all companies in which plaintiff claimed to have no ownership interest, except for SC Management. The court found that there was evidence, such as checks payable to plaintiff, that "raise[d] the possibility" that plaintiff received compensation for work she performed for that company. The court did not expressly address the subpoena served on Bank of New York.

The Appellate Division observed that in a divorce action, "[b]road pretrial disclosure which enables both spouses to obtain necessary information regarding the value and nature of the marital assets is critical if the trial court is to properly distribute the marital assets" (Kaye v. Kaye, 102 A.D.2d 682, 686 [1984] ). In Kaye, the court denied the husband's motion for a protective order preventing discovery into four closely held family corporations in which he held minority interests, observing, "[I]t has been held that both parties in a matrimonial action governed by the Equitable Distribution Law are now entitled to: a searching exploration of each other's assets and dealings at the time of and during the marriage, so as to delineate the extent of marital property, distinguish it from separate property, uncover hidden assets of marital property, discover possible waste of marital property, and in general gain any information which may bear on the issue of equitable distribution, as well as maintenance and child support. The entire financial history of the marriage must be open for inspection by both parties". Pursuant to this rule of liberal discovery in matrimonial litigation, defendant was entitled to records of the entities in which plaintiff had an interest, so that he may determine whether her interests have a bearing on the distribution of the marital estate as well as support obligations. However, it found that find that defendant had failed to establish that plaintiff had any interest in SC management, so the subpoena served on that entity should have been quashed. Further, to the extent the subpoena served on Bank of New York Mellon sought records related to El-Kam Realty, Aval Company, Old Salem Farm Acquisition Corporation and Affiliates, Enterprise Products Partners, LP Nantucket Campfire, LLC, and Bedford Entities, the bank need not comply. Defendant also failed to demonstrate any affiliation between plaintiff and those entities. The bank was required, however, to divulge information related to the companies in which plaintiff had conceded having an interest. While the entities were not immune from discovery in this action, the Appellate Division held that the subpoenas were overbroad in many respects. For example, the subpoenas included a demand to provide the names and addresses of all commercial and residential tenants, with copies of every lease, and all building permits filed for any building, including construction and renovations for every building plaintiff's family owned, over a 15-year period of time. This information appeared to be of dubious relevance. Accordingly, it remitted the matter and held that the motion court must reconsider plaintiff's motion to determine whether the particular demands annexed to the subpoenas were sufficiently tailored to the financial issues in the action, and whether it would be unduly burdensome for the entities to respond.

September 16, 2011

CPLR Amendments of Interest to Matrimonial Attorneys

Laws of 2011, Ch 473 , §1, amended CPLR 306-b, effective January 1, 2012, to provide that service be made within 120 days "after commencement of the action or proceeding." CPLR 306-b formerly required service of the summons and complaint, summons with notice, third-party summons and complaint, petition with notice of petition or order to show cause within 120 days after filing, with appropriate modifications where the statute of limitations is four months or less.

CPLR 306-b now provides:

§ 306-b. Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause. Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding, provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

Laws of 2011, Ch 473 , §2, amended CPLR 2101(f), effective January 1, 2012, to increase the time for raising objections to defects in form of a paper. The time in which an objection to a defect in form must be raised has been two days from receipt of the paper objected to. The period of time was amended from "two" to "fifteen" days.

CPLR 2101(f) now provides:

(f) Defects in form; waiver. A defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given. The party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within fifteen days after the receipt thereof, the party on whom the paper is served returns the paper to the party serving it with a statement of particular objections.

Laws of 2011, Ch 473 , §3, amended CPLR 3025(b), effective January 1, 2012 , to require a party moving to amend its pleadings to attach a copy of the proposed amended pleading to its motion to amend that pleading, clearly showing the proposed changes to the pleading.

CPLR 3025(b) now provides:

(b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

Laws of 2011, Ch 473 , §4, amended CPLR 3217(a)(1), effective January 1, 2012, to extend the time period in which, at the outset of a case, a voluntary discontinuance may be obtained without need for a court order or a stipulation of settlement. Formerly, a party alleging a cause of action in a complaint, counterclaim, cross-claim, or petition could only unilaterally discontinue it without court order or stipulation by serving and filing the requisite notice on all parties "at any time before a responsive pleading is served or within twenty days after service of the pleading asserting the claim, whichever is earlier..."CPLR 3217(a)(1). CPLR 3217(a)(1) was amended to permit a voluntary discontinuance without court order or stipulation before the responsive pleading is served or within 20 days after service of the pleading of the claim, whichever is later.

CPLR 3217(a)(1) now provides:

1. by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the leading asserting the claim and filing the notice with proof of service with the clerk of the court; or

September 1, 2011

Domestic Relations Law § 240 (1-b) subdivisions (d) (g) and (i) and Family Court Act § 413 (1) subdivisions (d) (g) and (i) amended by Laws of 2011, Ch 436, effective October 18, 2011

In Rose v Moody, 83 NY2d 65 (1993) the Court of Appeals held Domestic Relations Law § 240 (1-b) and Family Court Act § 413 (1) unconstitutional insofar as they imposed an inflexible minimum child support obligation against support obligors whose income would, by virtue of the obligation, fall below the poverty level. The Court of Appeals held that that the irrebuttable presumption mandating that an indigent, non-custodial parent be ordered to pay a minimum of $25 per month in child support contravened the Federal Child Support Enforcement Act Social Security Act, Title IV-D §467(b)(2), as amended, 42 USCA §667(b)(2), thus violating the constitutional principle of Federal preemption. While the effect of the Court's ruling has been to require that support obligors be permitted to rebut the presumption in favor of a minimum obligation of $25 per month, the statutory language had not been conformed accordingly. Additionally, in cases where the basic child support obligation would reduce the non-custodial parent's income to a level below the self-support reserve, but not below the poverty level, both subdivisions provide alternative standards for determining child support, that is, the greater of $50 per month or the difference between the non-custodial parents' income and the self-support reserve. However, both statutes are silent regarding whether separate amounts may also be ordered in such cases for child care, future medical and educational expenses, in accordance with subparagraphs four, five, six and seven of paragraph (c) of both subdivision one of section 413 of the Family Court Act and subdivision (1-b) of section 240 of the Domestic Relations Law. Several cases have, therefore, disallowed the inclusion of any of these expenses as part of the child support order in such circumstances. See Callen v Callen, 287 AD2d 818 ( 3rd Dept 2001); In Re Rhianna R., 256 AD2d 1184 (4th Dept 1998) (citing Matter of Cary)(Mahady) v Megrell, 219 AD2d 334 (3rd Dept 1996), Iv App Dismissed, 88 NY2d 1065 1996); Dunbar v. Dunbar, 233 AD2d 922 ( 4th Dept 1996.) (See NY Legis Memo 436 (2011).

Domestic Relations Law § 240 (1-b) and Family Court Act § 413 (1) were amended by Laws of 2011, Ch 436 to correct these anomalies and to codify the decision in Rose v Moody.

The amendments make the presumption in favor of a minimum order of $25 per month rebuttable by a showing that such an order would be unjust or inappropriate, based upon the ten factors applicable to departures from the child support standards set forth in Domestic Relations Law §240(1-b)(f); Family Court Act 413(1)(f). Family Court and Supreme Court are authorized to order payment of an amount it deems to be just and appropriate. The amendment eliminates the proviso that " in no instance shall the court order child support below $25 per month." The amendment also clarifies that in cases where imposition of the basic child support obligation would reduce the non-custodial parent's income to an amount below the self-support reserve, but not the poverty level, the Court would be authorized, although not required, to direct payments for child care, educational and health care expenses, as part of its child support order.

Domestic Relations Law § 240 (1-b), subdivisions (d) (g) and (i) were amended accordingly. In addition, subdivision (i) was amended to make technical corrections , including deleting “social services” and replacing it with “the office of temporary and disability assistance”.

Domestic Relations Law § 240 (1-b), paragraphs (d), (g) and (i) were amended to read as follows:

(d) Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be twenty-five dollars per month, provided, however, that if the court finds that such basic child support obligation is unjust or inappropriate, which finding shall be based upon considerations of the factors set forth in paragraph (f) of this subdivision, the court shall order the non-custodial parent to pay such amount of the child support as the court finds just and appropriate. Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the self-support reserve but not below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be fifty dollars per month or the difference between the non-custodial parent's income and the self-support reserve, whichever is greater, in addition to any amounts that the court may, in its discretion, order in accordance with subparagraphs four, five, six and/or seven of paragraph (c) of this subdivision.

(g) Where the court finds that the non-custodial parent's pro rata share of the basic child support obligation is unjust or inappropriate, the court shall order the non-custodial parent to pay such amount of child support as the court finds just and appropriate, and the court shall set forth, in a written order, the factors it considered; the amount of each party's pro rata share of the basic child support obligation; and the reasons that the court did not order the basic child support obligation. Such written order may not be waived by either party or counsel; provided, however, and notwithstanding any other provision of law, the court shall not find that the non-custodial parent's pro rata share of such obligation is unjust or inappropriate on the basis that such share exceeds the portion of a public assistance grant which is attributable to a child or children. Where the non-custodial parent's income is less than or equal to the poverty income guidelines amount for a single person as reported by the federal department of health and human services, unpaid child support arrears in excess of five hundred dollars shall not accrue.

(i) Where either or both parties are unrepresented, the court shall not enter an order or judgment other than a temporary order pursuant to section two hundred thirty-seven of this article, that includes a provision for child support unless the unrepresented party or parties have received a copy of the child support standards chart promulgated by the commissioner of the office of temporary and disability assistance pursuant to subdivision two of section one hundred eleven-i of the social services law. Where either party is in receipt of child support enforcement services through the local social services district, the local social services district child support enforcement unit shall advise such party of the amount derived from application of the child support percentage and that such amount serves as a starting point for the determination of the child support award, and shall provide such party with a copy of the child support standards chart. (Laws of 2011, Ch 436, §1, effective October 18, 2011)

Almost identical amendments were made to Family Court Act , § 413 (1), paragraphs (d), (g) and (i). (Laws of 2011, Ch 436, §2, effective October 18, 2011)

Second Department Holds That Counsel Fees May Be Requested under FCA 438 (a) At Any Time until the Appellate Process Has Concluded

In Talty v Talty--- N.Y.S.2d ----, 2011 WL 3715407 (N.Y.A.D. 2 Dept.), a support proceeding, the Appellate Division, Second Department reversed an order of the Family Court which had vacated a counsel fee award of $11,893.04 and reinstated the award. It observed that Family Court Act § 438(a) provides: "[i]n any proceeding under this article, including proceedings for support of a spouse and children, or for support of children only, or at any hearing to modify or enforce an order entered in that proceeding or a proceeding to modify a decree of divorce, separation, or annulment, including an appeal under article eleven, the court may allow counsel fees at any stage of the proceeding, to the attorney representing the spouse, former spouse or person on behalf of children." It construed the language "[i]n any proceeding under this article" to include "an appeal under article eleven" , and held that the plain meaning of the statute supports the interpretation that a request for an attorney's fee can be made "at any stage of the proceeding," which includes "an appeal under article eleven". In this context, therefore, the "proceeding" does not conclude until the appellate process has concluded. The proceeding is terminated when an appeal has concluded and no more appellate relief is available, or when the time to file an appeal has expired. Applying this interpretation of the statute to the facts of this case, it held that the mother's motion for an award of an additional attorney's fee was timely, as the appellate process had not yet concluded at the time the motion was made. It further held that to the extent that any of its decisions suggested otherwise (citing Matter of McGrath v. Parker, 41 AD3d 852; Matter of Cassieri v. Cassieri, 31 A.D.2d 927, 298 N.Y.S.2d 844), they are no longer to be followed.

“Extraordinary Circumstances Analysis” must Consider "The Cumulative Effect" of All Issues Present in a Given Case and Not View Each Factor in Isolation. Custody Awarded to Non-biological Relative of Child Rather than Father

In Matter of Pettaway v Savage, --- N.Y.S.2d ----, 2011 WL 3611215 (N.Y.A.D. 3 Dept.), Eric Pettaway was the father of a daughter (born in 1997). In 2003, he and the child's mother, Denise Knight, now deceased, stipulated to joint legal custody of the child with primary physical custody to the mother and visitation to the father. The child resided with the mother and the child's two half siblings until the mother's death in June 2009, at which time the father commenced proceeding No. 1, seeking custody. In response, the attorney for the child moved by order to show cause for an award of sole legal and physical custody to William Savage II, also known as Eric Savage. Savage was not a biological relative of the child; he was the father of the child's older half sister and had fostered a close relationship with the child over the course of several years. Savage then commenced proceeding No. 2, also seeking custody of the child. Family Court found the existence of extraordinary circumstances sufficient to permit the court to intervene in the father's relationship with the child and then, further, that the child's best interests would be served by an award of sole custody to Savage. The father, was granted visitation on alternate weekends and such additional periods of time as the parties and the child may agree. The Appellate Division affirmed. It noted that extraordinary circumstances may not be established "merely by showing that the child has bonded psychologically with the nonparent". The extraordinary circumstances analysis must consider "the cumulative effect" of all issues present in a given case and not view each factor in isolation. In prior cases, extraordinary circumstances have been established based upon the combined effect of factors, including the child's psychological bonding and attachments, the prior disruption of the parent's custody, separation from siblings and potential harm to the child, as well as the parent's neglect or abdication of responsibilities and the child's poor relationship with the parent (see Matter of Banks v. Banks, 285 A.D.2d 686, 687 [2001] ). In Matter of Banks v. Bank, a case in which there were a number of significant similarities to this one, the children--at the time of their father's death--had already developed a bond with his second wife after living with the couple for approximately 30 months. The Appellate Division reversed Family Court's award of custody to the biological mother, citing as extraordinary circumstances the death of the father, the "poor relationship" between the children and the mother, bereavement needs and other special issues affecting one of the children and the mother's recent "withdrawal as a parent". Each and all of those factors were present here; as in Banks, one of the child's parents was deceased, the child had formed a strong psychological bond with a nonparent, the child had special needs in addition to psychological needs resulting from bereavement, and the parent seeking custody withdrew almost completely from the parental role for an extended period before the other parent's death. Here, Family Court found that, prior to the mother's death, the father failed to play any significant role in the child's life, visited inconsistently throughout the child's life, and failed to attend to the child's emotional needs. The court credited a psychologist's testimony and opinion that the father had emotionally abandoned the child by his neglect of her and had demonstrated a fundamental lack of understanding of her needs. These findings were fully supported by the record. Family Court's conclusion that the father abdicated his parental responsibilities was supported by the testimony of several witnesses that the father frequently missed scheduled visits with the child and often left the child with other adults even when he did pick her up for visits, and by undisputed testimony that the father did not attend the child's school conferences or special education meetings until after the mother's death, did not know her teachers' names and never helped her with homework, although he testified that he knew she needed special assistance. Even while this matter was pending, the father failed to appear for a scheduled meeting with the child's teacher and guidance counselor, for reasons unexplained. Testimony further revealed that the father had failed to provide for the child's basic needs during her time with him--he had not provided her with enough food during past visits, nor did he supply her with essentials such as soap or deodorant. When the child sustained an injury while performing physical work for the father's brother, neither the father nor his brother furnished appropriate medical care. There was further disturbing testimony--which Family Court found to be credible--that the father knew that his brother had "badgered" the child about her desire to live with Savage, and that the brother had threatened the child that his conduct should not be mentioned in court; despite this knowledge, the father did not intervene or seek to protect the child. Family Court also found that the period in which the father had custody of the child after the mother's death "did not go well," noting that during this vulnerable period, the child felt isolated from her other family contacts and had limited interaction with them--at a time when any responsible parent or caretaker should have readily recognized that such support was essential. The court had ample basis for doubting the father's testimony that he would not relocate with the child to New Jersey, where his new wife resided and owned a growing travel business, finding it instead "extremely unlikely" that the father would foster the close relationship between the child and her sister and "the others [who] have become her true family." The court further found that the father lacked credibility regarding his previous conviction for attempted rape in the third degree of a person under 17, and his failure to complete sex offender treatment thereafter.

Error to Allow Wife to Benefit from Her Failure to Comply with Discovery

In Cabral v Cabral, --- N.Y.S.2d ----, 2011 WL 3600503 (N.Y.A.D. 2 Dept.) the parties were married on January 24, 1980, and had three children, born in 1980, 1982, and 1989. During the marriage, the parties purchased the marital residence in Westchester County, as well as a vacation residence in the Dominican Republic. Beginning in 1983, the defendant was employed by Westchester County, in which position she received a salary and accrued pension benefits. In 1986, the plaintiff obtained an insurance license and opened an agency selling insurance policies and providing financial and other services. The plaintiff was incarcerated from 1991 to 1994 upon his conviction of felony drug charges, and his insurance license was revoked. The plaintiff testified at trial that prior to his incarceration, he liquidated a retirement benefit and used the proceeds to provide a source of income to the defendant and the parties' children. The defendant continued operation of the agency during the plaintiff's incarceration, and during that time federal tax liens were levied against the agency. The plaintiff also testified that after he was released from prison, the defendant refused to allow him to return to work at the agency in any capacity. Thereafter, the plaintiff did obtain full-time employment, albeit at an annual salary which was significantly less than what he earned as an insurance broker. In 2001, the plaintiff commenced this action for a divorce. Due to the defendant's failure to comply with pretrial discovery orders, she was precluded from offering evidence at trial on the issue of equitable distribution. Supreme Court equitably distributed marital property and awarded child support, and the wife appealed. The Appellate Division, 35 A.D.3d 779, 826 N.Y.S.2d 443, reversed and remitted. On remittal, the Supreme Court awarded child support arrears, awarded the husband no share of the wife's pension, directed that he be solely responsible for the federal tax lien assessed on parties' business, and directed him to pay child support. The husband appealed and the Appellate Division reversed insofar as appealed from and remitted. It held that Supreme Court erred in failing to include the defendant's income from the insurance agency in calculating her income or assets, thereby allowing her to benefit from her failure to comply with discovery and shielding her insofar as the income related to equitable distribution. The defendant's income was also improperly omitted in the calculation of child support and in the apportionment of the debt incurred by the parties' insurance agency. It found that Supreme Court should have included the defendant's pension benefits which accrued prior to the commencement date of the action in the equitable distribution of marital property. Finally, under the particular circumstances of this case, and in the absence of any evidence demonstrating that the plaintiff had the ability to earn a salary approaching his previous income, the Supreme Court improperly imputed annual income to him of $85,000 as part of its calculation of child support.

Inquest on Papers to Determine the Amount of Restitution Is Permitted Pursuant to Family Court Act 841(e)

In Polanco v Dilone,--- N.Y.S.2d ----, 2011 WL 3557068 (N.Y.Fam.Ct.) Petitioner moved for summary judgment on her petition for an order of protection based on Mr. Dilone's guilty plea in Bronx Criminal Court to assault in the 3rd degree. On December 2, 2010, the court granted the motion, and issued findings of fact and a 5 year order of protection. The court also directed an inquest on papers to determine the amount of restitution. It observed that pursuant to Family Court Act 841(e), restitution is an available remedy in this case. Petitioner submitted an affidavit, dated December 15, 2010, delineating her expenses: Travel by Subway to prosecute this case: $78.50 Destroyed toys, bottle of perfume and bouquet of flowers: $100 Certificate of disposition: $10. There was no evidence that respondent was ordered to pay restitution in the criminal action and thus this order was not duplicative. Respondent failed to file opposition which was due by January 21, 2011. The Family Court observed that under FCA 834, the standard of proof at a dispostional hearing is material and relevant. Petitioner submitted a receipt for the certificate of disposition which established the $10 expense. Petitioner's travel expenses were also sufficiently documented in that her appearances in court were in the court's file and would necessitate trips to meet with her attorney, the detective and District Attorney. Further, petitioner testified to injuries for which medical treatment was documented and thus those travel expenses were supported by the record as well. However, petitioner did not allege in the petition that she suffered property damage. Since petitioner moved for summary judgment based on the criminal proceedings, there was no testimony here about property damage. The criminal disposition was silent as to property damage as well. In addition, there was no documentary evidence for the $100 for destroyed property. Admittedly, $100 was an estimate for items of sentimental value. While the court is authorized to award nominal damages, it cannot award sentimental value. Furlan v. Rayan Phot Works, Inc., 171 Misc. 839 (Mun Ct, Queens County 1939). The court accepted petitioner's credible testimony that the intrinsic value of the toys, perfume, and flowers was $100. Victoria C v. Higinio C., 1 AD3d 173 (1st Dept 2003). However, petitioner was required to first plead and prove property damage before any damages could be awarded. Therefore, petitioner had established damages in the amount of $88.50. The court granted the petition for restitution and directed that petitioner shall have judgment for $88.50 with interest from September 24, 2009. The clerk was directed to enter judgment accordingly.

August 18, 2011

Third Department Holds That While Plaintiff Lacked a Remedy at Law, the Dissolution of a Civil Union Falls Squarely Within the Scope of Supreme Court's Broad Equity Jurisdiction

In Dickerson v Thompson, --- N.Y.S.2d ----, 2011 WL 2899241 (N.Y.A.D. 3 Dept.) Plaintiff and defendant, residents of New York, entered into a civil union in Vermont in April 2003. In November 2007, plaintiff, unable to obtain a dissolution of the civil union in Vermont due to that state's residency requirements commenced an action for equitable and declaratory relief seeking a judgment dissolving the civil union and freeing her of all the rights and responsibilities incident to that union. Upon defendant's default, plaintiff moved for a judgment granting the requested relief. Supreme Court, sua sponte, dismissed the complaint for lack of subject matter jurisdiction. On appeal, the Appellate Division reversed and reinstated the complaint (73 A.D.3d 52 [2010] [ Dickerson I ] ), holding that the courts of this state may recognize the civil union status of the parties as a matter of comity and that Supreme Court is vested with subject matter jurisdiction to adjudicate the dispute. It did not, however, reach the issue as to what relief, if any, could ultimately be afforded to the parties on the merits. Upon remittal, Supreme Court granted plaintiff's motion seeking a declaration relieving the parties from all rights and obligations arising from the civil union, but denied that portion of the motion seeking a dissolution of the union. The Appellate Division modified, disagreeing with Supreme Court's conclusion that, in the absence of any legislatively created mechanism in New York by which a court could grant the dissolution of a civil union entered into in another state, it was powerless to grant the requested relief. It held that while plaintiff lacked a remedy at law, the dissolution of a civil union falls squarely within the scope of Supreme Court's broad equity jurisdiction. As it noted in Dickerson I, the N.Y. Constitution vests Supreme Court with "general original jurisdiction in law and equity" (N.Y. Const, art VI, s 7[a] ). " 'The power of equity is as broad as equity and justice require' ". Indeed, "[t]he essence of equity jurisdiction has been the power ... to [mold] each decree to the necessities of the particular case" (State of New York v. Barone, 74 N.Y.2d 332, 336 [1989]. Thus, once a court of equity has obtained jurisdiction over the subject matter of the action, as Supreme Court had here, it has the power to dispose of all matters at issue and to grant complete relief in accordance with the equities of the case. In other words, even in the absence of any direct grant of legislative power, Supreme Court has the "inherent authority ... to fashion whatever remedies are required for the resolution of justiciable disputes and the protection of the rights of citizens," tempered only by our Constitution and statutes. It found that the exercise of Supreme Court's equitable powers to grant a dissolution of the civil union was clearly warranted here. Plaintiff was in need of a judicial remedy to dissolve her legal relationship with defendant created by the laws of Vermont. Residency requirements prevent her from obtaining a dissolution of the civil union in Vermont, and the provisions of Domestic Relations Law 170, which provide for divorce and dissolution of a marriage, were not applicable to this action since the parties did not enter into a marriage in Vermont. Thus, absent Supreme Court's invocation of its equitable power to dissolve the civil union, there would be no court competent to provide plaintiff the requested relief and she would therefore be left without a remedy. A court of equity "withholds its remedies if the result would be unjust, but freely grants them to prevent injustice when the other courts are helpless". Here, the uncontested evidence submitted by plaintiff established that, during the course of the parties' relationship, defendant had subjected her to violent physical abuse on several occasions and was verbally abusive to both her and her autistic son on a daily basis. Defendant also stole from her, resulting in defendant's criminal conviction of grand larceny, and removed the license plates from plaintiff's vehicle to prevent her and her son from escaping defendant's abusive conduct. Furthermore, the parties had lived apart since April 2006 and plaintiff had alleged facts demonstrating that resumption of the civil union was not probable. Since plaintiff would be entitled to a dissolution of the civil union in Vermont but for that state's residency requirement (see Vt Stat Ann, tit 15, s 551[3], [7]; ss 592, 1206), the Court found that equity would be served by granting her the requested relief and that Supreme Court erred in declining to invoke its equitable powers to do so. Furthermore, notwithstanding Supreme Court's declaration freeing the parties from the rights and obligations flowing from the civil union, the fact remained that, in the absence of a judgment granting a dissolution, plaintiff and defendant continued to be interminably bound as partners to the union. Given this legal status, plaintiff was precluded from entering into another civil union or a marriage in Vermont as well as analogous relationships in several other jurisdictions. Supreme Court's denial of the requested dissolution also barred the parties from enjoying the more limited protections available to domestic partners under certain locals laws of this state, including New York City's Domestic Partnership Law, which forbids parties to a civil union from entering into a domestic partnership with another (see City of N.Y. Administrative Code s 3-241).

Costs of After-school Program and Summer Camp Qualify as Child Care Expenses.

In Matter of Scarduzio v Ryan, --- N.Y.S.2d ----, 2011 WL 2714203 (N.Y.A.D. 2 Dept.) the Appellate Division observed that the party seeking modification of a support order has the burden of establishing the existence of a substantial change in circumstances warranting the modification. A change in the expenses for the child may constitute such a change in circumstances . It was undisputed that the child care expenses had decreased significantly since the order of support had been issued, due to the child attending school full time. It held that the father should only be required to pay his share of the child care expenses actually incurred by the mother commencing January 7, 2010, the date that the father filed his petition for a downward modification of his child support obligation . It rejected the father's argument that the costs of the after-school program and summer camp in which the child was enrolled did not qualify as child care expenses. The father offered no evidence to refute the mother's contention that these programs provided care for the child while she was at work. Accordingly, those programs qualified as child care expenses consistent with the purpose of Family Court Act 413(1)(c)(4).

An Evidentiary Ruling, Even When Made in Advance of a Trial on Motion Papers, Is Not Appealable

In Matter of Lyons v Lyons, --- N.Y.S.2d ----, 2011 WL 2714210 (N.Y.A.D. 2 Dept.) The Appellate Division ruled that the appeal from so much of the order dated August 9, 2010, as denied the motion of Audrey Lyons to preclude the testimony of a court-appointed forensic evaluator at a hearing to be held on the issue of custody and to preclude the use of that evaluator's report at the hearing must be dismissed because it concerned an evidentiary ruling, which, even when made in advance of a hearing or trial on motion papers, is not appealable as of right or by permission.

Supreme Court Did Not Improvidently Exercise its Discretion In, Sua Sponte, Enjoining the Father from Bringing Any Further Motions in this Action Without the Permission of the Supreme Court.

In Scholar v Timinsky, --- N.Y.S.2d ----, 2011 WL 3505708 (N.Y.A.D. 2 Dept.) in the parties stipulation of settlement dated June 19, 2007, which was incorporated but not merged into the judgment of divorce entered June 10, 2008, the parties agreed that the mother would have sole custody of the parties' child, the parties would equally pay the education costs for their child from preschool through high school, the parties would have joint decision-making authority on all issues relating to their child's education, and if they could not agree, that the parties would arbitrate any such issues with a certain arbitrator. The Appellate Division held that Supreme Court properly determined that a change of circumstances existed so as to require a modification of the parties' stipulation of settlement to protect the best interests of the child. The resolution of a dispute regarding parental joint decision-making authority with respect to a child requires a determination of what is in the child's best interest, based on the totality of the circumstances. The Supreme Court possessed adequate relevant information which demonstrated that the parties were largely unable to cooperate on matters relating to their child's education. Therefore, an evidentiary hearing was unnecessary for the Supreme Court to determine that it was in the child's best interests, if the parties could not agree upon a parental coordinator, to award the mother sole decision-making authority over their child's education. Likewise, the Supreme Court properly disqualified, without a hearing, the individual whom the parties had previously selected to arbitrate issues relating to their child's education, in light of its decision to award the mother sole decision-making authority as to the child's education. Moreover, contrary to the father's contention, the attorney for the child did not overstep his authority in requesting that the father be directed to pay for his share of the child's preschool education costs. It held that the Supreme Court did not improvidently exercise its discretion in, sua sponte, enjoining the father from bringing any further motions in this action without the permission of the Supreme Court. While public policy generally mandates free access to the courts, the record reflected that the father forfeited that right by abusing the judicial process through vexatious litigation (see Vogelgesang v. Vogelgesang, 71 AD3d 1132, 1134).

Award of Interim Counsel Fees of $140,000 to the Nonmonied Spouse Was Warranted Where There Was a Significant Disparity in the Financial Circumstances of the Parties

In Palmeri v Palmeri, --- N.Y.S.2d ----, 2011 WL 3505748 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order of the Supreme Court which granted defendant temporary maintenance of $7,500 per month and interim counsel fees of $100,000, and an order which granted the defendant additional interim counsel fees of $40,000. It observed that an award of interim counsel fees is designed to create parity in divorce litigation by enabling the nonmonied spouse to litigate the action on equal footing with the monied spouse. Thus, "an award of interim counsel fees to the nonmonied spouse will generally be warranted where there is a significant disparity in the financial circumstances of the parties" (Princhep v. Princhep, 52 A.D.3d at 65. Here, the husband earned more than $3 million from his medical practice in 2008, and the resources available to him far exceeded those available to the wife, who was unemployed at the time she sought pendente lite relief. Under these circumstances, the Supreme Court providently exercised its discretion in awarding her interim counsel fees totaling $140,000. Furthermore, the husband had demonstrated no basis on which to modify the award of temporary maintenance to the wife. Modifications of pendente lite awards should rarely be made by an appellate court and then only under exigent circumstances, such as where a party is unable to meet his or her financial obligations, or justice otherwise requires. The husband had not established that the temporary maintenance obligation imposed upon him by the Supreme Court's pendente lite order would leave him unable to meet his own needs, or that other exigent circumstances warranting modification existed. Accordingly, it held that any perceived inequities in the pendente lite order can best be remedied by a speedy trial, at which the parties' financial circumstances can be throughly explored.

August 1, 2011

Antithetical to Grant Standing Due to Existence of No Contact Order.

In Matter of Thomas X, --- N.Y.S.2d ----, 2011 WL 2640258 (N.Y.A.D. 3 Dept.) the Appellate Division affirmed an order which dismissed Wayne RR.'s applications, in two proceedings for custody of the children. When the Broome County Department of Social Services alleged that respondent Megan X. (mother) had violated the terms of Family Court's order directing her to ensure that her children (born in 1997, 2002 and 2003) have no contact with her boyfriend, Wayne RR. (petitioner), who is a known sex offender, she surrendered her parental rights. The mother had previously admitted to allegations of neglect after allowing unsupervised and inappropriate contact between petitioner and the children. Thereupon, petitioner commenced two proceedings seeking custody of the children. Finding that petitioner lacked standing, Family Court dismissed his petitions without a hearing. Family Court also granted a one-year order of protection in favor of the children against petitioner and denied his subsequent motion to vacate that order. The Appellate Division held that inasmuch as petitioner has no biological relationship to the children, his standing to seek custody was determined under the common-law standard requiring the establishment of extraordinary factual circumstances (see Matter of Bennett v. Jeffreys, 40 N.Y.2d 543, 548 [1976]). While the mother's surrender, the absence of the biological fathers from the children's lives and the lack of any other suitable relative may normally be considered as extraordinary circumstances the Appellate Division agreed with Family Court that it would be antithetical here to grant standing in spite of the existence of the no contact order. The mother admitted neglect based, in part, on allowing petitioner, who had a history of exposing himself to children, to have unsupervised contact with the children, to sleep in the same bed with the male middle child and to shower and urinate in the toilet together with the oldest male child. Given the lack of any real factual dispute regarding petitioner's role in the circumstances leading to the mother's admission of neglect and the issuance of an order directing her to ensure that he have no contact with the children, it would not disturb Family Court's conclusion that he lacked standing to seek custody.

Motion to Dismiss Pursuant to CPLR 3211 May Be Directed Only Against a Cause of Action or a Defense, Not a Motion

In Matter of Burnham v Brenna, --- N.Y.S.2d ----, 2011 WL 2624043 (N.Y.A.D. 2 Dept.), the father moved to dismiss the mother's motion pursuant to CPLR 2221 to renew her prior motion and for an award of an attorney's fee. The Appellate Division held that Family Court properly denied the father's motion, because a motion to dismiss pursuant to CPLR 3211 may be directed only against a cause of action or a defense, not a motion (see CPLR 3211[a], [b] ). The proper response to the mother's motion would have been to submit opposition papers (see CPLR 2214[b] ).

It Is Error as a Matter of Law to Make an Order Respecting Custody, Even in a Pendente Lite Context, Based on Controverted Allegations Without a Full Hearing

In Matter of Swinson v Brewington, 84 A.D.3d 1251, 925 N.Y.S.2d 96 (2d Dept, 2011) petitioner father and the respondent mother were in a relationship from 2001 to 2004, but were never married. Their son David was born on May 10, 2002. From the time of his birth, David lived with his mother in Brooklyn while his father visited him at least four times a month. There was no court order concerning David's custody. In the Spring of 2006 the father moved to Tennessee. Beginning in 2007, David spent the summer with his father in Tennessee, and remained during the school year in Brooklyn with his mother. The father also traveled to Brooklyn to visit David during the Christmas holiday season in 2006, 2007, and 2008. At the end of the summer in August 2009, the father enrolled David in school in Tennessee, rather than return David to his mother in Brooklyn. He also filed a petition for custody. Shortly thereafter, the mother filed a cross petition for custody. When the parties initially appeared before the Family Court on September 8, 2009, the Family Court decided that David should remain in Tennessee so as not to disturb the status quo until the court received more information, since David had started school on August 10, 2009. Toward that end, the Family Court referred the matter to a judicial hearing officer for an evidentiary hearing. On October 26, 2009, the parties appeared before the Judicial Hearing Officer, at which time no testimony was taken or exhibits received, although the father indicated he was prepared to go forward. There was only oral argument on the issue of temporary custody. In support of his petition, the father annexed David's file from PS 329, David's former school in Brooklyn, which included his school records and his teachers' notes regarding various behavior issues and interactions with the mother. PS 329's file showed that for the 2008/2009 school year, David had excessive absences, was frequently tardy, and performed poorly. It also documented that from April to June 2009, David used profanity toward his teacher and classmates on numerous occasions, pushed his classmates, and punched himself. The teachers' notes also indicated that the mother was asked to leave the school grounds one morning when she began harassing another child about bothering David, and failed to attend an appointment with school personnel to discuss David's behavior. During this appearance, the attorney for the child stated, without submitting any evidence in support of her comments, that David was a special needs child and, as such, would not receive the services as provided for by PS 329 pursuant to his Individual Education Plan at his school in Tennessee. She acknowledged that David did not want to choose between his parents because he loved both of them, but it was her position that the mother should be issued a temporary order of custody. The father objected to the attorney for the child making a "report" and providing her own recommendation to the Judicial Hearing Officer. He disputed the statements made by the attorney for the child with respect to the sufficiency of David's school in Tennessee and sought to enter David's Tennessee school records into evidence. However, the Judicial Hearing Officer refused to admit the records or proceed with a hearing. In an order dated October 26, 2009, the Judicial Hearing Officer awarded temporary custody of David to the mother. The Appellate Division pointed out that as a general rule, while temporary custody may be properly fixed without a hearing where sufficient facts are shown by uncontroverted affidavits, it is error as a matter of law to make an order respecting custody, even in a pendente lite context, based on controverted allegations without having had the benefit of a full hearing. The Judicial Hearing Officer erred in relying on the report of the attorney for the child and refusing to take testimony and receive documentary evidence offered by the father to refute the report. While attorneys for the children, as advocates, may make their positions known to the court orally or in writing, presenting reports containing facts which are not part of the record or making ex parte submissions to the court are inappropriate practices (citing Weiglhofer v. Weiglhofer, 1 A.D.3d 786, 788, 766 N.Y.S.2d 727 n.). Here, the Judicial Hearing Officer erroneously allowed the attorney for the child to refer to matters that were not in evidence, and compounded its error by refusing to allow the father to proffer documentary evidence to contradict the assertions of the attorney for the child.

An Oral Directive Placed upon the Record and Transcribed into the Minutes of the Proceeding May Form the Basis for Contempt

In Matter of Lagano v Soule, --- N.Y.S.2d ----, 2011 WL 2637330 (N.Y.A.D. 3 Dept.), prior to adjourning the April 2006 hearing the Judge repeatedly advised respondent-grandmother that she was required to produce the child on May 2, 2006, and respondent, in turn, indicated that she understood the court's directive. When Soule failed to appear or produce the child as ordered, the court awarded the mother sole legal custody with visitation to the father. After eventually locating and regaining physical custody of her son, the mother commenced a violation proceeding. The Appellate Division found that the mother established a prima facie case of a willful violation as to Soule and, as such, Family Court erred in granting the motion to dismiss. There was no question that she had actual knowledge of the Judge’s oral directive. It held that "an oral 'order' or directive, issued in the contemnor's presence, placed upon the record and transcribed into the minutes of the proceeding, may be deemed a 'mandate' ... and, hence, may form the basis for contempt" (citing Matter of Betancourt v. Boughton, 204 A.D.2d 804, 808 [1994] ). It was clear from a review of the April 2006 transcript, of which Family Court took judicial notice, that Soule was repeatedly and unequivocally ordered by the Judge to produce the child at the May 2006 court appearance, which, despite her acknowledgment of this directive and her expressed understanding thereof, Soule thereafter failed to do. Further, Soule's defiance of this clear and lawful mandate, as well as her subsequent conduct in secreting the child's whereabouts for the ensuing three years, plainly prejudiced the mother's parental rights and, was sufficient to establish a willful violation of the April 2006 order. In a footnote the court observed that Family Court, without objection, took judicial notice of "all prior proceedings involving [the child at issue]. The mere fact that the court did so in the context of a separate Family Court proceeding involving the child was of no moment, as a court may take judicial notice of prior judicial proceedings though in a different court and involving different parties. Family Court also took judicial notice of Judge Connerton's May 2006 order.

Expert Opinion Based on Hearsay Not Admissible Where Proper Foundation Not Laid

In Matter of Anthony WW, --- N.Y.S.2d ----, 2011 WL 2637279 (N.Y.A.D. 3 Dept.) licensed psychologists who examined respondent, in their reports and in their trial testimony, made reference to statements about respondent attributed to other witnesses who did not testify at trial, none of which was admitted into evidence or was otherwise qualified for admission pursuant to a recognized exception to the rule against hearsay. Danger testified that, in forming his opinion, he relied on his interview with respondent, as well as the results of various psychological tests that he performed on him. Danger also reviewed records that petitioner had on file regarding respondent, including case, progress and supervision notes, all of which were compiled during a four-year period beginning in 2003, as well as documents describing mental health treatment that respondent received during this time period. While Danger did not testify that this evidence was commonly relied upon in his profession to perform such an evaluation, Family Court determined that it was proper for him to refer to it, because some of this evidence was contained in the trial testimony given by other witnesses or in records that had been properly admitted into evidence at trial. However, the court did acknowledge that some of the references in Danger's report should not have been admitted and, for that reason, directed that a section of his report, entitled "Review of Records," be stricken because it referred to evidence that had not been admitted at trial. Significantly, Danger was never asked what impact this redacted evidence had on his evaluation of respondent and what effect, if any, it had on his opinion regarding respondent's mental condition. Similar issues existed with Liotta's report and testimony, both of which were admitted into evidence at trial. When he was first retained to perform his evaluation, Liotta was provided with petitioner's complete file on respondent. Later, he was asked to return the file and then, pursuant to a court order, was provided with a limited record to review. Liotta was also directed to limit his review to the records provided and not base his evaluation on respondent's fitness as a parent on statements made by the mother about respondent or on any collateral interviews that he may have conducted with other individuals regarding respondent. However, it was clear from the content of his report, as well as his testimony at trial, that Liotta, in forming his final opinion regarding respondent's fitness as a parent, relied on observations of respondent made by his eldest son's mental health provider as well as on statements made by the mother about respondent. In addition, Liotta's interviews with respondent's caseworker and his current mental heath therapist were referenced in his report and obviously played a role in the opinion that he ultimately offered regarding respondent's mental illness and its impact on his ability to be a parent. Like Danger, Liotta was never asked if this evidence was normally relied on within his profession as appropriate for the performance of such an evaluation and, while some of it was redacted, including any reference to his interview with the mental health therapist, Liotta was never asked what impact this evidence had in formulating his final opinion as to respondent's fitness as a parent. As a result, a proper foundation was not laid for the admission of the testimony of either psychologist or their reports. In footnotes the court pointed out that a redacted version of respondent's records from 2005 through 2007 was admitted into evidence at the trial. It also noted that Danger's evaluation focused on respondent's ability to function and contained recommendations for treatment. It was not performed for the specific purpose of determining whether respondent had the ability to provide an acceptable level of care for his children and, for that reason alone, should not have been admitted into evidence (see Social Services Law 384-b).

Frye Hearing Not Necessary for Validation Testimony. Once a Scientific Procedure Has Been Proved Reliable, a Frye Inquiry Need Not Be Conducted

In Matter of Bethany F, 925 N.Y.S.2d 737 (4 Dept, 2011) respondent father appealed from an order that placed him under the supervision of petitioner based on a finding that he sexually abused his daughter. The Appellate Division affirmed holding that Family Court did not abuse its discretion in denying his motion for a Frye hearing with respect to the admissibility of validation testimony of a court-appointed mental health counselor. "Once a scientific procedure has been proved reliable, a Frye inquiry need not be conducted each time such evidence is offered and courts may take judicial notice of its reliability (People v. Hopkins, 46 A.D.3d 1449, 1450, 848 N.Y.S.2d 460]; see People v. LeGrand, 8 N.Y.3d 449, 458, 835 N.Y.S.2d 523, 867 N.E.2d 374). Here, the court-appointed counselor utilized the Sgroi method to interview the child and make a determination with respect to the veracity of her allegations. The Court of Appeals has cited to Dr. Sgroi's "Handbook of Clinical Intervention in Child Sexual Abuse" (see Matter of Nicole V., 71 N.Y.2d 112, 120-121, 524 N.Y.S.2d 19, 518 N.E.2d 9140, and other courts in New York State have admitted validation testimony of experts who have utilized the Sgroi method. The court-appointed counselor testified at the hearing that the Sgroi method was used by "all" counselors in the field to validate allegations of sexual abuse. Inasmuch as a Frye hearing is required only where a party seeks to introduce testimony on a novel topic (see People v. Garrow, 75 A.D.3d 849, 852, 904 N.Y.S.2d 589), and there was no indication in the record that the methods used by the court-appointed counselor to validate the allegations of sexual abuse in this case were novel, the father's motion for a Frye hearing was properly denied.

Disposition Based Almost Entirely upon Proof That Court Elicited Is Expressly Disapproved. Function of the Judge is to Protect the Record at Trial, Not to Make It.

In Matter of Kyle FF, 926 N.Y.S.2d 196 (3 Dept, 2011) in August 2010, respondent (born in 1995) appeared in Family Court and admitted to committing acts that, if committed by an adult, would constitute the crime of criminal mischief in the fourth degree. At the dispositional hearing that followed, the parties stipulated to the admission of the predispositional report, which recommended, among other things, that respondent be placed on probation for two years subject to various special conditions. Although the parties asked that Family Court accept that recommendation and indicated that they intended to offer no further proof in this regard, Family Court called as its own witness the author of the report and questioned her extensively regarding respondent's prior admission to the local hospital's mental health unit and a subsequent mental health evaluation conducted by the Northeast Parent & Child Society. In response to this testimony, Family Court then indicated that it would not close the proof until it obtained the corresponding records for respondent's admission/evaluation and stated its intent to issue subpoenas to that effect. Following additional discussion, Family Court agreed to accept the discharge summary from respondent's hospital admission and closed the proof. Thereafter, relying almost exclusively upon proof that it elicited, Family Court ordered that respondent be placed with the Office of Children and Family Services until August 31, 2011. The Appellate Division held that Family Court improperly assumed a prosecutorial role by eliciting testimonial and documentary evidence at the dispositional hearing. Although respondent did not object when Family Court called the author of the predispositional report as a witness and, further, stipulated to the admission of the discharge summary, thereby rendering this issue unpreserved for review it exercised its discretion and reversed Family Court's order. The Appellate Division observed that Family Court is vested with the discretion to call witnesses, including the author of the predispositional report (see Family Ct. Act 350.4[2] ), and may assume "a more active role in the presentation of evidence in order to clarify a confusing issue or to avoid misleading the trier of fact" (People v. Arnold, 98 N.Y.2d 63, 67[2002] ). However, "[t]he overarching principle restraining the court's discretion [in this regard] is that it is the function of the judge to protect the record at trial, not to make it" and the court must take care to avoid assuming "the function or appearance of an advocate" (Matter of Yadiel Roque C., 17 A.D.3d at 1169). Here, even though the parties agreed with the recommendation made by the Probation Department, Family Court called and extensively questioned the author of the predispositional report, secured the production of additional documentary evidence and then, according essentially no weight to the underlying recommendation and the parties' expressed wishes, crafted a disposition based almost entirely upon proof that it elicited-a practice with which this Court previously had expressed its disapproval (see Matter of Keaghn Y., 921 N.Y.S.2d at 739; Matter of Blaize F. [Christopher F.], 74 A.D.3d 1454, 1455 [2010]; Matter of Stampfler v. Snow, 290 A.D.2d 595, 596[2002]). Accordingly, Family Court's order was reversed and, as respondent's placement had not yet expired, the matter was remitted for a new dispositional hearing before a different judge.

Family Court Deprived Father of Right to Procedural Due Process by Denying Right to Cross-examine

In Matter of Middlemiss v Pratt, --- N.Y.S.2d ----, 2011 WL 2637285 (N.Y.A.D. 3 Dept.), pursuant to a prior order of custody, the parties shared joint custody of their child and had equal parenting time on alternating weeks. The mother cross-petitioned for modification, seeking full custody and parenting time with the father as agreed upon by the father and the child. During the fact-finding hearing, the mother completed her direct testimony but, due to witness availability and upon the consent of the parties, witnesses were then taken out of order, and the father was not afforded an opportunity to cross-examine the mother. The mother called several more witnesses, including the child, who testified in open court under oath. After the child testified, Family Court, sua sponte, concluded that it did not need to permit any cross-examination of the mother or any testimony from the father-or, indeed, to allow the presentation of any further evidence-in order to reach a decision. The court then suspended the father's parenting time and concluded the proceeding and, later, issued a written order embodying its decision. The Appellate Division reversed on the law agreeing with the father's contention that Family Court deprived him of his right to procedural due process. Although the father did not preserve this argument through objection, the argument was held to be properly before the Appellate Division, as Family Court's abrupt termination of the proceedings afforded him no opportunity to enter any objection. In a proceeding pursuant to Family Ct Act article 6 seeking modification of a prior custody order, a " 'full and comprehensive hearing' " is required. At such a hearing, due process requires that a parent be afforded a full and fair opportunity to be heard. Family Court abjectly denied the father due process by refusing him any opportunity to cross-examine a key witness, the mother, present any witnesses or even testify on his own behalf . It revered and remitted for a full hearing on the merits and, given Family Court's wholesale refusal to entertain the father's position, directed that the case be remitted to a different judge for further proceedings .

July 18, 2011

Court of Appeals Holds That Marital Property' Within the Meaning of Domestic Relations Law 236 Includes the Proceeds of Fraud

In Commodity Futures Trading Commission v Walsh, --- N.E.2d ----, 2011 WL 2471544 (N.Y.) the Second Circuit certified the following two questions to the Court of Appeals. "(1) Does 'marital property' within the meaning of New York Domestic Relations Law 236 include the proceeds of fraud? "(2) Does a spouse pay 'fair consideration' according to the terms of New York Debtor and Creditor Law 272 when she relinquishes in good faith a claim to the proceeds of fraud?" The Second Circuit also invited the Court to "reformulate these questions as it sees fit, or expand them to address any other issues of New York law pertinent to these appeals". The wife asserted that she validly acquired certain assets pursuant to a settlement agreement, and that by entering into this agreement she became a good faith purchaser for value of the distributed property. The Agencies responded that monies derived from the securities fraud were not part of the marital estate in the first instance and, consequently, cannot be retained or transferred through equitable distribution of marital assets under Domestic Relations Law 236. The Court concluded that given that it had repeatedly held that the scope of marital property is to be "construed broadly" (see e.g. Mesholam v. Mesholam, 11 N.Y.3d 24, 28 [2008] the proceeds of fraud can constitute marital property as defined in Domestic Relations Law 236 and it answered the first certified question in the affirmative. It is therefore possible under the Domestic Relations Law to transfer assets derived from fraud to an innocent and unknowing spouse in a divorce proceeding. The Court held that ex-spouses have a reasonable expectation that, once their marriage has been dissolved and their property divided, they will be free to move on with their lives. To hold that the proceeds of fraud acquired by one spouse unbeknownst to the other cannot be subject to equitable distribution or conveyed through a settlement agreement as marital property would undermine one of the fundamental policies underlying the equitable distribution process, namely finality. The exception proposed by the Agencies would effectively undo court orders and settlement agreements for an indeterminate time after the "winding up of the parties' economic affairs" and "subvert the policy of upholding settled domestic relations ... in divorce cases". The Court accepted for purposes of answering the Second question the Second Circuit's assumption that the marital estate here "consisted almost entirely of the proceeds of fraud" . It noted that there are other valid forms of consideration that are relevant to the determination of fair consideration, even where the bulk of a marital estate consists of ill-gotten gains. It reformulated the second question to read as follows: "Is a determination that a spouse paid 'fair consideration' according to the terms of New York Debtor and Creditor Law 272 precluded, as a matter of law, where part or all of the marital estate consists of the proceeds of fraud?" As reformulated, and under its analysis, it answered this question in the negative. The Court held that an innocent spouse who received possession of tainted property in good faith and gave fair consideration for it should prevail over the claims of the original owner or owners consistent with this State's strong public policy of ensuring finality in divorce proceedings.

Failure to Send Itemized Bills Every 60 Days Results in Reduction of Counsel Fee Award from Spouse

In Moyal v Moyal, --- N.Y.S.2d ----, 2011 WL 2473023 (N.Y.A.D. 1 Dept.)the Appellate Division observed that while there is no uniform rule for fixing the value of a business for the purpose of equitable distribution the Special Referee did not sufficiently explain her basic concurrence in the valuation of the husband's business by the wife's appraiser despite the numerous recognized flaws in his report, including, among other things, the insufficient examination and murky explanation of its accounts receivable, the unclear rationale for the particular earnings multiple chosen, the inadequate explanation for the application of a gross profit margin, unsubstantiated assumptions regarding personal use of business credit cards and the consideration of industry trends without adequate basis. It held that the husband's $1.2 million loan receivable should have been included as part of the marital estate, since he did not carry his burden to show that he did not use marital funds to make the loan. The Special Referee awarded the wife an additional $65,000 in counsel fees, substantially less than the total amount requested ($161,972.50, an amount that included a prior award of $25,000). In support of her decision to award less than the amount requested, the Special Referee took into account the substantial equitable distribution award, the $5,000 maintenance award, the fact that the wife "[p]lainly ... has more liquid assets than the husband," that numerous motions by the wife were "soundly defeated" and that "certain litigation strategy by the wife's counsel was nonproductive." The Special Referee noted the failure of the wife's counsel to comply with 22 NYCRR 1400.2, which entitles the client "to receive a written, itemized bill on a regular basis, at least every 60 days." The Special Referee also noted that counsel had provided a "mere four bills" over a 26- month period of the representation. The bills "lumped together multiple legal services rendered and [a] total amount for ... all of those services." One such bill lumped together dozens of separate services counsel provided and stated the total number of hours (136) for all the services. A computer printout providing considerably more specificity concerning the number of hours spent on each day that services were provided was admitted into evidence at the hearing. But for that printout and counsel's testimony that the daily entries were prepared either contemporaneously or shortly thereafter, the Court stated that it would direct an additional reduction in the fee award. Without impugning counsel's integrity, the Court stated that it thought that the printout was not an adequate substitute for the itemized bills required by 22 NYCRR 1400.2. It agreed with the Special Referee that "where there is a different individual to be charged by the court there should be an available higher level of scrutiny." Nonetheless, it appeared that the Special Referee reduced the award on account of counsel's failure to comply with this requirement of 22 NYCRR 1400.2, one of the rules "promulgated to address abuses in the practice of matrimonial law". Under all the circumstances of this case, it declined to exercise its discretion to further reduce the amount of the award.

In Voluntary Arbitration, Attorneys' Fees May Not Be Recovered Unless Expressly Provided for in the Arbitration Agreement

In Berg v Berg, --- N.Y.S.2d ----, 2011 WL 2478948 (N.Y.A.D. 2 Dept.) plaintiff and the defendant, who were separated, agreed to arbitrate the dissolution of their marriage before a rabbinical court, or Beth Din. They subsequently divorced, and the Beth Din limited the arbitration to the financial issues. The Beth Din issued an award dated January 6, 2008. The Supreme Court denied plaintiff's motion to vacate so much of the arbitration award as awarded an attorney's fee to the defendant and directed him to pay all of the defendant's legal expenses in all future matters in which he is the plaintiff, and granted defendant's cross motion which was to confirm that portion of the arbitration award. The Appellate Division held that the arbitrators erred in awarding an attorney's fee to the defendant and in directing the plaintiff to pay all of the defendant's legal expenses in all future matters in which he is the plaintiff. In a voluntary arbitration, attorneys' fees may not be recovered unless they are expressly provided for in the arbitration agreement.

Family Court Has No Jurisdiction to Make Support Award in Absence of a Petition for Such Relief

In Matter of Suffolk County Department of Social Services v Myrick,--- N.Y.S.2d ----, 2011 WL 2496631 (N.Y.A.D. 2 Dept.) the Appellate Division found that the Support Magistrate's determination that respondent should pay child support arrears in the sum of $54 per week from February 2008 through November 2008 was properly based upon income imputed to him. Since the father confirmed that he lost his job as a home health aide in February 2008, but could not give a reason as to why his employment was terminated, the Support Magistrate providently exercised her discretion in determining that the loss of the father's earning ability was brought about by his own actions and thereupon imputing income to him based upon his past employment history. However, it agreed with the father that the Support Magistrate erred in directing him to pay $10 per week in spousal support. The Family Court has no jurisdiction to make such an award in the absence of a petition for such relief (see Family Ct Act 422).

Second Department Holds That 529 Plan College Fund Is Not a Bank Account under Stipulation for Division of Assets

In Zuchowski v Zuchowski, --- N.Y.S.2d ----, 2011 WL 2279060 (N.Y.A.D. 2 Dept.) the parties 2009 stipulation of settlement, which was incorporated but did not merge into their judgment of divorce that was entered on June 17, 2009 provided that "all joint bank accounts have been split to the mutual satisfaction of the parties and here and forward each party shall keep any bank accounts in their respective names; namely, the wife in her name, the husband in his name." The stipulation also provided that "each party is responsible to pay the 50/50 share of college" for their children, but "the children shall avail themselves of every possible loan, grant or any other moneys offered to them by the college before the parties are respectfully [sic] required to contribute towards the education of the children." In an order dated January 11, 2010, the Supreme Court granted the defendant former husband's motion which was, in effect, to direct the plaintiff former wife to provide him with quarterly statements relating to a "529 Plan" sponsored by the State of New Hampshire and managed by Fidelity Investments, which the parties had established as a college fund for their son Peter, and to apply the money in the subject account to Peter's college expenses before either party would be required to contribute to such expenses. The former wife moved for leave to reargue, contending that since the 529 Plan was in her name, it was, under the terms of the stipulation of settlement, separate property belonging to her, and thus should be applied to reduce only her share of Peter's college costs. The account statements named the former wife as the "participant" and Peter as the "beneficiary," and the record indicated that the participant is considered to be the owner of the account assets until they are withdrawn. Supreme Court granted the former wife's motion and, upon reargument, vacated the portion of its January 11, 2010, order relating to the 529 Plan.

The Appellate Division reversed on the law. It observed that when interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized. Contrary to the former wife's contention, the stipulation of settlement could not reasonably be interpreted as treating the 529 Plan as one of the "bank accounts" that the party named as the account holder was entitled to "keep." While the stipulation of settlement provided that "all joint bank accounts have been split to the mutual satisfaction of the parties," there was nothing in the stipulation to support a finding that the parties intended the monetary assets they were allocating between themselves to include Peter's college fund. Although the former wife was technically the owner of the funds in the 529 Plan, the reason for that account's existence was not to personally benefit either of the parties, but to fund Peter's college education. Accordingly, upon reargument, the Supreme Court should have adhered to its original determination directing the former wife to provide the former husband with quarterly statements relating to the 529 Plan, and to apply the money in that account to Peter's college expenses before either party would be required to contribute to such expenses.

Failure to Agree on a Modified Visitation Schedule Is Not a "Default” for Purposes of Attorneys Fee Provision

In Matter of Allegretti v Fitzpatrick, --- N.Y.S.2d ----, 2011 WL 2279571 (N.Y.A.D. 2 Dept.) the Appellate Division held that the Family Court did not err in denying her motion for an award of an attorney's fee in connection with her petition to modify the visitation provisions set forth in a stipulation that was incorporated but not merged into the parties' judgment of divorce. The stipulation provided, among other things, that the parties were to "re-evaluate" the established visitation arrangements when their child began school. The stipulation also provided that in the event that either party defaulted with respect to their obligations thereunder, that party would be responsible for paying the attorney's fee incurred by the other party in an enforcement proceeding. The Family Court correctly concluded that the parties' failure to agree on a modified visitation schedule once their child began school did not constitute a "default" under the terms of the stipulation. Accordingly, the Family Court properly denied the mother's motion for an award of an attorney's fee.

Appellate Division Holds That Emancipation Occurs When Child Becomes Economically Independent Through Employment and Is Self-supporting.

In Smith v Smith, --- N.Y.S.2d ----, 2011 WL 2571089 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order which, granted the wife child support and spousal support. It found that the record supported the Support Magistrate's determination that the parties' son was not emancipated. It pointed out that a parent is obligated to support his or her child until the age of 21 unless the child becomes emancipated, which occurs once the child becomes economically independent through employment and is self-supporting. Although the parties' son worked full-time, paid for his own car insurance, and paid for his own cell phone, the fact that his mother still paid for his food, shelter, clothing, and health and dental insurance, demonstrated that he was not economically independent of his parents.

Family Court Lacks Jurisdiction to Consider Objections Unless Proof of Service Filed

In Matter of Girgenti v Cress, --- N.Y.S.2d ----, 2011 WL 2571850 (N.Y.A.D. 2 Dept.), the father appealed from an order of the family court which dismissed his petition to enforce a stipulation of settlement concerning child support arrears. The Appellate Division affirmed the order finding that the issues raised by the father on this appeal are not reviewable, since he failed to file proof of service of a copy of the objections on the mother. Family Court Act 439(e) provides, in pertinent part, that "[a] party filing objections shall serve a copy of such objections upon the opposing party," and that "[p]roof of service upon the opposing party shall be filed with the court at the time of filing of objections and any rebuttal." By failing to file proof of service of a copy of his objections on the mother, the father failed to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order. Consequently, the Family Court lacked jurisdiction to consider the merits of the objections and the father waived his right to appellate review.

Denial of Objections to Finding of Willfulness and Recommendation of Incarceration Proper since Recommendations Had No Force or Effect until Confirmed

In Matter of Ceballos v Castillo, --- N.Y.S.2d ----, 2011 WL 2572307 (N.Y.A.D. 2 Dept.), the Appellate Division observed that to establish entitlement to a downward modification of a child support order entered on consent, a party has the burden of showing that there has been a substantial change in circumstances. Loss of employment may at times constitute a substantial change in circumstances. A party seeking a downward modification of his or her child support obligation based upon a loss of employment has the burden of demonstrating that he or she diligently sought to obtain employment commensurate with his or her earning capacity . Here, the father testified that he was unable to pay child support because he had not worked since 2008 and was not eligible to receive unemployment benefits. He stated that he had been working for the Renaissance Hotel until May 2008, but that he left that job after the hotel significantly cut back his hours. He thereafter obtained employment at a pizzeria, where he was initially able to work longer hours. Although he was eventually let go from his position at the pizzeria, he did not, contrary to the Support Magistrate's finding, quit the pizzeria job. The father further testified in detail that he attempted to obtain employment at various specified restaurants and supermarkets; that he went to an employment agency called Labor Ready to find a job; that he looked for employment in newspapers and the "Pennysaver" publication; and that he explored job leads which he learned of via word-of-mouth. Under these circumstances, the father demonstrated that his loss of employment constituted a substantial change in circumstances, and that he made a good faith effort to obtain new employment which was commensurate with his qualifications and experience. Thus, the Support Magistrate's determination that the father failed to satisfy his burden of establishing an inability to pay his child support obligation was not supported by the evidence. Accordingly, the father's objections to the denial of his petition for downward modification of his child support obligations should have been granted.

The Appellate Division pointed out that to the extent that the father filed objections to the Support Magistrate's finding of willfulness and her recommendation of a term of incarceration of six months, the denial of those objections was proper, since the Support Magistrate's recommendations had no force and effect until confirmed by the Family Court Judge. Upon, in effect, confirming the willfulness finding, the Family Court issued an order of commitment directing that the father be committed to the Westchester County Jail unless he purged his contempt by paying the sum of $1140 to the Support Collection Unit. The father's failure to pay child support constituted prima facie evidence of a willful violation. This prima facie showing shifted the burden to the father to come forward with competent, credible evidence that his failure to pay support in accordance with the terms of the order on consent was not willful. In the absence of proof of an ability to pay, an order of commitment for willful violation of a support order may not stand. Based upon the evidence in the record, the father met his burden of establishing his inability to meet his child support obligation set forth in the order dated April 11, 2005. The evidence did not support the Support Magistrate's finding that the father had the means, resources, and ability to pay child support, but chose not do so.

Counsel Sanctioned for Obtaining From Court a “So-Ordered Trial Subpoena Before Trial Date Was Set

In Duval v Duval, --- N.Y.S.2d ----, 2011 WL 2574001 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court improvidently exercised its discretion in denying defendant's motion to impose sanctions upon the plaintiff and her counsel pursuant to 22 NYCRR 130-1.1. Under the circumstances presented, the conduct of the plaintiff and her counsel in obtaining a "so-ordered" subpoena duces tecum and serving it upon Long Island Jewish Medical Center to obtain the defendant's medical records prior to filing a note of issue and before a trial date was set was frivolous within the meaning of 22 NYCRR 130-1.1(c), as it was completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law. Contrary to the defendant's contention, pretrial disclosure on the issue of child custody is permissible with respect to a parent's health, since the parties to a contested custody proceeding place their physical and mental conditions in issue. Here, in her attempt to obtain pretrial disclosure of the defendant's medical records in connection with the issue of child custody, the plaintiff sought a "so-ordered" trial subpoena duces tecum from the Supreme Court, thereby obviating the need to obtain the defendant's written authorization to release the records. The plaintiff also failed to serve the subpoena on the defendant in a timely manner, thus depriving him of the opportunity to request withdrawal of the subpoena or to make a timely motion to quash. Moreover, it can be inferred from the record that the challenged conduct was designed primarily to harass and maliciously injure the defendant. In view of the foregoing, the defendant's motion to impose sanctions upon the plaintiff and her counsel pursuant to 22 NYCRR 130-1.1 should have been granted. It remitted the matter to the Supreme Court for a hearing on the issue of the amount of an appropriate sanction to be imposed upon the plaintiff and her counsel. The Appellate Division also held that Supreme Court improvidently exercised its discretion in denying, with limited exception, defendant's motion to suppress all information relating to the contents of records produced in response to the subpoena duces tecum served upon Long Island Jewish Medical Center and to preclude the plaintiff from using such information. Under the circumstances of this case, suppression and preclusion, along with the imposition of a sanction, were the appropriate remedies for the improper manner in which those records were obtained (see CPLR 3103[c] ). Accordingly, that branch of the defendant's motion which was to suppress all information relating to the contents of records produced in response to the subpoena served upon Long Island Jewish Medical Center and to preclude the plaintiff from using such information should have been granted in its entirety, with a directive that the plaintiff and her counsel deliver all records produced in response to the aforementioned subpoena to the defendant and to affirm that all such records, and any copies thereof, have been so returned and/or destroyed and were not transmitted to any third party.

July 1, 2011

The Marriage Equality Act

On June 24, 2011 New York enacted “The Marriage Equality Act’, which amended the domestic relations law to grant same-sex couples the ability to enter into civil marriages in New York. (See Laws of 2011, Ch. 95 and Laws of 2011, Ch. 96, both signed into law on June 24, 2011, effective on July 24, 2011.) New York, has joined Vermont and New Hampshire in becoming the third state to pass legislation permitting same-sex marriage. The only other U.S. jurisdictions that permit same-sex marriage are the District of Columbia, which also passed a same-sex marriage law, and Massachusetts, Connecticut and Iowa which permit same-sex marriage as a consequence of court rulings.

The Marriage Equality Act provides that an otherwise valid marriage shall be valid regardless of whether the parties are of the same sex or different sex. To ensure that the law does not improperly intrude into matters of conscience or religious belief, the Act affirms that no member of the clergy can be compelled to solemnize any marriage. The law also ensures that the statutory protections for religious organizations found in the New York Human Rights law remains intact, including, guaranteeing that religious institutions remain free to choose who may use their facilities and halls for marriage ceremonies and celebrations, to whom they rent their housing accommodations, or to whom they provide religious services, consistent with their religious principles. The Act contains language to ensure that benevolent organizations remain exempt from New York prohibitions against discrimination in public accommodations, and are not be required to rent social halls to weddings of same-sex or other couples it chooses not to accommodate.

The Domestic Relations Law was amended by adding two new sections Domestic Relations Law §§10-a and 10-b to read as follows:

§ 10-a. Parties to a marriage.

1. A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.

2. No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.

§ 10-b. Religious exception.

1. Notwithstanding any state, local or municipal law, rule, regulation, ordinance, or other provision of law to the contrary, a religious entity as defined under the education law or section two of the religious corporations law, or a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a not-for- profit corporation operated, supervised, or controlled by a religious corporation, or any employee thereof, being managed, directed, or super vised by or in conjunction with a religious corporation, benevolent order, or a not-for-profit corporation as described in this subdivision, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage. Any such refusal to provide services, accommodations, advantages, facilities, goods, or privileges shall not create any civil claim or cause of action or result in any state or local government action to penalize, withhold benefits, or discriminate against such religious corporation, benevolent order, a not-for-profit corporation operated, supervised, or controlled by a religious corporation, or any employee thereof being managed, directed, or supervised by or in conjunction with a religious corporation, benevolent order, or a not-for-profit corporation.

2. Notwithstanding any state, local or municipal law or rule, regulation, ordinance, or other provision of law to the contrary, nothing in this article shall limit or diminish the right, pursuant to subdivision eleven of section two hundred ninety-six of the executive law, of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, to limit employment or sales or rental of housing accommodations or admission to or give preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.3. Nothing in this section shall be deemed or construed to limit the protections and exemptions otherwise provided to religious organizations under section three of article one of the constitution of the state of New York.

Domestic Relations Law § 13 Marriage licenses, was amended to add the last sentence which provides that “No application for a marriage license shall be denied on the ground that the parties are of the same, or a different, sex.

Domestic Relations Law §11 was amended to make clear that no member of the clergy acting in such capacity may be required to perform any marriage. Domestic Relations Law §11, subdivision 1 was amended, to add the provision that “no clergyman or minister as defined in section two of the religious corporations law, or Society for Ethical Culture leader shall be required to solemnize any marriage when acting in his or her capacity under this subdivision, and subdivision 1-a was added.

The legislation provides that it is “...to be construed as a whole, and all parts of it are to be read and construed together. If any part of this act shall be adjudged by any court of competent jurisdiction to be invalid, the remainder of this act shall be invalidated. Nothing herein shall be construed to affect the parties' right to appeal the matter. “

Fair Trial Denied Where Family Court Judge Took on the Function and Appearance of an Advocate

In Matter of Jacquilin M, 83 A.D.3d 844, 922 N.Y.S.2d 111 (2 Dept, 2011) Jacqulin M. appealed from an order of disposition of the Family which, upon a fact-finding order of a hearing, finding that the appellant committed acts which, if committed by an adult, would have constituted the crimes of grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, adjudged her to be a juvenile delinquent, and placed her on probation for a period of 18 months. The order of disposition was reversed on the law and as a matter of discretion in the interest of justice, the fact-finding order was vacated, and the matter is remitted to the Family Court for a new fact-finding hearing. The appellant's contention that she was deprived of a fair trial because the Family Court Judge took on the function of an advocate by excessively intervening in the fact-finding hearing was unpreserved for appellate review. However, the Appellate Division reached this issue in the exercise of its interest of justice jurisdiction because the Family Court Judge's excessive intervention deprived the appellant of her right to a fair fact-finding hearing. It observed that although trial courts may appropriately take an active role in the presentation of evidence "in order to clarify a confusing issue or to avoid misleading the trier of fact" (People v. Arnold, 98 N.Y.2d 63, 67, 745 N.Y.S.2d 782, 772 N.E.2d 1140), the function of the judge is "to protect the record at trial, not to make it". Thus, while a certain degree of judicial intervention in the presentation of evidence is permissible, "the line is crossed when the judge takes on either the function or appearance of an advocate at trial" (People v. Arnold, 98 N.Y.2d at 67, 745 N.Y.S.2d 782, 772 N.E.2d 1140; see People v. Zamorano, 301 A.D.2d 544, 546, 754 N.Y.S.2d 645). These principles apply in bench trials, including juvenile delinquency proceedings. Here, the Family Court Judge took on the function and appearance of an advocate by extensively participating in both the direct and cross-examination of the two presentment agency witnesses and eliciting testimony which strengthened the presentment agency's case. Furthermore, when the appellant indicated, during the course of her direct examination, that a certain document which would support her defense had been turned over to a Probation Department officer, the Judge interrupted her testimony to question a Probation Department Court Liaison who was present in the courtroom about whether documents of this nature would indeed be kept by the Probation Department. The Judge then summoned the Probation Department officer assigned to the appellant's case to the courtroom, and indicated to the appellant's attorney that unless he agreed to stipulate as to what certain Probation Department records would reflect, those records would be admitted into evidence through the Probation Officer's testimony. It was clear from the record that neither the presentment agency nor the appellant's attorney intended to call the Probation Officer as a witness or enter the Probation Department records into evidence, and the stipulation regarding what those records reflected had the effect of rebutting a portion of the appellant's testimony. Thus, the Judge essentially "assumed the parties' traditional role of deciding what evidence to present" . Furthermore, the Judge offered no explanation on the record as to why he felt compelled to solicit this evidence. Under these circumstances, a new fact-finding hearing was warranted.

Third Department Explains Difference Between in Camera Hearing and True Lincoln Hearing

In Matter of Spencer v Spencer, --- N.Y.S.2d ----, 2011 WL 2150028 (N.Y.A.D. 3 Dept.) the parties were the parents of three children (born in 1997, 1999 and 2001). In their divorce judgment, the parties agreed to joint legal custody, physical placement with respondent (mother), and visitation with petitioner (father) every other weekend. In 2009, the father commenced a proceeding seeking to modify the custodial arrangement based upon an improper relationship that the mother's male friend had with one of the parties' children while in the mother's care. Family Court temporarily placed the children with the father. After several court appearances and an in camera interview with each of the children, the court issued an order awarding primary physical custody to the father and extensive visitation to the mother. The Appellate Division found that the mother did not consent to the court making and order without a hearing, and held that Family Court erred by modifying the custody order without holding a fact-finding hearing. The father's petition adequately alleged a change in circumstances, namely that the mother exposed the children to a convicted sex offender and she was aware that this individual had an inappropriate relationship with one of the children. The mother admitted that an inappropriate relationship occurred, but denied knowing about it. The parties disagreed about most of the other allegations. The mother specifically objected to the court's failure to hold a hearing, and the court lacked record information that would permit it to determine whether the alleged change in circumstances required a modification of the prior custody order .A court may not grant a final order based upon mere allegations and a request by an attorney for a party or the children; evidentiary proof is required. Thus, it reversed the order on the law and remitted for Family Court to hold a hearing on the petition.

The Appellate Division observed that Family Court and the parties inaccurately referred to the in camera interviews with the children as a Lincoln hearing. The purpose of a Lincoln hearing in a custody proceeding "is to corroborate information acquired through testimonial or documentary evidence adduced during the fact-finding hearing" (Matter of Lincoln v. Lincoln, 24 N.Y.2d 270, 273 [1969] ). Thus, a true Lincoln hearing is held after, or during, a fact-finding hearing; there is no authority or legitimate purpose for courts to conduct such interviews in place of fact-finding hearings, and Family Court erred in doing so here. Additionally, it cautioned the court to protect the children's right to confidentiality by avoiding disclosure of what children reveal in camera during a custody proceeding.

Unsubstantiated Allegations Insufficient to Warrant the Invocation of Temporary Emergency Jurisdiction under UCCJEA.

In Segovia v Bushnell, --- N.Y.S.2d ----, 2011 WL 2150113 (N.Y.A.D. 3 Dept.) Respondent, the mother of two sons (born in 1999 and 2002), refused to release the children to the paternal grandparents for visitation and instead brought them to New York from Texas. A Texas court thereafter issued a temporary order granting custody to the father and petitioner, the paternal grandmother. Petitioner then commenced a proceeding seeking registration and enforcement of the Texas order ( Domestic Relations Law 77-d, 77-g). Respondent did not contest registration of the Texas order, but requested that Family Court exercise temporary emergency jurisdiction based on her allegations that the paternal grandparents had sexually abused the children (Domestic Relations Law 76-c). Family Court placed the children in the temporary custody of the Department of Social Services and ordered an investigation into respondent's allegations. Upon conclusion of the investigation, Family Court found the allegations to be unfounded and granted enforcement of the Texas order. The Appellate Divison affirmed. Family Court heard, without objection, testimony that the children met with a local sexual abuse validator who determined that there was no sexual abuse, and it reviewed an investigative report prepared by authorities in Texas after respondent made the same allegations there. The Texas authorities conducted an exhaustive review and found no evidence to substantiate the allegations of sexual abuse. In light of the information rebutting respondent's claims, it agreed with Family Court that her unsubstantiated allegations were insufficient to warrant the invocation of temporary emergency jurisdiction.

The Rights and Needs of the Children Must Be Accorded the Greatest Weight in a Relocation Case

In Alaire K.G. v Anthony P.G.,--- N.Y.S.2d ----, 2011 WL 2135385 (N.Y.A.D. 1 Dept.) the First Department, in an opinion by Justice Moskowitz, observed that the appeal, involving a custodial parent's request to relocate with the parties' child, fell within the class of cases that "present some of the knottiest and most disturbing problems that our courts are called upon to resolve" (Matter of Tropea v. Tropea, 87 N.Y.2d 727, 736 [1996] ). The parties were married in January 2004, separated about a year and a half later and were divorced on July 13, 2006. They were the parents of a now six-year-old boy born on May 17, 2004. The stipulation settling the divorce case granted the mother legal and physical custody of the child. The father had visitation every week from Monday at 8:00 p.m. until Wednesday at 6:00 p.m. The stipulation allowed relocation within 25-miles of the father's house in the Bronx.

The father had a history of irregular employment and was currently not employed. At the time of trial, the mother, who was remarried, cared for her younger child from her second marriage, full time. After the parties separated, the mother remained in the marital apartment in the Bronx with the child for two years. In the fall of 2007, she began working as a project administrator in the construction field. In 2007, she moved with the child and her boyfriend to Connecticut. The mother testified that she always wanted her son to be in a suburban environment. She stated that she was trying "to mirror my own childhood. I had a wonderful suburban upbringing." The relationship in Connecticut ended when the boyfriend returned to his native New Zealand. The mother returned to New York with the child and moved into an apartment in Harlem. In March 2008, the mother met her future husband, Hugh Bonnar, on Match.com. Bonnar was retired from the Air Force, lived in North Carolina and was then involved in a nation-wide job search. Ultimately, Bonnar took a job with Northrop Grumman in San Diego. He had requested to work at Northrop Grumman's Long Island branch, but the company could not accommodate his request. The mother and Bonnar became engaged in May 2008. Soon after her engagement, the mother approached the father about moving to California to live with Bonnar. The father was concerned about the distance and the stability of the mother's new relationship. The parties therefore met with a mediator to try to work out an arrangement by which the mother could leave the child with the father temporarily while she settled in California. The mediator sent a letter, dated May 12, 2008, that purported to memorialize the parties' agreement. The letter stated that the parties agreed that the child would stay with the father from June 27, 2008 until December 31, 2008, with the mother making several long weekend visits to New York. Mother and son were also to participate in a webcam phone call two to three times a week. The letter did not address where the child would live after December 31, 2008. However, the father refused to sign an agreement embodying these terms and instead asked the mother to sign over custody to him. She refused. The mother left for California on June 26, 2008. She claimed that she never intended the father to have permanent custody, but arrangements to move to California had become irreversible by the time she learned that the father did not agree. The mother gave birth to Bonnar's son on April 4, 2009. She and Bonnar were also married in April 2009.

On July 17, 2008, the father filed a petition seeking sole legal and physical custody of the parties' child, claiming that the mother had abandoned the child. On December 1, 2008, the mother filed a petition for relocation.

Justice Moskowitz pointed out that each relocation request must be considered on its own merits with due consideration of all relevant facts and circumstances and with the predominant emphasis being placed on what outcome is most likely to serve the best interests of the child" (citing Tropea v. Tropea 87 N.Y.2d 727, 739 [1996] ). The dissent stated that Tropea dictates that the court's "central concern" should be the impact of the move on the relationship between the child and the noncustodial parent. Justice Moskowitz held that this interpretation misreads the case. Tropea states that "[o]f course, the impact of the move on the relationship between the child and the noncustodial parent will remain a central concern." However, it is not "the" central concern. Rather, the case makes abundantly clear that "it is the rights and needs of the children that must be accorded the greatest weight". She noted that the Court of Appeals rejected the "three-tiered" analysis that required a court to determine first "whether the proposed relocation would deprive the noncustodial parent of regular and meaningful access to the child".

The court found that there was a sound and substantial basis in the record for the determination granting the mother's request to relocate to California with her son. First, there was no question that the California home was financially more stable than the father's home. The stepfather had a steady job with Northrop Grumman that provided his family with health insurance. By contrast, the father was not currently working. Although he had been offered a job as a teacher's aide, he had postponed his start date. He was currently on some type of public assistance and received money from his parents in Ireland. He admitted that "it's not been easy like money wise." He was not currently in a relationship. Given his bleak financial circumstances, with no career or family in New York, it appeared that there was nothing keeping the father from moving to San Diego himself to be closer to his son. The Court quoted that part of Tropea, 87 N.Y.2d at 740 which said"where the custodial parent's reasons for moving are deemed valid and sound, the court in a proper case might consider the possibility and feasibility of a parallel move by an involved and committed noncustodial parent as an alternative to restricting a custodial parent's mobility". Further, living in San Diego ensured that the child would grow up in the same house as his half brother. The father agreed that it was very important for the child to have a brother in his life. He even testified that he actually expected the child eventually to move to California so that he could be with his brother, the father was merely opposed to the date of the move. The mother established that the child would have access to an education that was just as good as, if not better than, his school in New York. Moreover, she testified that Bonnar's status as a veteran would allow the child to attend college within the State of California's university system free of charge. The record also reflected that the mother went out of her way to facilitate communication between the child and his father. The same could not be said of the father with respect to communication between the child and his mother. Finally, the child's own attorney recommended that the court permit the mother to relocate with the child, a factor that militated in favor of affirming the result the court reached.

Justice Moskowitz commented that the dissent's characterization of the mother as putting her own romantic interests ahead of her son's welfare was rank speculation. It was just as likely that the mother, herself an only child, was pursuing marriage aggressively to produce a sibling for her son, before he became much older, and an intact family. Regardless of the mother's motivations, it is the best interest of the child that must guide the decision.

The Court found that the visitation schedule, that required the mother to pay for air travel for the child to be with the father on numerous extended weekend visits throughout the year in addition to extended summer and holiday visits, did not deprive the father of the opportunity to maintain a close relationship with his son .

Memorandum of Understanding Was Not a Final Agreement Even Thought it Contemplated Parties' Subsequent Execution of "Opting-out Agreement”

In Vega v Papaleo, --- N.Y.S.2d ----, 2011 WL 2224860 (N.Y.A.D. 3 Dept.) Plaintiff commenced the action for divorce in 2006 on the ground of cruel and inhuman treatment. In 2008, after engaging in protracted litigation and settlement negotiations, the parties, both of whom were represented by counsel, signed a memorandum of understanding (MOU) that provided for distribution of the parties' marital assets. Plaintiff's attorney then notified Supreme Court that the matter had been resolved and the case, which had been scheduled for trial, was removed from the trial calendar. Thereafter, plaintiff was presented with a settlement agreement but refused to sign it. Plaintiff subsequently retained new counsel and the matter was restored to the trial calendar. After several pretrial conferences, Supreme Court granted a motion by defendant for summary judgment, seeking a judgment granting plaintiff a divorce and incorporating, but not merging, the terms of the MOU into the judgment of divorce. A judgment of divorce was entered accordingly, prompting this appeal by plaintiff.

On appeal Plaintiff argued that the MOU was not an enforceable agreement and that, even if it is enforceable, it should be set aside on the basis that her attorney fraudulently induced her to sign the document by misrepresenting its legal significance. The Appellate Division affirmed. It found that as the movant for summary judgment, defendant met his initial burden of demonstrating that the MOU was an enforceable agreement under Domestic Relations Law 236(B)(3), as the document, itself was in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded" (Domestic Relations Law 236[B] [3]; see CPLR 2104). Plaintiff conceded that the MOU met the statutory requirements. Her argument that it was not enforceable because it was not "endorsed" in open court was unavailing, as there is no requirement that a properly executed written settlement agreement be so endorsed Thus, the burden shifted to plaintiff to demonstrate by the proffer of admissible evidence the existence of material issues of fact requiring a trial. To that end, plaintiff submitted her own affidavit, and the affirmations of her current attorney and a friend who accompanied her to her then attorney's office on the day she signed the MOU. According to those submissions, plaintiff did not wish to sign the MOU because it did not address certain assets, but she ultimately signed it based upon her then attorney's assurances that those issues could be raised at a later time. Plaintiff alleges that she would not have signed the MOU if she had known that it would be considered a final agreement. As to the merits, plaintiff had not alleged that defendant, or anyone acting on defendant's behalf, perpetrated any fraud or duress upon her. While plaintiff may have other remedies available to her, her allegations--relating solely to her attorney's conduct–were insufficient to set aside the MOU.

The Appellate Division also rejected plaintiff's argument that the MOU was not a final agreement because it contemplated the parties' subsequent execution of an "opting-out agreement." The MOU provided that it "will be incorporated into a full opting-out agreement to be signed by the parties containing these terms and only those other terms which are necessary to have a full and complete opting-out agreement, but due to the time constraints, [the parties] may not have the ability to finalize an opting-out agreement prior to the date scheduled for trial." The MOU then goes on to address, in detail, numerous issues including, among other things, a division of various items of real property, business interests, bank accounts, retirement accounts, marital debt and maintenance payments. It also contained a provision that "any additional terms and agreements to be contained within the opting-out agreement shall not alter or change any of the terms or conditions set forth in this [MOU]." Although the MOU directed entry into a further agreement, its terms were not contingent upon entry into such agreement. Accordingly, plaintiff failed to raise a question of fact sufficient to defeat defendant's motion.

June 16, 2011

Family Court's Determination That the Child Was Emancipated Pursuant to the Terms of the Parties' Stipulation Did Not Preclude the Child from Filing His Own Support Petition

In Wakefield v Wakefield, --- N.Y.S.2d ----, 2011 WL 2089752 (N.Y.A.D. 2 Dept.) the parties October 2006 stipulation of settlement, which was incorporated but not merged into their judgment of divorce provided for joint legal custody of their two children. It further provided that the mother would have physical custody of the children and that both parents would provide child support until the happening of an emancipating event, which included either of the children's "permanent residence away from the residence of the wife." The parties were divorced on January 29, 2007, and, in October 2008, the subject child moved from his mother's home to the father's home. In March 2009 the father filed a petition seeking to modify the support provisions of the stipulation of settlement so as to receive child support from the mother, upon the ground that the subject child was living with him. After a hearing, the Support Magistrate granted the petition, finding that the subject child's residence with the father constituted a change in circumstances warranting an award of child support to the father. Family Court granted the mother's objections to the extent of "deeming" the subject child to be emancipated pursuant to the parties' stipulation, and dismissed the father's petition. On September 24, 2009, the subject child filed his own petition seeking support from his mother. At a hearing on the petition, both the subject child and the father testified that the subject child was 18 years old, that he lived with the father, and that he attended Suffolk Community College full time. In an order dated February 8, 2010, the Support Magistrate granted the subject child's support petition. Family Court denied the mother's objection to the order dated February 8, 2010, rejecting her contention that the subject child was emancipated and, not entitled to child support. It also rejected the mother's contentions that the award was not based upon adequate evidence, and that a child who commences a support proceeding on his or her own behalf may not be awarded an attorney's fee. The Appellate Division held that the Family Court's determination that the subject child was emancipated pursuant to the terms of the parties' stipulation did not preclude the subject child from filing his own support petition. "A husband and wife, in entering into a separation agreement, may include in that agreement provisions pertaining to the support of the children of their marriage. The terms, like any other contract clauses, are binding on the parties to the agreement. The child, on the other hand, is not bound by the terms of the agreement ... and an action may be commenced against [a parent] for child support despite the existence of the agreement" (citing Matter of Boden v. Boden, 42 N.Y.2d 210, 212). Since the subject child moved from his mother's residence to the father's residence with his parents' consent, the subject child was entitled to adequate support from his mother. It also held that the Family Court properly rejected the mother's contention that the child was not entitled to an award of an attorney's fee (citing Family Ct Act 422 [a], 438[a] ).

Motions to Enforce the Terms of a Stipulation of Settlement Are Not Subject to Statutes of Limitation. An Application or Motion for the Issuance of a QDRO Is Not Barred by the Statute of Limitations

In Denaro v Denaro, --- N.Y.S.2d ----, 2011 WL 2090821 (N.Y.A.D. 2 Dept.) the plaintiff former wife and the defendant former husband, who was a police officer employed by the New York City Police Department, were married in 1981. By a judgment entered July 2, 1997, they were granted an uncontested divorce. In a Stipulation and Agreement of Settlement, which was incorporated but not merged into the judgment of divorce, the parties agreed that the plaintiff would be entitled to a certain percentage of the marital portion of the defendant's police retirement benefits. The parties acknowledged in the stipulation that a valuation of those benefits had been performed, and they agreed that that valuation would "be utilized to prepare a Qualified Domestic Relations Order to be submitted to the Court as soon as practicable after the Judgment of Divorce is signed." No Qualified Domestic Relations Order was submitted at that time. The defendant retired from the NYPD in 2003, after 20 years of service, and he began collecting his pension. In January 2010 the plaintiff submitted a proposed QDRO to the Supreme Court, requesting the Supreme Court to enforce the stipulation to the extent of issuing an appropriate QDRO. The defendant moved to vacate the retirement provision of the stipulation. Supreme Court granted the plaintiff's application and denied the defendant's motion. The Appellate Division held that contrary to the defendant's contention, the statute of limitations does not bar issuance of the QDRO. It held that motions to enforce the terms of a stipulation of settlement are not subject to statutes of limitation.. Because a QDRO is derived from the bargain struck by the parties at the time of the judgment of divorce, there is no need to commence a separate 'action' in order for the court to formalize the agreement between the parties in the form of a QDRO. It pointed out that the Court had expressly held that an application or motion for the issuance of a QDRO is not barred by the statute of limitations (citing Bayen v. Bayen, 81 AD3d at 866-867). The defendant also contended that the plaintiff's failure to submit the QDRO to the Court within 60 days of entry of the divorce judgment (see 22 NYCRR 202.48) barred its issuance thereafter. The Appellate Division found defendant's contention to be without merit because that court rule does not apply to a QDRO, which is merely a mechanism to effectuate payment of a party's share in a retirement plan. The plaintiff's right to her share of the defendant's pension was created by the stipulation and the judgment of divorce, and it was not abandoned when the QDRO was not filed within 60 days. It also rejected the defendant's claim that the doctrine of laches barred the plaintiff's entitlement to the QDRO. Invocation of laches requires a showing of both delay and prejudice. The delay in submitting a QDRO for execution was lengthy, but the defendant had not shown any prejudice to himself resulting from the plaintiff's delay. The Court also rejected defendant's claim that the plaintiff waived her right to her share of the defendant's retirement benefits. The plaintiff's delay in submitting the QDRO to the Supreme Court did not evince an intent to waive her rights. Waiver does not result from negligence, oversight, or inattention, and it may not be inferred merely from silence.

An Interim Restraint on the Disposition or Encumbrance of Property Should Not Be Imposed Absent a Demonstration That the Party to Be Restrained Has Done, or Is Threatening to Do, an Act Which Would Prejudice the Movant's Equitable Distribution Claim.

In Many v Many, --- N.Y.S.2d ----, 2011 Wl 1902259 (N.Y.A.D. 2 Dept.)Residence to Meet His Pendente Lite Maintenance Obligation. The wife appealed from an order denying her motion to restrain the defendant husband from encumbering the marital residence, and in effect, authorized the defendant to refinance the equity in the marital residence and to use any funds obtained therefrom for the sole purpose of paying his pendente lite maintenance obligation. The order also directed the defendant to pay arrears for his pendente lite maintenance obligation retroactive to only february 1, 2010, and awarded her an attorney's fee of $15,000. The appellate division held that supreme court did not improvidently exercise its discretion in failing to restrain the defendant husband from encumbering the marital residence. It pointed out that an interim restraint on the disposition or encumbrance of property should not be imposed absent a demonstration that the party to be restrained has done, or is threatening to do, an act which would prejudice the movant's equitable distribution claim. Here, no evidence indicated that the defendant had done, or was threatening to do, an act that would threaten the plaintiff's equitable distribution claim. The court noted that while the plaintiff may be entitled to an equitable share of the value of the marital residence, that issue had yet to be adjudicated. At a later date, the supreme court would be able to ensure that the plaintiff was reimbursed for her equitable share of any funds used by the defendant as a result of the sale or refinancing of the marital residence.

Family Court Act Provides for the Award of an Attorney's Fee Only to a Prevailing Party in a Violation Proceeding

In Matter of Shvetsova v Paderno, --- N.Y.S.2d ----, 2011 WL 1902198 (N.Y.A.D. 2 Dept.) the father appealed from an order of the Family Court which denied his objection to an order of the Court which granted the mother's motion for an award of an attorney's fee and awarded her $11,500. The Appellate Division observed that the attorney's fee at issue was awarded to the mother for legal fees she incurred in defending against the father's petition for a downward modification of his child support obligation, and in prosecuting her petition to hold the father in civil contempt for his alleged violation of a prior support order. In a related appeal, it reversed the Family Court's denial of the father's petition for downward modification of his child support obligation and remitted the matter to the Family Court for a new determination of the father's child support obligation and arrears. In light of the decision and order in the related appeal, it reversed the award of an attorney's fee to the mother insofar as it was in connection with her defense against the father's petition. In addition, in the same related appeal, it reversed the Family Court's finding that the father willfully violated the prior support order. Therefore, although the Family Court Act provides for the award of an attorney's fee to a prevailing party in connection with a violation proceeding (see Family Ct Act 438 [b] ), here, the mother was not entitled to such an award. Accordingly, it directed that after the Support Magistrate makes a new determination of the father's petition for a downward modification of his child support obligation, in accordance with its decision and order in the related appeal, the Support Magistrate shall make a new determination on the mother's motion for an award of an attorney's fee. Any award of an attorney's fee, if warranted, shall be limited to fees incurred in connection with the mother's defense against the father's petition.

Family Court Act 1028 Hearing Is Triggered by the Removal of a Child from the Home

In Matter of Lucinda R, --- N.Y.S.2d ----, 2011 WL 1902203 (N.Y.A.D. 2 Dept.) the question presented on this appeal was whether a Family Court Act 1028 hearing is triggered by the removal of a child from the home of one parent and temporary placement into the custody of another parent or relative, or whether such hearing is triggered only where a child is placed into government-administered foster care. The Appellate Division concluded that the Family Court erred in denying the mother's application for a hearing under Family Court Act 1028. In relevant part, that section provides: "(a) Upon the application of the parent or other person legally responsible for the care of a child temporarily removed under this part or upon the application of the [attorney for the child] for an order returning the child, the court shall hold a hearing to determine whether the child should be returned (i) unless there has been a hearing pursuant to [Family Court Act 1027] on the removal of the child at which the parent or other person legally responsible for the child's care was present and had the opportunity to be represented by counsel, or (ii) upon good cause shown. Except for good cause shown, such hearing shall be held within three court days of the application and shall not be adjourned." The disposition of the mother's application here turned on the meaning of the word "removal," as used in the statute. The Family Court found that there was no removal within the meaning of Family Court Act 1028 because "when a child is moved from the [petitioner's] home to the non respondent father's home [,] that ... is not a removal and it does not generate a basis for a 1028 hearing." The Family Court reasoned that "1028 hearings protect the primacy of parental right[s] as against the state, not as against the parent vs. parent."

Justice Belen wrote that the Appellate Division disagreed. In assessing the Family Court's interpretation of the statute, it begins with the language of the statute itself, "as the statutory text is the clearest indicator of legislative intent. If the terms of the statute are clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used. On its face, Family Court Act 1028 does not limit a hearing only to parents whose children have been placed in the custody of a governmental agency. There is no qualification to its application whatsoever. It plainly and simply states that, upon the application of a parent of a child who has been temporarily removed, the court shall hold a hearing to determine whether the child should be returned, and this must be done within three court days without adjournment. The Court pointed that that these rules of strict construction, however, cannot be applied without regard to the statute as a whole, as its various sections must be considered together and with reference to each other. The purpose of article 10 of the Family Court Act is to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that the child's needs are properly met. (Family Ct Act 1011). The Appellate Division held that the Family Court's finding of a legal distinction between a child's removal from the home and placement in the custody of another parent, on one hand, and placement in the custody of a governmental agency, on the other hand, was illusory. In either case, it is the State acting within its parens patriae power effectuating that transfer and removal. Accordingly, the Court found that that the applicability of a Family Court Act 1028 hearing is not dependent on whether the child removed is placed with another parent or whether the child is placed in foster care. In sum, the trigger is that the State has acted to effectuate the removal of the child from the home and placed him or her in the custody of another.

Allegations of a Family Offense Are Not Subject to the Defense of Laches or Statute of Limitations. The Issue in Family Offense Matters Is Not the Age of the Threat but the Imminence of the Danger.

In Matter of Opray v Fitzharris, --- N.Y.S.2d ----, 2011 WL 1902204 (N.Y.A.D. 2 Dept.), the wife initiated a family offense proceeding on or about April 7, 2010, alleging that the husband committed the family offenses of assault and aggravated harassment during various incidents occurring in April 2001 and December 2006, as well as on January 6, 2010, April 3, 2010, and April 6, 2010. The Appellate Division held that the Family Court properly dismissed allegations in the petition regarding incidents alleged to have occurred in April 2001 and December 2006. It pointed out that allegations of a family offense are not subject to the defense of laches or statute of limitations (citing Matter of Ashley P., 31 AD3d 767, 769; Matter of Nina K. v. Victor K., 195 Misc.2d 726, 727). The issue in family offense matters is not the age of the threat but the imminence of the danger. (Matter of Nina K. v. Victor K., 195 Misc.2d at 727). Here, in addition to the remoteness of the allegations, the Family Court properly determined that they did not bear upon the existence of an "immediate and ongoing danger" to the wife or children (see Family Ct Act 827). However, it found that the Family Court erred in determining that the wife failed to establish a prima facie case of aggravated harassment with respect to the incident alleged to have occurred on April 6, 2010. In determining a motion to dismiss for failure to establish a prima facie case, the evidence must be accepted as true and given the benefit of every reasonable inference which may be drawn therefrom. The question of credibility is irrelevant, and should not be considered. Here, viewing the wife's testimony in the light most favorable to her, and accepting her testimony as true, the wife failed to establish a prima facie case of assault in the third degree or aggravated harassment in the second degree with respect to the incident alleged to have occurred January 6, 2010. The wife did, however, establish a prima facie case of aggravated harassment in the second degree based on her testimony that during a telephone conversation on April 6, 2010, the husband threatened, among other things, to find her and kidnap the children (see Penal Law 240.30[1][a] ). The petition was reinstated and the matter remitted to the Family Court, for a new fact-finding hearing and for a new determination of the petition with respect to the allegations regarding the events of April 6, 2010.

Defense of Action for Fraudulent Misrepresentation Is Not an Enforcement of Rights Within Meaning of Counsel Fee Provision of Agreement

In Etzion v Etzion, --- N.Y.S.2d ----, 2011 WL 1902589 (N.Y.A.D. 2 Dept.), an action, inter alia, to recover damages for fraudulent misrepresentation in connection with negotiations relating to a stipulation of settlement dated June 8, 2005, which was incorporated, but not merged, into the parties August 16, 2005 judgment of divorce, the facts of the action were set forth in the decision and order on a prior appeal (see Etzion v. Etzion, 62 AD3d 646). On this appeal, the plaintiff contended that the Supreme Court erred in denying her motion pursuant to CPLR 3211(a)(1) and (7) to dismiss a counterclaim asserted by the defendant former husband, Rafael Etzion (defendant), for an award of an attorney's fee pursuant to the terms of a stipulation of settlement entered into by the defendant and the plaintiff on June 8, 2005, or, in the alternative, for summary judgment dismissing the counterclaim. The Appellate Divison observed that the fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent. Where the contract is clear and unambiguous on its face, the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. Courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing. Thus, a court will not imply a term where the circumstances surrounding the formation of the contract indicate that the parties, when the contract was made, must have foreseen the contingency at issue and the agreement can be enforced according to its terms. The construction and interpretation of an unambiguous written contract is an issue of law within the province of the court. It found that the defendant's counterclaim for an award of an attorney's fee was based on an overbroad reading of an attorney's fee provision in the parties' stipulation of settlement executed on June 8, 2005 which was subsequently incorporated, but not merged, into their judgment of divorce. The parties' separation agreement, at Article XXV, paragraph 3, stated, in relevant part: "In the event either party is forced to seek aid of counsel in enforcing any rights pursuant to this Stipulation, and in the event that party is successful in enforcing such right(s), the other shall reimburse him or her for any reasonable attorneys' fees necessarily incurred in enforcing such rights. The provisions of this paragraph shall be in addition, and without prejudice or limitation, to any other rights or remedies to which the aggrieved party may be entitled. The parties agree that the purpose of this paragraph is to prevent unnecessary litigation between them and to encourage each to fulfill his or her responsibilities under the terms of this Stipulation as fully as possible" The defendant, in his counterclaim, asserted that he was entitled to an award of an attorney's fee pursuant to the fees provision because he had been forced, in effect, to defend his rights under the separation agreement. However, the agreement clearly and unambiguously provided that only the party seeking to enforce any rights under the agreement shall be entitled to an attorney's fee, if successful. The defendant was not enforcing any rights under the agreement by simply defending against the plaintiff's motion. Had the parties intended the fees provision to be construed as the defendant contended, they were free to expressly so provide. The Court pointed out that where documentary evidence utterly refutes the proponent's factual allegations, conclusively establishing a defense as a matter of law, a motion to dismiss may be properly granted. Based upon the documentary evidence, consisting of the agreement, the plaintiff conclusively established, as a matter of law, that the defendant was not entitled to an award of an attorney's fee, regardless of the outcome of the current dispute. Accordingly, the Supreme Court erred in denying the plaintiff's motion to dismiss the defendant's counterclaim pursuant to CPLR 3211 (a)(1).

Stipulation Void as Against Public Policy, since it Expressly Required the Former Wife to Seek Dissolution of the Marriage and "Provided for the Procurement of Grounds of Divorce

In Charap v Willett, --- N.Y.S.2d ----, 2011 WL 1902605 (N.Y.A.D. 2 Dept.), the parties were divorced by judgment dated March 30, 2009. In a related appeal the Appellate Divison affirmed the judgment of divorce insofar as appealed from. The former wife initially contested the divorce action commenced in 2003. After a nonjury trial, the Supreme Court determined that the former husband failed to prove his alleged grounds for divorce. The parties then entered into a custody agreement and the former wife filed an amended answer dated May 7, 2007, containing a counterclaim for a divorce on the ground of cruel and inhuman treatment. The former husband waived his reply and, while neither admitting nor denying the allegations, consented to the former wife obtaining a divorce on that ground. A nonjury trial was held on the financial issues, and a judgment of divorce was issued on March 30, 2009. By order to show cause dated July 29, 2009, the former wife moved, inter alia, to direct the former husband to comply with a theretofore confidential stipulation between the parties dated May 7, 2007, and to pay back maintenance and child support in the sum of $13,587.61, plus interest. The stipulation was subscribed by the parties and notarized, but, in accordance with its provisions, was kept confidential from the court during the trial on financial issues. In the stipulation, the former husband agreed, inter alia, to pay the former wife $65,000 over and above a future equitable distribution award, and to pay her counsel $10,000. In exchange, the former wife agreed to promptly prepare an amended answer and counterclaim for a divorce alleging cruel and inhuman treatment. As soon as the court placed the matter on its calendar, the parties would proceed to inquest whereby the grounds for a divorce would be finally and irrevocably determined. The Supreme Court denied the former wife's motion, finding the stipulation unenforceable and her claim of entitlement to back maintenance and child support without merit. The Appellate Divison affirmed. It held that the May 7, 2007, stipulation was void as against public policy, since it expressly required the former wife to seek dissolution of the marriage and "provides for the procurement of grounds of divorce" (General Obligations Law 5-311). As the offending provision represented the only consideration provided by the former wife for the agreement, which did not contain a severability provision, the stipulation was void in its entirety (cf. Taft v. Taft, 156 A.D.2d 444).

Supreme Court providently imputed $200,000 per year in income to the former wife, an attorney, for child support purposes.

In Charap v Willett, --- N.Y.S.2d ----, 2011 WL 1902606 (N.Y.A.D. 2 Dept.) the parties were married in 1982. There were two children of the marriage, born in 1990 and 1995, respectively. The former husband left the marital residence in December 2002 and commenced this action for a divorce on March 17, 2003. After a nonjury trial on grounds for divorce, the Supreme Court determined that the former husband failed to prove his alleged grounds for divorce. On May 7, 2007, the parties entered into a "Stipulation as to Custody, Decision-Making and Parental Access," and the former wife filed an amended answer containing a counterclaim for divorce on the ground of cruel and inhuman treatment. The former husband waived his reply and, while neither admitting or denying the allegations, consented to the former wife obtaining a divorce on that ground. After an inquest, the divorce was granted, but entry of the divorce judgment was held in abeyance pending the resolution of ancillary issues. The matter was transferred for trial on the remaining financial issues. After a nonjury trial, the Supreme Court, inter alia, distributed the marital estate and directed the former husband to pay the former wife durational maintenance in the sum of $5,000 per month for two years. The court also imputed income to the former wife for child support purposes, pro-rated the parties' obligations, and directed the former husband to pay the former wife $3,859.34 per month in child support, plus direct payments of the children's college expenses and other add-ons. The Appellate Divison affirmed. It held that Supreme Court properly rejected the former wife's request for lifetime maintenance. First, a purported agreement dated March 19, 2001, which provided, inter alia, that the former wife would not be required to work outside the family home during a divorce, was ambiguous as to duration and, in any event, was not enforceable (see Domestic Relations Law 236[B][3] ). Moreover, the former wife was an attorney who practiced law for almost 20 years and was capable of earning a significant salary. Given her skills, experience, and the children's mature ages, the Supreme Court appropriately limited maintenance to $5,000 per month for a period of two years. It also held that Supreme Court providently imputed $200,000 per year in income to the former wife for child support purposes. Child support is determined by the parents' ability to provide for their child rather than their current economic situation. In determining a party's child support obligation, the court 'need not rely upon the party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential. Courts are afforded considerable discretion in determining whether to impute income to a parent. Here, given the former wife's education, experience, and salary history, the imputed sum was supported by the record. Further, the court properly considered the statutory factors in capping the combined parental income at $300,000 for child support purposes, and there was no basis in this record for disturbing its determination. It held that Supreme Court providently awarded the former wife only 10% of the value of the former husband's law practice. The former wife made only indirect contributions to the former husband's career and was herself employed as an attorney for most of the marriage. The Supreme Court providently exercised its discretion in denying the former wife's application for counsel fees, as she received a large distributive award and had a substantial earning capacity.

Cruel and Inhuman Treatment Divorce Granted

In Ying Jung Yan v Ke-en Wang, --- N.Y.S.2d ----, 2011 WL 2184145 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which granted plaintiff's application for a divorce on the ground of cruel and inhuman treatment. It found that Plaintiff's testimony that defendant directed her to have an abortion against her wishes and did not visit her during her two-week convalescence; that defendant often worked late into the evening and through the night and would not communicate his plans to plaintiff and ignored her telephone calls; that the parties fought often, both verbally and physically, especially after plaintiff refused to assist defendant in obtaining his green card; that defendant made false claims against plaintiff to the police; and that during an altercation, plaintiff suffered a serious laceration on her left forearm while attempting to block a knife yielded by defendant, amply established that defendant's conduct endangered plaintiff's physical and mental well-being and constituted cruel and inhuman treatment.

June 1, 2011

Improper to Incorporate Agreement into Judgment Where No Meeting of the Minds

In Alton v Alton, --- N.Y.S.2d ----, 2011 WL 1612577 (N.Y.A.D. 2 Dept.) the Appellate Division pointed out that the defendant husband contended that the Supreme Court erred in denying his motion which were to set aside the provisions of the parties' oral, on-the-record stipulation of settlement relating to equitable distribution, maintenance, his obligation to purchase an apartment for the plaintiff wife, and the validity of the parties' prenuptial agreement, because there was no meeting of the minds on an essential material term, to wit, the purchase price of the subject apartment. It held that since a judgment was entered that purported to incorporate the terms of the putative settlement, the defendant was precluded from challenging the validity or enforceability of the settlement by way of motion, but was required either to appeal from the judgment or commence a plenary action. Since the defendant appealed from the judgment, it reached the merits of the defendant's contention that no stipulation of settlement was, in fact, consummated. It noted that in determining whether an agreement exists, the inquiry centers upon the parties' intent to be bound and whether there was a meeting of the minds regarding the material terms of the transaction . A review of the transcribed proceedings at which the parties attempted to negotiate a settlement revealed that the parties never reached an agreement on the essential and material term regarding the purchase price of the apartment. The provisions relating to the apartment purchase were intertwined and integrated with the other provisions of the disputed stipulation of settlement, i.e., the provisions relating to equitable distribution, maintenance, and the validity of the parties' prenuptial agreement. Accordingly, the Supreme Court should not have incorporated the disputed stipulation of settlement provisions into the judgment of divorce.

Best Interest of Child Outweighed Application of Exclusionary Rule in Custody Case

In Matter of Young v Young, --- N.Y.S.2d ----, 2010 WL 6622106 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order which awarded the father sole custody of the parties child. It held that Family Court did not err in summarily denying the mother's motion to suppress certain evidence which she alleged was obtained illegally. In a custody case, the court is required to determine "solely what is for the best interest of the child, and what will promote its welfare and happiness, and make an award accordingly. It stated that the best interests of the child are determined by a review of the totality of the circumstances. It held that the application of the exclusionary rule to prevent the court from considering factors relevant to that determination, pertaining here to the condition of the home of a parent who was seeking custody, would have a "detrimental impact upon the fact-finding process and the State's enormous interest in protecting the welfare of children," which outweighed the deterrent effect of applying the exclusionary rule (citing Matter of Diane P., 110 A.D.2d 354, 354). It also rejected the mother's contention that the Family Court should have conducted a pretrial hearing as to the voluntariness of an admission she made and the effectiveness of her counsel in a neglect proceeding which had been brought against her. The mother testified as to these matters during the custody trial, such that the issues and her position thereon were before the Family Court. Family Court's determination that it was in the children's best interest for the father to be awarded custody had a sound and substantial basis in the record.

Well-established Precedent Overwhelmingly Supports a Party's Right to an Evidentiary Hearing Before a Finding of Contempt

In Bergman v Bergman, --- N.Y.S.2d ----, 2011 WL 1796364 (N.Y.A.D. 1 Dept.) the Appellate Division held that a hearing is required on a contempt motion when the party opposing the motion asserts a defense of financial inability to comply. Domestic Relations Law s 246(3) in pertinent part states: "Any person may assert his financial inability to comply with ... an order or judgment ... as a defense in a proceeding instituted against him ... to punish him for his failure to comply ... and if the court, upon the hearing of such contempt proceeding is satisfied from the proofs and evidence offered ... that the defendant is financially unable to comply ... it may, in its discretion, until further order of the court, make an order modifying such order or judgment...." Further, Domestic Relations Law 236(B)(9)(b) provides that a party may seek downward modification if he or she has experienced a "substantial change in circumstances:" There is no limit to the number of times a party may seek downward modification. The party must demonstrate that there has been a substantial change in circumstances to merit any downward modification. There is no right to a hearing absent a prima facie showing of entitlement to downward modification. However, well-established precedent overwhelmingly supports a party's right to an evidentiary hearing before a finding of contempt (Boritzer v. Boritzer, 137 A.D.2d 477 [1988]; Comerford v. Comerford, 49 A.D.2d 818 [1975]; Singer v. Singer, 52 A.D.2d 774 [1976]; see also Gifford v. Gifford, 223 A.D.2d 669 [1996] ). In Singer, this Court held that "[d]ue process requires that a hearing be held before one can be adjudged in contempt" , undoubtably because a finding of contempt may result in incarceration as, indeed, it did in this case. Here, defendant has not had any opportunity to offer "proofs [or] evidence" at a hearing on either plaintiff's contempt motion or defendant's cross motion for downward modification. The court entirely ignored the affidavits prepared by a reputable forensic accountant, and the voluminous documentation defendant presented. In the court's opinion, defendant had "repeated days in court." However, on this motion, defendant clearly presented new financial information and an expert affidavit explaining that defendant's circumstances had changed, and not for the better. Accordingly, it held that defendant should have had a hearing to assess the new financial information and new expert affidavit.

Lifetime Maintenance Award of $200 per Week to Be Warranted Given the Identified Disparity in the Parties' Respective Incomes and the Wife's Reduced Earning Potential.

In Scarpace v Scarpace, --- N.Y.S.2d ----, 2011 WL 1797230 (N.Y.A.D. 3 Dept.) after 31 years of marriage, plaintiff (husband) commenced an action for divorce. The parties entered into a stipulation with respect to all issues with the exception of spousal maintenance. According to their stipulation, the marital property was divided such that each party would retain various liquid assets valued at approximately $580,000. The wife's share included the unencumbered former marital residence, appraised at $250,000, and a payment received from the husband in the amount of $110,000. The parties also stipulated, that they each retain their own pension rights as separate property. After a trial, Supreme Court awarded the wife maintenance in the amount of $200 per week for six years, effective May 22, 2009. On appeal the wife contended that Supreme Court erred in setting the amount of maintenance at $200 per week and in limiting its duration to six years. The wife argued that the maintenance award would impair her ability to save money and, because she would reach her intended retirement age when the maintenance award terminates, she will be forced to rely on her savings to maintain her standard of living. The Appellate Division modified the underlying judgment to he extent that the wife was to receive lifetime maintenance in the amount of $200 per week, retroactive to October 16, 2007, the date of her answer. The Appellate Division observed that "Maintenance is appropriate where, among other things, the marriage is of long duration, the recipient spouse has been out of the work force for a number of years, has sacrificed her or his own career development or has made substantial noneconomic contributions to the household or to the career of the payor". At the time of trial, both parties were in their mid-fifties and in generally good health. Throughout their marriage, they lived a financially conservative lifestyle, resulting in no college loans for their four emancipated children and no mortgage on the marital home. While the husband attended college and built his career, the wife worked various part-time and seasonal jobs and devoted her time to tending to the needs of their children. As a result, the wife did not commence her current full-time occupation with State Farm Insurance until approximately 1996, such that at the time of trial, her annual income was roughly $32,000. The husband was earning $104,000 per year as a 32-year employee of the Department of Taxation and Finance. While the husband estimated that he would receive over $5,000 per month from his pension alone upon retirement, the wife estimated that between Social Security retirement and her own pension, she would receive approximately $1,200 per month upon her retirement. The wife also testified that she was now required to pay for health and homeowner's insurance, school and property taxes and various utilities and household expenses, all of which previously had been paid for by the husband. Finally, the wife testified that, while she used to save $600 per month, since the divorce she can only afford to save $275 per month, and that she has accumulated $8,600 in credit card debt due to their son's college expenses. The Appellate Division was persuaded that an award of lifetime maintenance was appropriate here. While it was true that the parties enjoyed a modest standard of living during their marriage and that the wife not only can contribute toward her own support but also has received assets through equitable distribution, one of "the many specific considerations underlying an award of nondurational maintenance ... is the present and potential future income of the parties". Given the identified disparity in the parties' respective incomes and the wife's reduced earning potential, it found a nondurational maintenance award of $200 per week to be warranted.

Finding That MBA Made the Defendant a More Attractive Candidate for Position in the Financial Sector of the Cable Television Industry Enhanced His Earning Capacity and Was a Marital Asset.

In Huffman v Huffman, --- N.Y.S.2d ----, 2011 WL 1817309 (N.Y.A.D. 2 Dept.) Supreme Court awarded the plaintiff 30% of the value of defendants master's degree, weekly child support of $1,281.14, and maintenance for four years commencing December 1, 2008, in the amounts of $5,000 per month for the first and second years, $3,500 per month for the third year, and $2,000 per month for the fourth year, and directed him to pay to the plaintiff $90,793.02 in connection with certain bonus money. The Appellate Divison held that Supreme Court's determination of basic child support was proper. The Supreme Court providently exercised its discretion in calculating child support against $300,000 of the defendant's income based upon the standard of living that the parties' children would have enjoyed had the marriage not dissolved and upon the parties' disparate financial circumstances, which were apparent from the record. Under the circumstances of this case, the Supreme Court improvidently exercised its discretion in awarding the plaintiff maintenance for four years beginning December 2008, given the length of the parties' marriage, the plaintiff's ability to reenter the workforce, and the fact that the defendant was paying temporary support pursuant to a pendente lite order dated February 25, 2005, requiring him to pay the plaintiff $2,500 per month in maintenance retroactive to November 11, 2004. Thus, the maintenance award had to be recalculated retroactive to November 11, 2004, taking into account any credit due for amounts paid by the defendant pursuant to the pendente lite order. The Appellate Division disagreed with defendants contention that the trial court erred in concluding that his MBA degree provided him with an enhanced earning capacity subject to equitable distribution. An academic degree earned during a marriage qualifies as marital property which is subject to equitable distribution ( McGowan v. McGowan, 142 A.D.2d 355, 357). The value of a degree is the "enhanced earning capacity it affords the holder" (O'Brien v. O'Brien, 66 N.Y.2d 576, 588). Here, while the defendant presented some evidence that an MBA degree was not an actual prerequisite to his employment in various finance positions in the cable television industry, there was also ample evidence, including expert testimony, to support the Supreme Court's finding that the attainment of this degree made the defendant a more attractive candidate for a position in the financial sector of the cable television industry. Accordingly, the Supreme Court properly concluded that the MBA degree which the defendant obtained during the course of his employment enhanced his earning capacity. The Supreme Court also properly determined that the plaintiff was entitled to a 30% share of the defendant's enhanced earning capacity. Although the plaintiff did not make direct financial contributions to the husband's attainment of his MBA degree, she made substantial indirect contributions by, inter alia, supporting the husband's educational endeavors, working until August 2000 and contributing her earnings to the family, being the primary caretaker of the couple's children, cooking family meals, and participating in housekeeping responsibilities. Bonuses earned for work by a spouse during the marriage constitute marital property subject to equitable distribution, even if paid after commencement of the divorce action, and are distributed after taking income taxes into account. It saw no reason to disturb the Supreme Court's equitable distribution of the defendant's 2002 and 2003 bonuses. However, it agreed with the defendant's contention that the Supreme Court erroneously distributed his gross 2004 bonus without taking into account income taxes. Accordingly, upon remittal, to the Supreme Court the award had to be recalculated to the extent it is based upon the defendant's 2004 bonus, to take into account income taxes paid by the plaintiff.

Proper to Apply a Lack of Marketability Discount of 25% to Reflect the Risk Associated with the Illiquidity of a Close Corporation Whose Shares Cannot Be Freely Traded.

In Cooper v Cooper, --- N.Y.S.2d ----, 2011 WL 1817757 (N.Y.A.D. 2 Dept.) the parties were married on April 8, 1984, and had two children, born in 1989, and 1992, respectively. Supreme Court, inter alia, awarded the plaintiff post-divorce maintenance of $5,000 per month for a period of four years, interest of 9% per annum on installment payments of the plaintiff's distributive awards, child support of $1,192.31 per week, based upon a finding that the defendant's "CSSA income is $250,000 per year," directed the defendant to maintain a life insurance policy for the benefit of the plaintiff and the children in the value of $500,000, and awarded her counsel fees of $50,000. This action was commenced in March 2003. The defendant was the founder and owner of Triangle Electronics Group, Inc. ( Triangle), which distributed electronic components. A primary issue at trial and on appeal was the equitable distribution of the defendant's 100% interest in Triangle, which the Supreme Court determined was worth $1,625,000 on the date of commencement of the action. In so doing, the Supreme Court credited the defendant's expert. The Appellate Divison held that the determination of the fact finder as to the value of a business, if within the range of the testimony presented, will be accorded deference on appeal if it rests primarily on the credibility of expert witnesses and their valuation techniques". The testimony of the defendant's expert, which was supported by competent evidence in the record and a written report admitted into evidence, was properly credited by the Supreme Court. The defendant's expert properly applied a lack of marketability discount of 25% to reflect the risk associated with the illiquidity of a close corporation whose shares cannot be freely traded. The Supreme Court properly determined that the plaintiff was responsible for one-half of the federal tax liability of $1,371,744 incurred when the defendant filed amended income tax returns for the tax years 1999, 2000, 2001, 2002, and 2003, but that she was not responsible for New York State tax liability, or any interest and penalties as a result of the filing of the amended tax returns. Since that tax liability was incurred during the marriage, the Supreme Court properly determined that the plaintiff was responsible for part of this liability. The record established that the defendant was responsible for the delay in reporting the income declared on those amended returns and, therefore, was properly required to pay all interest and penalties. Further, under all of the circumstances of this case, including that fact that, with respect to New York State tax liability, the plaintiff was officially adjudicated an innocent spouse, the Supreme Court providently exercised its discretion in determining that the plaintiff was not responsible for any of the New York State tax liability. The Supreme Court properly exercised its discretion in awarding the plaintiff post-divorce maintenance in the sum of $5,000 per month for a period of four years, based upon the parties' standard of living during the marriage, their income, and the plaintiff's distributive awards. The amount of maintenance awarded to the plaintiff would ensure that her reasonable needs were met, while providing her with an incentive to become self-supporting. Further, the award of child support was proper. The award of counsel fees, and the denial of additional expert fees, was a provident exercise of discretion, in light of the interim awards of counsel fees and expert fees, and the Supreme Court's conclusion that the fees demanded by the plaintiff's expert were excessive. Further, the award of interest at the statutory rate of 9% per annum (see CPLR 5004), on the plaintiff's distributive awards, should the defendant elect to pay those awards in installments over a period of five years, was a provident exercise of discretion.

Amendments to Rule 7.1 (c), (d), (e) and (g) of Part 1200 of Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York, entitled “Rules of Professional Conduct, were approved by the four presiding justices of the Appellate Division departments.

The amendments allow the use of testimonials or endorsements from clients with respect to a pending matter, as long as the clients give informed consent. They allow actors to portray judges, lawyers or clients provided the advertisements disclose that the characters are actors. The rule prohibiting a pop-up or pop-under advertisement in connection with computer-accessed communications has been eliminated.

The Amendments to Former Rule 7.1 (c), (d) (e) and (g) of Part 1200 of Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York, entitled “Rules of Professional Conduct, deleted the sections highlighted below:

(c) An advertisement shall not:

(1) include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending; [DELETED]

(2) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;

(3) include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case; [DELETED]

(4) use actors to portray the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same;

(5) rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence; [DELETED](6) be made to resemble legal documents; or

(7) utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter. [DELETED]

(d) An advertisement that complies with paragraph (e) may contain the following:

(1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;

(2) statements that compare the lawyer's services with the services of other lawyers;

(3) testimonials or endorsements of clients, where not prohibited by paragraph (c)(1), and of former clients; or [DELETED “where not prohibited by paragraph (c)(1)”]

(4) statements describing or characterizing the quality of the lawyer's or law firm's services.

(e) It is permissible to provide the information set forth in paragraph (d) provided:

[DELETED “subdivision (d) of this section” and replaced it with “in paragraph (d)”

(1) its dissemination does not violate paragraph (a); [DELETED “paragraph (a) and replaced it with “subdivision (a) of this section’]

(2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; and

(3) it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome."

(g) A lawyer or law firm shall not utilize:

(1) a pop-up or pop-under advertisement in connection with computer-accessed communications, other than on the lawyer or law firm's own web site or other internet presence; or [DELETED]

(2) meta tags or other hidden computer codes that, if displayed, would violate these Rules.

May 16, 2011

In Determining Parents' Respective Obligations Towards Cost of College, a Court Should Not Take into Account Any College Loans for Which the Student Is Responsible

In Matter of Yorke v Yorke, --- N.Y.S.2d ----, 2011 WL 1499108 (N.Y.A.D. 2 Dept.) the parties were the parents of a child who was a college student beginning in the Fall 2007 semester. By orders dated October 16, 2007, and December 20, 2007, respectively, the father was directed to pay 83% of the college tuition for the child prior to March 2009, and 82% of the tuition for the child subsequent to March 2009. Those orders provided that the father was not responsible for contributing towards the child's room and board at college. In 2009 the mother commenced a proceeding, alleging that the father had failed to contribute the required amount to college tuition for the five semesters from Fall 2007 through and including Fall 2009. Family Court issued an order dated March 29, 2010, in which that court determined the father's obligation for college costs for the child and found that the father was entitled to a credit in the sum of $3,407. In the order the Family Court deducted financial aid, including "Stafford" loans, prior to determining the father's share of college costs for the child. The Appellate Division held that in determining the parents' respective obligations towards the cost of college, a court should not take into account any college loans for which the student is responsible. Therefore, any loans for which the child is responsible should not have been deducted from the college costs prior to determining the father's pro rata share of those costs. Here, the record did not indicate whether the child was responsible for repayment of the Stafford loans reflected on the statements from the college. Accordingly, the matter was remitted to the Family Court for clarification of this matter. In addition, the Family Court erred in applying the total amount of scholarships, grants, and student loans for which the child was not responsible ( financial aid). First, the Family Court should have calculated the total cost of attending college, including tuition, and room and board. Next, it should have determined the percentage of that total cost which was covered by financial aid. That percentage should then have been applied to the tuition portion. Finally, the father's share of the net tuition, after deducting the pro rata financial aid, should have been calculated based upon his percentage of responsibility . For example, if tuition is $12,000 and room and board is $8,000, totaling $20,000, and financial aid is $15,000, or 75% of the total college cost, the net tuition after pro rata financial aid would be $3,000. The father's pro rata tuition obligation should then be applied to that amount to determine his contribution to tuition. Accordingly, the matter was remitted to the Family Court for recalculation of the father's obligation to contribute towards college costs.

No Reduction of Child Support Arrears Accrued Prior to the Making of Application for Modification Even Where Noncustodial Parent Establishes His Income Is less than Poverty Income Guidelines Amount

In Matter of Fisher v Nathan, --- N.Y.S.2d ----, 2011 WL 1499660 (N.Y.A.D. 2 Dept.), the Appellate Division held that Family Court properly denied the father's objection to the order of the Judicial Hearing Officer, which denied his motion for a temporary downward modification of his obligation to pay arrears for his daughter's college expenses. Although child support arrears cease to accrue above the sum of $500 where a noncustodial parent can establish that his or her income is less than or equal to poverty income guidelines amount for a single person, as reported by the United States Department of Health and Human Services (see Family Ct Act 413[1][g] ), a "modification, set aside or vacatur [of a child support obligation set forth in a judgment or order] shall not reduce or annul child support arrears accrued prior to the making of an application pursuant to this section" (Family Ct Act 451). "In that regard, contrary to the father's claim, child support arrears may not be reduced or annulled even where the defaulting party shows good cause for failing to make an application for relief from the judgment or order of support prior to the accrual of arrears or where requiring the party to pay the arrears will result in a grievous injustice" (Matter of Mandelowitz v. Bodden, 68 AD3d 871, 875; see Matter of Dox v. Tynan, 90 N.Y.2d 166, 173-174). Here, the father failed to establish that any decline in business sustained by his solo law practice as a result of his illness left him below the Federal poverty income guidelines. Accordingly, his obligation for child support arrears continued to accrue, and there is no basis in law to adjust or reduce his obligation to pay child support arrears.

Direction in Judgment to Pay "One-half of the Mortgage and Real Estate Charges of the Marital Residence and Half of the Cost of Any Repair to the Home in Excess of $750.00" Constituted an Improper Open-ended Obligation

In Mosso v Mosso--- N.Y.S.2d ----, 2011 WL 1733948 (N.Y.A.D. 2 Dept.) defendant appealed from so much of a judgment of the Supreme Court as (1) imputed an annual income to him of $52,000 for the purpose of calculating his child support obligations, (2) directed him to pay $1,160 per month in child support retroactive to the date of the commencement of the action, (3) directed him to pay one-half of the mortgage and real estate tax charges of the marital residence and half the cost of any repair to the home in excess of $750, (4) directed him to pay 100% of a $30,000 home equity loan on the marital residence, (5) awarded the plaintiff $13,777 from certain bank accounts, and (6) awarded the plaintiff exclusive use and occupancy of the marital residence until the last of the parties' children reaches majority. The Appellate Divison held that Supreme Court did not improvidently exercise its discretion in it imputing an annual income to the defendant of $52,000 for the purpose of calculating his child support obligations. However, in calculating the child support award, the Supreme Court's direction that the defendant pay both child support and half of the carrying charges on the marital residence resulted in an improper double shelter allowance. The matter was remitted to the Supreme Court to recalculate the child support award ‘taking into account the shelter costs incurred by the defendant in providing housing to the plaintiff and the minor children". It held that Supreme Court also improperly awarded retroactive child support to August 1, 2007, the date of the commencement of the action, since the plaintiff did not request child support until she filed an amended complaint on August 27, 2007. It directed that since an award of child support may be made "effective as of the date of the application therefor" (Domestic Relations Law 236[B][7][a] ), on remittal, the Supreme Court's new child support award should be made retroactive to August 27, 2007. It found the defendant's contention that the plaintiff was not entitled to any retroactive child support because she later withdrew her amended complaint was without merit. The record established that the amended complaint was withdrawn solely to relinquish a cause of action for divorce on the ground of cruel and inhuman treatment, and that the plaintiff's request for child support was intended to remain a part of the action. In addition, the matter had to be remitted to the Supreme Court because the Supreme Court's directive that the defendant pay "one-half of the mortgage and real estate charges of the marital residence and half of the cost of any repair to the home in excess of $750.00" constituted an improper open-ended obligation (citing 22 NYCRR subtitle D, Ch III, subchapter B0. The direction to pay for repairs and other maintenance should state a maximum monthly or yearly amount. The Appellate Divison held that Supreme Court also improvidently exercised its discretion in directing that the defendant be 100% responsible for repayment of a $30,000 loan drawn on a home equity line of credit. Expenses incurred prior to the commencement of a divorce action constitute marital debt and should be equally shared by the parties. Although the defendant should be solely responsible for repaying $10,000 of this loan, which he used to pay his attorney's fees, the burden of repaying the remaining $20,000 should be shared by the parties since this debt was incurred during the marriage and the evidence at trial failed to establish a compelling reason why the defendant should bear the cost of repayment alone. The Appellate Division held that Supreme Court did not err in granting the plaintiff and the parties' children the exclusive use and occupancy of the marital residence until the youngest child reaches the age of 18. Exclusive possession of the marital residence is usually granted to the spouse who has custody of the minor children of the marriage. In making this determination, the need of the custodial parent to occupy the marital residence is weighed against the financial need of the parties. The evidence at trial established that the parties were capable of maintaining the marital residence and that suitable comparable housing could not be obtained at a lesser cost than the cost to maintain the marital residence. Further, the defendant failed to establish an immediate need for his share of the proceeds of the sale of the marital residence. The defendant failed to meet his burden of establishing that certain assets in a bank account, acquired during the marriage, were not marital property subject to equitable distribution. Accordingly, the Supreme Court properly provided for the equitable distribution of those funds.

Must be Sufficient Evidence to Support Interim Counsel Fee Award for Services Previously Rendered

In Mimran v Mimran, --- N.Y.S.2d ----, 2011 WL 1496465 (N.Y.A.D. 1 Dept.) Supreme Court directed defendant to pay plaintiff $200,000 as interim counsel fees. The Appellate Division reversed. It held that regardless of whether plaintiff otherwise made a sufficient showing to support an award of interim counsel fees defendant was correct that neither plaintiff nor her counsel provided adequate documentation of the amount of fees already paid, the amount required for experts, the dates and nature of the services previously rendered, or the number of hours of work to be performed. Thus, there was insufficient evidence to support an award for outstanding fees already incurred and no basis upon which an appropriate prospective fee award could be determined.

Agreement Provision for Full Indemnification of Attorneys' Fees in Enforcement Proceedings must Be Enforced

In Colyer v Colyer,--- N.Y.S.2d ----, 2011 WL 1496486 (N.Y.A.D. 1 Dept.) upon granting plaintiff's motion for an order compelling defendant to pay college and medical expenses of the parties' daughter, Supreme Court awarded plaintiff $20,000 in attorneys' fees. The Appellate Division increased the attorneys' fees to $54,467.50 and otherwise affirmed. It noted that Plaintiff's entitlement to attorneys' fees in connection with the instant proceeding arose from the parties' separation agreement, which provided for defendant's full indemnification of fees if he defaulted on his obligation to pay the daughter's college expenses and certain medical expenses and it became necessary for plaintiff to bring proceedings to enforce his obligations. Thus, plaintiff was entitled to collect the full amount of her attorneys' fees in connection with the successful enforcement proceeding. Although defendant complained generally about the reasonableness of the total amount of attorneys' fees sought, he did not contend that any amounts should be excluded as unrelated to the successful portion of the application. Thus, there was no basis for reducing the total amount, which was $45,270.

Liberal Policy to Vacate Default Judgment in Matrimonial Cases Where Meritorious Position with Respect to Ancillary Issues

In Osman v Osman, --- N.Y.S.2d ----, 2011 WL 1601891 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court improvidently exercised its discretion in denying the defendant's motion to vacate her default in appearing for a trial on the ancillary economic issues attendant to the parties' divorce. Although a party seeking to vacate a default must establish a reasonable excuse for the default and a potentially meritorious cause of action or defense, the courts of this state have adopted a liberal policy toward vacating defaults in matrimonial actions. In matrimonial actions, "[t]he State's interest in the marital res and allied issues ... favor[s] dispositions on the merits". The record revealed that the defendant former wife was taken directly from court to the hospital by ambulance on December 15, 2009, where she underwent medical tests, including a chest x-ray and EKG, before being released with a diagnosis of anxiety. Under these circumstances, it found that the wife's claim that the anxiety attack she suffered on December 15, 2009, caused her to misapprehend the Supreme Court's instructions as to the time she was required to return to court the next day, constituted a reasonable excuse for her failure to appear on the morning of December 16, 2009. Furthermore, the parties had been married for 27 years at the time of the commencement of the action, and the plaintiff former husband allegedly was the primary wage earner throughout the marriage. Thus, the wife had a potentially meritorious position with respect to all ancillary economic issues, including maintenance, which were resolved after the inquest held upon her default.

Appeal Dismissed for Failure to Include All Transcripts of Proceedings

In Kociubinski v Kociubinski,--- N.Y.S.2d ----, 2011 WL 1631591 (N.Y.A.D. 2 Dept.) the Appellate Division pointed out that it is the obligation of the appellant to assemble a proper record on appeal, which must include any relevant transcripts of proceedings before the Supreme Court. The record must contain all of the relevant papers that were before the Supreme Court, including the transcript, if any, of the proceedings. Here, the plaintiff appealed from an order and judgment of the Supreme Court which, inter alia, granted the defendant's motion, after a hearing, for an award of child support arrears pursuant to the parties' judgment of divorce and stipulation of settlement. However, the plaintiff's failure to provide this Court with the full hearing transcript renders the record on appeal inadequate to enable the Court to reach an informed decision on the merits and, thus, the appeal was dismissed.

May 2, 2011

Plaintiff's Self-serving Declaration Is All That Required for the Dissolution on Irretrievably Broken Ground

In AC v DR, --- N.Y.S.2d ----, 2011 WL 1137739 (N.Y.Sup.) on a prior motion to the court, in which the husband sought full consolidation of Action 1 and Action 2, the wife sought joinder of the actions for trial, without consolidation, so that she could pursue the benefits of the newly enacted matrimonial legislation available to all actions commenced after October 12, 2010. By decision and order dated January 18, 2011, the court directed that Action 1 and Action 2 be joined for trial and discovery. In Action 2, the wife moved to partake in the benefits of the new matrimonial legislation and sought pendente lite maintenance and counsel fees as well as partial summary judgment on grounds (DRL 170[7] ) under the new law. The Court observed that the newly enacted matrimonial legislation, effective October 12, 2010, provides a new no-fault ground for divorce, DRL 170(7), as follows: (7) The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath ... Citing a Massachusetts case the Supreme Court concluded that the decision that a marriage is irretrievably broken need not be based on any objectifiable fact. It is sufficient that one or both of the parties subjectively decide that their marriage is over and there is no hope for reconciliation (Citing Caffyn v. Caffyn 441 Mass. 487, 806 N.E.2d 415 [2004] ). It concluded that a plaintiff's self-serving declaration about his or her state of mind is all that is required for the dissolution of a marriage on grounds that it is irretrievably broken. It asserted that the conclusion, that it is sufficient that a party subjectively decide that their marriage is over, finds support in the reasoning of other courts. (citing In re Marriage of Walton, 28 Cal.App.3d 108, 117 [1972]; Joy v. Joy, 178 Conn. 254, 255 [1979]; Mattson v. Mattson, 375 A.2d 473, 475 [Me. 1977]; Matter of the Marriage of Dunn, 13 Or.App. 497, 501-502, n. 1 [1973] Caffyn v. Caffyn, supra, n. 17 ). In the court's view, the Legislature did not intend nor is there a defense to DRL 170(7). Nevertheless, while the court would ordinarily grant partial summary judgment to movant, where there are no defenses and no triable issues of fact, the court pointed out that the new legislation directs that "no judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts; fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce". (DRL 170 [7] ). It noted that it had been the practice of the Part, when deemed appropriate, to hold bifurcated trials with respect to grounds for the purpose of disposing of fault issues so, if a divorce was granted, the court could concentrate its resources on equitable distribution. If a divorce was not granted, issues of support and custody, as well as related issues, always remained before the court. This was in aid of judicial economy. Yet, even in those cases where a divorce was granted, the court always held entry of judgment in abeyance pending determination of all other issues, as now set forth in detail in the new legislation. Since the new legislation directs that a judgment of divorce may not be "granted " when the cause of action is predicated on the no-fault ground until all the financial issues are complete, the court concluded that a motion for partial summary judgment cannot be granted nor can a bifurcated trial be held with respect to DRL 170(7). To continue this practice would allow fault trials on one party's claim to advance in time against the other party's no-fault claim. Moreover, since there is no defense to the no-fault ground, no judicial economy would be served by having a bifurcated trial on fault grounds, the only purpose of which was to determine whether a divorce would be granted in the first instance, and a divorce would be granted in this case provided the matter proceeds to its expected conclusion. Therefore, the wife's motion for partial summary judgment was denied, and that portion of the court's previous order, dated January 18, 2011, that directed a bifurcated trial on fault grounds was sua sponte recalled and vacated.

Anglo-American Custom to Give Child the Father's Name Is Not an Objection to Hyphenated Name

In Matter of Eberhardt, --- N.Y.S.2d ----, 2011 WL 1206136 (N.Y.A.D. 2 Dept.), 2011 the mother petitioned the Supreme Court for permission to change the child's surname by hyphenating the father's surname with the mother's surname. The impetus for the change was the mother's use of both parties' surnames on the child's application for a passport. The father, before signing the application, redacted the mother's surname. The mother reinserted her surname and filed the application, leading the father, once he saw the child's passport, to contact federal officials and ask that the passport reflect her legal name. The Appellate Division observed that to the extent the father's objection was based on traditional values, meaning that it is Anglo-American custom to give a child the father's name, the objection was not reasonable, because neither parent has a superior right to determine the surname of the child (citing Swank v. Petkovsek, 216 A.D.2d 920; Matter of Bell v. Bell, 116 A.D.2d 97, 99; Matter of Cohan v. Cunningham, 104 A.D.2d 716; Rio v. Rio, 132 Misc.2d at 319).

Family Court May Prohibit Mother from Telling Child That Any Man Other than the Father Is Child's Biological Father

In Matter of Buxenbaum v Fulmer, --- N.Y.S.2d ----, 2011 WL 1206140 (N.Y.A.D. 2 Dept.) the Appellate Division held that the Family Court's determination that there had been a change in circumstances since the issuance of the prior order of custody and visitation dated January 28, 2008, and that it was in the child's best interests to award sole custody to the father, was supported by a sound and substantial basis in the record. It held that Family Court properly took judicial notice of the order of filiation entered on consent. The Family Court's determination that the mother could not testify, in rebuttal to the admission of the order of filiation, that she had lacked the capacity to consent to the order of filiation, was not an improvident exercise of discretion (see Matter of Lane v. Lane, 68 AD3d 995, 997). The Family Court providently exercised its discretion in prohibiting the mother from telling the child that any man other than the father is the child's biological father (citing Matter of Powell v. Blumenthal, 35 AD3d 615, 617).

Error For Supreme Court to Disregard Parties Stipulation

In Aloi v Simoni, 918 N.Y.S.2d 506 (2 Dept 2011) the Appellate Division observed that where the determination as to equitable distribution has been made after a nonjury trial, the trial court's assessment of the credibility of witnesses is afforded great weight on appeal. It held that Supreme Court erred in disregarding the parties' stipulation that the appreciation in the value of the plaintiff's retirement account during the course of the marriage was the sum of $25,189. The plaintiff was entitled to 50% of the sum of the appreciation of the parties' respective retirement accounts (50% of $450,115 + $25,189 = $237,652). In calculating the amount to be paid to the plaintiff, the defendant was entitled to a credit of the appreciation remaining in the plaintiff's account ($25,189). Accordingly, the amended judgment had to be modified to direct the defendant to pay the plaintiff the sum of $212,463. The Supreme Court also erred in failing to award interest on the plaintiff's distributive award from the date of the decision until the entry of the judgment, and from the entry of the judgment to the date of payment. In exercising its discretionary power to award an attorney's fee, the court may consider, among other things, "whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation" Here, there was a significant economic disparity between the defendant and the plaintiff, and the complexity of the defendant's business endeavors, as well as the defendant's uncooperativeness with discovery and with sorting out his financial affairs, greatly contributed to the high cost of the litigation. Under these circumstances, it was appropriate to award the plaintiff one half of her total counsel fees, which, after crediting the defendant for his payment of interim counsel fees, amounted to $81,103.

Needs of a Child must Take Precedence over the Terms of the Agreement Where Needs Not Met

In Duggan v Duggan, --- N.Y.S.2d ----, 2011 WL 1331920 (N.Y.A.D. 2 Dept.), the father, and the mother entered into stipulation of settlement on February 26, 2009, to end their marriage. They had four children. The stipulation noted that the father's annual gross income was $475,000, whereas the mother had no income. It further noted that, according to the child support percentage calculation provided in the Child Support Standards Act the father's monthly child support obligation would be $11,929.54. The parties, however, agreed to deviate from this calculation, and set the father's monthly child support obligation at $8,000. The mother filed a petition seeking child support arrears. At the ensuing hearing, the husband stated that his yearly income had dropped from $475,000 to $466,757, and he argued that, pursuant to the language in the stipulation, this decrease in income entitled him to an 80 percent decrease in his child support payments, to $1,600 per month. In a fact-finding order dated April 21, 2010, the Family Court denied the father's motion to dismiss the petition, holding that his interpretation of the stipulation was "not plausible." The same court issued an order on the same day, in which it directed the father to pay the mother child support arrears in the sum of $19,200. The father filed objections, and the Family Court denied the objections in an order dated June 14, 2010. The Family Court held that the language of the stipulation, as interpreted by the father, would violate the CSSA, and was against the best interests of the children. The Appellate Divison held that Family Court was without jurisdiction to modify the terms of a separation agreement absent a showing of an unanticipated and unreasonable change in circumstances, which the father had not alleged here (citing Kleila v. Kleila, 50 N.Y.2d 277). But the Family Court does have the authority to interpret and enforce the provisions of a separation agreement.. It pointed out that "When interpreting a contract, such as a separation agreement, the court should arrive at a construction that will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (Matter of Schiano v. Hirsch, 22 AD3d at 502). But "the needs of a child must take precedence over the terms of the agreement when it appears that the best interests of the child are not being met" (Matter of Gravlin, 98 N.Y.2d 1, 5). Thus, the Family Court had the authority to find that a provision in a stipulation of settlement violates the CSSA. The stipulation here provided that, according to the child support percentage calculation provided in the CSSA, the father's monthly child support obligation would be $11,929.54 per month. But the parties agreed to deviate from this calculation, on the grounds that it was in the best interests of the children and that the children's needs would be met, and set the father's monthly child support obligation at the sum of $8,000 per month. The father now sought to use the provision at issue to lower his child support obligation--for four children--to $1,600 per month, or 13% of the presumptive support level based on the CSSA. He sought to do this because his income dropped by 1.7%--from $475,000 per year to $466,757 per year. The Appellate Division concluded that Family Court properly found that this was against the best interests of the children.

Not Reversible Error to Deny Party’s Right to Make Opening Statement

In Matter of Sagese v Steinmetz, --- N.Y.S.2d ----, 2011 WL 1306419 (N.Y.A.D. 3 Dept.) Petitioner (father) and respondent (mother) were the parents of a daughter (born in 2004). The mother also had another child. In 2006, the parties consented to an order which granted them joint legal and physical custody of the child. In April 2009, based on allegations that there was a drug overdose in the residence where the mother resided, the father commenced a modification proceeding seeking sole custody of the child. In response, the mother filed a family offense petition and criminal complaint against the father alleging that the father struck her on the mouth during an argument. The father was subsequently arrested for assault, at which time he was found to be in possession of marihuana. The assault charge was later adjourned in contemplation of dismissal and the father paid a fine for the marihuana violation. In August 2009, Family Court issued a temporary order of custody providing that the parties share joint legal custody of the children, that the children reside with the paternal grandfather and, based on the father's marihuana conviction, that he submit to a chemical dependency evaluation. The resulting evaluation, based in part on a positive drug screen, diagnosed the father with cannabis abuse and recommended treatment. After a fact-finding hearing, Family Court awarded the parties joint legal custody of the children. Family Court further ordered that the father successfully complete chemical dependency treatment. The Appellate Divison rejected the father’ argument that Family Court committed reversible error by denying the father the right to present an opening statement. While a party to a civil proceeding has the right to make an opening statement (see CPLR 4016 [a]; De Vito v. Katsch, 157 A.D.2d 413, 415 [1990] ), it found that Family Court's error did not require reversal since the court was fully familiar with the facts of the case, the parties and their respective arguments through the numerous court appearances during the year prior to trial (citing Lohmiller v. Lohmiller, 140 A.D.2d 497, 497 [1988] ). The court held that Family Court did not err in ordering the father to attend substance abuse treatment. So long as a party's right to access to his or her child is not conditioned on participation in, or completion of, counseling, Family Court may, as part of its visitation or custody order, direct a party to obtain substance abuse treatment or counseling if such treatment or counseling will serve the children's best interests. In this regard, evidence of a party's continuous use of an illegal drug is certainly relevant to a determination of whether substance abuse treatment for the parent is in the children's best interests. Here, the father had already been convicted of the violation of unlawful possession of marihuana and, at the fact-finding hearing, he admitted to smoking marihuana "no more than once or twice per week" and during the pendency of his custody proceeding. While Family Court found the father to be a good parent, it did not find his testimony--that he did not purchase the drug, keep it in his home or use it in the presence of the children--to be credible. Family Court was also unpersuaded that the father's routine use of marihuana--which the record reflected could affect a person's judgment, memory and problem-solving ability--posed no risk to the children. Finally, to the extent that the father argued that treatment would create a financial burden, the record reflected that costs are based on ability to pay and the father was eligible to apply for Medicaid benefits, which would completely cover the costs of treatment.

Not Error to Suspend Child Support Payment Where Child Not of Employable Age

In Dobies v Brefka, --- N.Y.S.2d ----, 2011 WL 1307284 (N.Y.A.D. 3 Dept.) Petitioner (father) and respondent (mother) were the unmarried parents of two children, Jaclyn (born in 1993) and Nikolas (born in 1995). In October 2008, the father commenced violation proceedings. Family Court, inter alia, granted the father sole physical and legal custody of Nikolas, terminated the father's child support obligations for Jaclyn, and suspended the father's child support obligations for Nikolas..The father claimed that a sufficient change in circumstance had occurred since entry of these prior orders based on, among other things, the mother's deliberate attempts to influence and disrupt the father's parenting time with the children. At the hearing of this matter, the father testified that he had not had any visitation with Jaclyn since March 2007 and has had no weekend parenting time with Nikolas between August 2008 and March 2009. The father recounted multiple examples of alienating behavior engaged in by the mother, including in the spring of 2007 when the mother refused to let Nikolas participate in visitation with the father because of inclement weather--despite the fact that both parties had already driven to the custody exchange point. The father also testified that, in 2007, the mother told Jaclyn that she did not have to participate in the spring break visit with the father. The father further testified that on two occasions--in April 2007 and at the commencement of Father's Day weekend in June 2007--when Jaclyn refused to participate in visitation with the father, the mother indicated that there was nothing she could do about it and that Jaclyn had a mind of her own. The father also testified that during an attempted exchange occurring in the summer of 2007 at a restaurant parking lot--an exchange that never occurred--the mother refused to transfer Nikolas' suitcase to the father's car and then laughed at the father and took a photograph of him with her cell phone while she walked inside the restaurant with the children. Family Court found the mother's explanations for her conduct insufficient and her "credibility to be seriously impaired and her testimony contradictory throughout the trial, particularly when she denied actively discouraging the children from having a relationship with their father." Thus, there was sufficient evidence in the record supporting the court's conclusion that the mother interfered in the father's relationship with the children, such that the father established the requisite change in circumstances. While a determination of the children's best interests must be based on a totality of the circumstances "[e]vidence that the custodial parent intentionally interfered with the noncustodial parent's relationship with the [children] is so inconsistent with the best interests of the [children] as to, per se, raise a strong probability that [the offending party] is unfit to act as custodial parent". The Appellate Divison held that Family Court did not err in terminating the father's child support obligation for Jaclyn and suspending the father's child support obligation for Nikolas. Child support payments may be suspended " '[w]here it can be established by the noncustodial parent that the custodial parent has unjustifiably frustrated the noncustodial parent's right of reasonable access' " (Usack v. Usack, 17 AD3d 736, 737-738 [2005] ). In addition, child support payments may be deemed forfeited when "a child of employable age ... actively abandons the noncustodial parent by refusing all contact and visitation, without cause, ... a concept sometimes referred to as the doctrine of self-emancipation" (Labanowski v. Labanowski, 49 AD3d 1051, 1053 [2008] ). However, abandonment by a child who is not "of employable age" cannot be deemed to constitute constructive emancipation (Foster v. Daigle, 25 AD3d at 1004) Family Court's determination that the mother deliberately frustrated the father's relationship with Nikolas had a sound and substantial basis in the record. While it agreed with the mother that Jaclyn, who was only 16 years of age at the time of the court's order, was unable to abandon the father so as to forfeit his support obligation and, thus, Family Court erred in terminating the father's child support obligation as to her the facts clearly supported a finding that the father's support obligation should also be suspended with respect to Jaclyn based on the mother's conduct in deliberately frustrating his relationship with Jaclyn . Accordingly, the father's support obligations with respect to Jaclyn were suspended pending further court order upon a showing that the mother has made good faith efforts to actively encourage and restore the father's relationship with the children.

Husbands Claim of Extreme Hardship Rejected Where No Appreciable Change in Lifestyle.

In Taylor v Taylor, --- N.Y.S.2d ----, 2011 WL 1440992 (N.Y.A.D. 2 Dept.) the parties 2005 stipulation of settlement, which was incorporated but not merged into their divorce judgment, provided that the plaintiff would have custody of the children, and that the defendant would pay maintenance and child support in an agreed-upon amount. The stipulation also provided that the defendant waived his right to seek any downward modification of his maintenance obligation until August 1, 2012, "excluding an unforeseen, unanticipated catastrophic event, that so negatively impacts the Husband's health or earning capacity as to result in 'extreme hardship' to him as that term is set forth in [Domestic Relations Law] 236(B)(9)(b)." After the defendant lost his job at Bear Stearns in 2008 and was hired by Natixis, a French bank, the defendant moved for a downward modification of his maintenance and child support obligations. After a hearing, Supreme Court denied defendant's motion for a downward modification of his maintenance obligation. The Appellate Division observed that the evidence at the hearing showed that, although the economic downturn resulted in the defendant losing his job at Bear Stearns and earning a substantially smaller bonus in 2009 than he had received in previous years at Bear Stearns, the defendant's base salary and compensation plan at Natixis were similar to his base salary and compensation plan at Bear Stearns. Moreover, the evidence at the hearing showed that the economic downturn did not result in any appreciable change in the defendant's lifestyle. Accordingly, the defendant failed to demonstrate that continued enforcement of his obligation to pay maintenance under the parties' stipulation of settlement would create an "extreme hardship" .

April 18, 2011

Party Must Prevail on All Issues to Be Awarded Counsel Fee Pursuant to Agreement Provision

In Matter of Bederman v Bederman, --- N.Y.S.2d ----, 2011 WL 749719 (N.Y.A.D. 2 Dept.) the parties' stipulation of settlement which was incorporated but not merged into their judgment of divorce entered September 24, 2004, provided that in the event the parties agreed, or a court determined, that the parties' child should attend private preschool, elementary, or secondary school, the parties would proportionately share any educational expenses. The mother commenced a proceeding seeking reimbursement from the father for private school tuition and to direct the father to pay his proportionate share of religious education expenses. The Appellate Division fount that the record supported the Support Magistrate's findings that the father was not required to pay certain private school tuition payments for previous years which were gifts from the maternal grandmother, and that the father was not required to pay for religious education expenses under the terms of the parties' stipulation of settlement. The Support Magistrate also properly denied the mother's request to direct the father to pay his monthly child support through the Nassau County Support Collection Unit pursuant to Family Court Act 440(2). The stipulation of settlement provided for an alternate arrangement for the payment of child support in the form of direct payment to the mother unless the father defaulted in his child support payments and the record established that the father was not in arrears on his child support obligations. It also held that the mother was not entitled to an award of an attorney's fee, as she did not prevail on all issues (citing D'Amico v. D'Amico, 251 A.D.2d 616).

Court Cannot Issue a QDRO More Expansive or Encompassing Rights Not Provided in Underlying Stipulation

In Coulon v Coulon, --- N.Y.S.2d ----, 2011 WL 924351 (N.Y.A.D. 2 Dept.) the defendant appealed from so much of a Qualified Domestic Relations Order of the Supreme Court as designated the plaintiff as a surviving spouse under the pre-retirement and post-retirement survivor annuity provisions of his pension plan, and directed that she receive a share of such benefits in the event of his death. On the Court's own motion, the appellant's notice of appeal was treated as an application for leave to appeal, and leave to appeal was granted (see CPLR 5701[c] ). The Qualified Domestic Relations Order was reversed on the law and the matter was remitted to the Supreme Court for the entry of an amended Qualified Domestic Relations Order in accordance. The Appellate Division observed that a Qualified Domestic Relations Order entered pursuant to a stipulation of settlement can convey only those rights to which the parties stipulated as a basis for the judgment. Thus, a court cannot issue a QDRO more expansive or encompassing rights not provided in the underlying stipulation. Here, the parties' 1992 stipulation of settlement, which was incorporated but not merged in their judgment of divorce, provided for the plaintiff to receive a share of the defendant's pension in accordance with Majauskas v. Majauskas (61 N.Y.2d 481). However, "pension benefits and death benefits are two distinct matters" ( Kazel v. Kazel, 3 NY3d 331, 334), and a stipulation which is silent as to death benefits cannot be read to include an intent to include such benefits (McCoy v. Feinman, 99 N.Y.2d at 303). Since the parties' stipulation contained no provision entitling the plaintiff to be designated as a surviving spouse under the pre-retirement and post-retirement survivor annuity provisions of the defendant's pension plan and to receive a share of such benefits in the event of his death, it was error for the Supreme Court to include such a provision in the QDRO.

Decision Denying Mothers Request to Relocate with Children Reversed Where Family Court Did Not Give Appropriate Weight to Domestic Violence.

In Matter of Clarke v Boertlein, --- N.Y.S.2d ----, 2011 WL 924280 (N.Y.A.D. 2 Dept.), Family Court awarded the mother custody of the parties' three children, but denied her motion for permission to relocate with the parties' three children to Pennsylvania. The Appellate Divison reversed the order and granted her permission to relocate. The parties were the parents of three children, ages 10, 6, and 4. In August 2008 the mother removed the children from their home in Yaphank, New York, and moved to Bellefonte, Pennsylvania, where one of her sisters resided, allegedly to escape the father's domestic violence. The mother obtained an order of protection and temporary custody from a court in Pennsylvania. In November 2008 the mother reconciled with the father and returned with the children to New York, only to leave with the children again to Pennsylvania in April 2009. The father then commenced this proceeding in the Supreme Court (IDV Part), seeking custody of the children. The mother moved for an award of custody and permission to relocate with the children to Pennsylvania. After a hearing, the Supreme Court awarded the mother custody, but denied her request for permission to relocate with the children to Pennsylvania. The Appellate Divison pointed out that the disposition of a petition for permission to relocate with minor children rests upon a determination of the best interests of the children. Moreover, "[d]espite the multitude of factors that may properly be considered in the context of a relocation petition, the impact of the move on the relationship between the child[ren] and the noncustodial parent will remain a central concern" (Matter of Tropea v. Tropea, 87 N.Y.2d at 739). Upon its review of the record, it found that Supreme Court's determination to deny the mother permission to relocate with the children to Pennsylvania lacked a sound and substantial basis in the record. The record demonstrated that the mother had at all times served as the primary caregiver to the children and had displayed a continued commitment to their needs, whereas the father showed little involvement with the children when the parties lived together. The Supreme Court failed to give enough weight to the mother's allegations of domestic violence, often in the presence of the children, which permeated the parties' relationship and caused the mother to remove herself and the children from the parties' home. While the father denied that there was any domestic violence in the home, the Supreme Court noted that the father exhibited his temper during the course of the hearing when he left the witness stand while yelling at the mother's attorney. The father also admitted that he engaged in harassing and intimidating behavior after the mother left, such as calling the mother's cell phone numerous times each day, questioning the oldest child as to the mother's whereabouts, and placing a tracking device on the mother's car. Contrary to the Supreme Court's finding, the mother's move to Pennsylvania did not appear to have been motivated by bad faith but, rather, was an opportunity to escape domestic violence in the home, to reside in close proximity to supportive family members, and to secure affordable housing. The mother testified as to her unsuccessful attempts to obtain affordable housing on Long Island, and compared those attempts to her ability to secure a suitable rental home in Pennsylvania near where her sister resides with her family and the maternal grandmother. Testimony also revealed that the children were adapting well to their new surroundings, and were living with their half-brother in close proximity to their aunt and maternal grandmother, and that the two oldest children were attending school and receiving educational services. In contrast, the record suggested that the father opposed the relocation in order to harass the mother and in order to keep the mother in close proximity to facilitate his efforts to reconcile with her.

Divorce Based upon Cruelty Affirmed Where Husband Threatened to Kill Wife

In Siu Nam Wong Pun v Che Kwok Pun, --- N.Y.S.2d ----, 2011 WL 1046040 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which granted plaintiff a divorce on the grounds of cruelty. Plaintiff testified that during the marriage, defendant regularly lost his temper and yelled at her, verbally abused and demeaned her, and made disparaging remarks in response to her cancer diagnosis. She further testified that several years before she commenced this action, defendant choked her. In addition, she testified that he frequently yelled at her insisting that the family had to listen to him because he was the master of the household. Plaintiff recounted defendant's threat to kill her if she sought a divorce, and explained that she ultimately moved out because she feared defendant and was concerned for her safety. This testimony, portions of which were corroborated by the testimony of the parties' adult son, was sufficient to support the finding of cruel and inhuman treatment. Although plaintiff periodically returned to the marital residence after she moved out, she credibly explained that she did so to cook and clean the residence for her sons, who resided there. The lower court was not persuaded by defendant's claim that this behavior undermined plaintiff's contention that it was unsafe and improper for her to cohabit with defendant, and the Appellate Division agreed with that determination. Moreover, plaintiff testified that when she did return on occasion, defendant scolded and berated her.

Appellate Division Affirms Order Denying Counsel Fee to Attorney Who Agreed to Accept Litigation Assignment with No Guarantee of Compensation

In Moccia v Moccia, --- N.Y.S.2d ----, 2011 WL 1088033 (N.Y.A.D. 2 Dept.) the defendant wife in this divorce action was unable to afford counsel. The Supreme Court assigned the nonparty-appellant, Eric Ole Thorson (appellant), to represent the wife without compensation from her, "without prejudice to [a] motion by counsel for compensation pursuant to CPLR 1102(d), DRL Section 237, Judiciary Law Section 35 or as otherwise provided by law." The parties engaged in discovery, prepared for trial, and successfully negotiated a settlement agreement. The Supreme Court denied the appellant's motion for an award of an attorney's fee to be paid by the plaintiff husband. The Appellate Division affirmed. It pointed out that a court may award an attorney's fee in a divorce action to a spouse to enable that spouse to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties (Domestic Relations Law s 237[a]). While the husband's income from the Yonkers Parking Authority was greater than the wife's income, his earnings were nevertheless modest and they were expended, in large part, on the wife and their children, as he paid, among other things, the mortgage and home equity loan, plus utilities on the marital home. In this regard, the Supreme Court properly considered the terms of the parties' settlement agreement and statements of net worth, which reflected the husband's income and expenses, limited assets, outstanding mortgage, the absence of savings, and debt to his own counsel, in determining that the parties' financial circumstances were "not that disparate so as to warrant an award of counsel fees." The Appellate Division commended any attorney who, as here, agrees to accept a litigation assignment with no guarantee of compensation, but held that the denial of an award of an attorney's fee in this case was not an improvident exercise of the Supreme Court's discretion. Judges Austin and Belen dissented.

Supreme Court Lacked Jurisdiction to Impose Obligations in the Amended Judgment upon the Nonparty-appellant Insurance Company

In Flangos v Flangos, --- N.Y.S.2d ----, 2011 WL 1088123 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court lacked jurisdiction to impose obligations in the amended judgment upon the nonparty-appellant insurance company. A court has no power to grant relief against an entity not named as a party and not properly summoned before the court (Riverside Capital Advisors, Inc. v. First Secured Capital Corp., 28 AD3d 457, 460). Accordingly, the Supreme Court should have granted that branch of the nonparty-appellant's motion which was to vacate so much of the amended judgment as directed it to make certain payments. Similarly, the Supreme Court erred to the extent that it, sua sponte, in effect, amended a provision in the amended judgment directing the nonparty-appellant to give notice of stated proposed changes in the payments. Contrary to the plaintiff's contention, the amended judgment itself was not a proper income execution order under CPLR 5241, nor is it a proper income deduction order under CPLR 5242.

Supreme Court Erred in Directing Husband to Transfer to Wife Title to Property Owned by a Corporation over Which the Supreme Court Lacked Jurisdiction.

In Manning v Manning, --- N.Y.S.2d ----, 2011 WL 1088041 (N.Y.A.D. 2 Dept.) the Appellate Divison observed that in order to sustain a finding of civil contempt under Judiciary Law 753 based on a violation of a court order, it is necessary to establish by clear and convincing evidence that a lawful court order clearly expressing an unequivocal mandate was in effect, that the person alleged to have violated the order had actual knowledge of its terms, and that the violation has defeated, impaired, impeded, or prejudiced the rights of a party . Here, the evidence was sufficient to establish that the defendant knowingly disobeyed the Supreme Court's order directing him to pay an expert to ascertain the value of his business and also failed to comply with the pendente lite support order. Consequently, the Supreme Court properly adjudicated the defendant in contempt of court. It noted that a court is not required to rely upon a party's account of his or her finances in determining that party's income. It agreed with the defendant that the Supreme Court erred in directing him to transfer title to certain commercial real property to the plaintiff. The commercial property at issue was owned by a corporation over which the Supreme Court lacked jurisdiction.

April 1, 2011

Child Support Payments May Be Waived Prospectively

In Stevens v Stevens, --- N.Y.S.2d ----, 2011 WL 833962 (N.Y.A.D. 2 Dept.) the Appellate Division held that child support payments may be waived prospectively, before the obligation to make such payments has accrued (citing Matter of O'Connor v Curcio, 281 A.D.2d 100). The party claiming a waiver must come forward with evidence of a voluntary and intentional relinquishment of a known and otherwise enforceable right to child support. It agreed with the Supreme Court that while the evidence supported a finding that the plaintiff waived her right to child support for the parties' son, upon their agreement for the defendant to take physical custody of him, the plaintiff did not waive her right to child support for their daughter, who continued to live with her. It affirmed the order modifying the judgment by vacating the provision obligating him to pay child support for the parties' daughter.

Reimbursement Required Where One Party Pays Marital Debt

In Le v Le, --- N.Y.S.2d ----, 2011 WL 834198 (N.Y.A.D. 2 Dept.) Supreme Court awarded custody of the parties' three children to the plaintiff, awarded the plaintiff a two-thirds share of the proceeds of the sale of the marital residence with a credit for "the difference between the princip[al] balance of the mortgage as of March 22, 2007 and the amount due at closing, ... after payment of closing costs and joint liens, as long as there are monies available from the proceeds," directed that the plaintiff was not required to pay maintenance to the defendant for the months that he resided in the marital residence, and awarded the plaintiff child support in the sum of $50 per month and arrears totaling $988.33. The Appellate Division held that the plaintiff was entitled to receive a credit against the proceeds of the sale of the marital residence for the money that she paid to reduce the balance of the mortgage during the pendency of the divorce action. She made these payments without any contribution from the defendant. Where, as here, a party has paid the other party's share of what proves to be marital debt, such as the mortgage, taxes, and insurance on the marital residence, reimbursement is required. However, the plaintiff was entitled to only a 50% of the reduction in mortgage principal because generally it is the responsibility of both parties to maintain the marital residence during the pendency of a matrimonial action. Therefore, the Supreme Court improvidently exercised its discretion in awarding the plaintiff a credit for 100% of the payments she made on the marital residence during the divorce proceedings.

Not Error to Exclude Parents from Courtroom During Child's Testimony in Neglect Case Where Attorney Present.

In the Matter of Deshawn D.O. --- N.Y.S.2d ----, 2011 WL 668113 (N.Y.A.D. 2 Dept.), the Appellate Division affirmed an order which found that the appellants neglected the subject child. The evidence established that the appellants engaged in a pattern of conduct which included the infliction of excessive corporal punishment, domestic violence in the child's presence, and punishment of the child by, inter alia, restricting his food intake and making him sleep on the floor. As a result, the child ran away from home numerous times, was afraid and refused to return home, and was so frustrated that he felt he might hurt himself or someone else. The petitioner established by a preponderance of the evidence that the child's physical and emotional condition was impaired, or was in imminent danger of becoming impaired, as a result of the appellants' conduct. The record demonstrated that the Family Court did not err in excluding the appellants from the courtroom during the child's testimony. Under the circumstances, the Family Court properly balanced the respective interests of the parties and reasonably concluded that the child would suffer emotional trauma if compelled to testify in the appellants' presence (citing Matter of Q.-L.H., 27 A.D.3d 738, 815 N.Y.S.2d 601). Because the appellants' attorneys were present during the child's testimony and cross-examined him on the appellants' behalf, the appellants' constitutional rights were not violated by their exclusion from the courtroom.

Challenge to Child Support in Surviving Stipulation Must Be By Plenary Action

In Brody v Brody, --- N.Y.S.2d ----, 2011 WL 834544 (N.Y.A.D. 2 Dept.) The Appellate Divison affirmed an order motion which denied the former wife’s motion to set aside the child support provisions of a stipulation of settlement entered into by the parties on September 13, 2002, which was incorporated but not merged into the judgment of divorce, on the ground that those provisions did not comply with Domestic Relations Law s 240(1-b)(h), and to recalculate child support de novo. It held a postjudgment motion in a matrimonial action is not the proper vehicle for challenging the propriety of child support provisions contained in a stipulation of settlement incorporated but not merged into a judgment of divorce. A challenge to such a stipulation must be made by the commencement of a separate plenary action to set aside the stipulation.

Validity of Same Sex Canadian Marriage Upheld

In re Estate of Ranftle,--- N.Y.S.2d ----, 2011 WL 650739 (N.Y.A.D. 1 Dept.) Surrogate's Court issued an opinion finding that respondent was "decedent's surviving spouse and sole distributee" (EPTL 4- 1.1) and thus, citation of the probate proceeding need not issue to anyone under SCPA 1403(1)(a). The court found that the decedent's same-sex marriage to respondent was valid under the laws of Canada, where it was performed, and did not fall into either of the two exceptions to the marriage recognition rule, as the marriage was not affirmatively prohibited or proscribed by natural law. Accordingly, the Surrogate's Court found that the marriage was entitled to recognition. Appellant petitioned the Surrogate's Court for vacatur of the probate decree and permission to file objections, alleging that the court was without jurisdiction to grant probate without citation having been issued on the decedent's surviving siblings. Appellant argued that the recognition of the decedent's same-sex marriage violated public policy in New York and that he should have been cited in the probate proceeding and provided with an opportunity to file objections thereto as a distributee. In denying the instant petition, the Surrogate found that appellant's position that same-sex marriage violated public policy had been "specifically addressed and rejected by the Appellate Division in Martinez v. County of Monroe (50 AD3d 189 [2008], lv dismissed 10 NY3d 856 [2008] ) and is patently without merit." The Appellate Division agreed. It observed that New York's long-settled marriage recognition rule affords comity to out-of-state marriages and "recognizes as valid a marriage considered valid in the place where celebrated". This rule does not extend such recognition where the foreign marriage is "contrary to the prohibitions of natural law or the express prohibitions of a statute". Same-sex marriage does not fall within either of the two exceptions to the marriage recognition rule. The failure of the Legislature to enact a bill affords the most dubious foundation for drawing positive inferences. Thus, the Legislature's failure to authorize same-sex couples to enter into marriage in New York or require recognition of validly performed out-of-state same-sex marriages, cannot serve as an expression of public policy for the State. In the absence of an express statutory prohibition legislative action or inaction does not qualify as an exception to the marriage recognition rule.

Family Court Abused its Discretion in Awarding the Father Sole Legal Custody of the Child, Relief He Did Not Request.

In Matter of Joseph A. v Jaimy B, --- N.Y.S.2d ----, 2011 WL 651298 (N.Y.A.D. 3 Dept.), the parties, who never married, had a son (born in 2004). Pursuant to an order of custody entered in November 2009, the parties were awarded joint legal custody of their son with primary physical custody to respondent (mother), and petitioner (father) having parenting time. As is relevant to this case, the order provided that for the Christmas holiday, the father was granted parenting time with the child from 3:00 P.M. on December 23 until 3:00 P.M. on Christmas eve, and the mother was granted parenting time with the child from 3:00 P.M. on Christmas eve until 3:00 P.M. on Christmas day during even-numbered years, and the reverse would occur during odd-numbered years. Less than one month after the November 2009 order was entered, a physical altercation occurred between the parties on Christmas day, as a result of which the father filed a police report and obtained an order of protection. He also commenced this modification proceeding seeking physical custody of the child. The mother then petitioned for a writ of habeus corpus based on allegations that the father violated the November 2009 order by failing to abide by the holiday schedule and by failing to return the child to her on Sunday evening, December 27, 2009. In January 2010, the mother cross-petitioned for a temporary modification of custody, requesting that "the child exchange not take place at the police station" based on the father's insistence that the custody exchange take place under police supervision. Family Court conducted a hearing in May 2010, at which the mother testified that, on Christmas day, when she attempted to retrieve the child at 3:00 P .M., the father and the child were not home. After driving to the homes of the father's relatives, she eventually returned to his grandmother's house, where the father arrived with the child shortly thereafter. The father testified that, as he attempted to pick up the child out of the car, the mother ran up the driveway, began to scream at him, jumped on his back and grabbed the child's arm. The father further testified that he handed the child to his cousin and called the police, and the child wet his pants as a result of the incident. The mother testified, however, that she attempted to greet the child, whereupon the father grabbed the child and pulled him; as a result, the mother's finger got caught in his grip. After the hearing, Family Court found that the father had violated the November 2009 custody order, but that the violation was not willful or intentional. Family Court also determined that the father should have sole legal and physical custody of the child commencing June 25, 2010, with the mother having parenting time on alternate weekends and each Wednesday afternoon, and holiday parenting time to follow the November 2009 order. The Appellate Division agreed with the mother that Family Court abused its discretion in awarding the father sole legal custody of the child, relief he did not request. Where, as here, neither the petition nor the father's testimony provided the mother with notice that he sought to modify the existing order of joint legal custody it was improper for Family Court to make such a modification. Family Court also failed to make a finding that a change in circumstances had occurred since entry of the November 2009 order and, thus, Family Court erred in modifying that order. Notwithstanding the failure of Family Court to make the threshold determination of a change in circumstances, it was not necessary to remit the matter to Family Court because the courts independent review of the record revealed insufficient evidence to support such a change. Accordingly, Family Court erred in modifying the custody order and the father's petition should have been dismissed.

Award of Maintenance Properly Made Taxable to Wife and Tax Deductible for Husband Where No Rationale Exists "For a Departure from the Norm Envisioned by Current Internal Revenue Code Provisions

In Girgenti v Girgenti, --- N.Y.S.2d ----, 2011 WL 668280 (N.Y.A.D. 2 Dept.) the parties were married on October 21, 1989. They had three children. At the time of the marriage, the defendant (husband) was the sole owner of AVA Pork Products, Inc., a company which distributed meat. Over the years, the husband's business grew. By 2005, the year this action was commenced, he owned several companies bearing the AVA name. At the time of the marriage, the plaintiff (wife) worked as a substitute teacher. Approximately one year later she obtained a full-time teaching position. However, she stopped working in December 1991, shortly before the birth of the parties' first child. Since that time, her teaching license expired. During the marriage, the husband acquired four parcels of real property and placed them under the ownership of several separate corporate entities in which he was the sole shareholder. He sold two of those parcels in 2007, for $535,000 and $300,000, respectively. His corporations continue to own the other two parcels and lease them out. They were appraised at $2,050,000 and $5,900,000. The wife commenced this action for a divorce on November 18, 2005. Prior to the trial, the parties stipulated as to the prices of the parcels which had been sold, as well as to the appraised value of the other two parcels. They also stipulated that, after the commencement of the divorce action, the husband withdrew the sums of $320,000 from the home equity line of credit account (HELOC) and $424,925 from his life insurance policy. Furthermore, the parties stipulated that the wife's position at trial regarding distribution of the husband's business would be that "the value of the AVA business should not be separately distributed," as she was seeking maintenance. After a two-day hearing, the parties were divorced by judgment entered December 22, 2009. The Supreme Court found that the four parcels of real property acquired by the husband during the marriage were not marital property, but were part of the AVA business, and, since the wife had waived her interest in the husband's business, she was not entitled to distribution of these assets. The Supreme Court also found that the money withdrawn from the HELOC and the life insurance policy was subsequently put into the business and, thus, the wife had no claim to these amounts. The wife was awarded, inter alia, 50% of the proceeds from the sale of the marital residence, and approximately $158,223 in cash, retirement accounts, and proceeds from the life insurance policy. She also was awarded maintenance in the sums of $20,000 per month for seven years and $10,000 per month thereafter for four years. The Appellate Divison observed that a stipulation entered into by spouses in contemplation of divorce is a contract subject to general principles of contract construction. Where possible, a contract should be interpreted to avoid inconsistencies and to give meaning to all of its provisions, giving a practical and reasonable interpretation to the language employed and the parties' reasonable expectations with respect thereto. The stipulation should be read as a whole to determine its purpose and intent. Here, the Supreme Court erred in determining that, in the stipulation of facts, the parties intended that the four parcels of real property acquired by the husband during the marriage were part of the AVA business. If the parties had intended that the four parcels of real property should not be distributed to the wife, there would have been no need for them to stipulate as to their respective value. Moreover, had the parties intended to exempt the four parcels from equitable distribution, they could have explicitly said so, just as they had done with regard to the husband's business. Therefore, the wife was entitled to 50% of the proceeds of the two parcels that were sold by the husband, and 50% of the appraised value of the properties currently owned by the husband. This amount included 50% of the proceeds of a mortgage which the husband took out on one of the parcels after the commencement of this action. The wife correctly contended that she was entitled to 50% of the amount that the husband withdrew from the home equity line of credit after the commencement of this action and 50% of the amount that the husband withdrew from his life insurance policy. Since this matrimonial action was commenced on November 18, 2005, $371,519.30 of the 2005 federal and state income tax refunds should have been deemed marital property. The award of maintenance was properly made taxable to the wife and tax deductible for the husband because no rationale exists "for a departure from the norm envisioned by current Internal Revenue Code provisions" (citing Grumet v. Grumet, 37 AD3d 534, 536; see also Markopoulos v. Markopoulos, 274 A.D.2d 457, 459). The Court pointed out that in light of its determination as to equitable distribution, the wife's maintenance award may have to be recalculated but took no position on this issue.

Motions to Enforce the Terms of a Stipulation of Settlement Are Not Subject to Statutes of Limitation

In Bayen v Bayen, --- N.Y.S.2d ----, 2011 WL 668354 (N.Y.A.D. 2 Dept.) the parties were divorced by judgment entered September 10, 1999. The judgment incorporated, but did not merge, the parties' stipulation of settlement. The parties' stipulation provided that the former husband would pay the former wife one half of the present value of his 401(k) pension as of the date of the stipulation, or the sum $41,144.15, pursuant to a Qualified Domestic Relations Order ( QDRO). In 2001 the former wife submitted a proposed QDRO to the Supreme Court, but the Supreme Court did not sign it, finding that it was inconsistent with the terms of the stipulation of settlement. In January 2009 the former wife moved, inter alia, to enforce the provision in the stipulation referable to the former husband's pension, to the extent of directing him to pay her the sum of $41,144.15, plus interest, for her share of his retirement pension or, alternatively, that she be awarded her marital share of the pension pursuant to the Majauskas formula (Majauskas v.. Majauskas, 61 N.Y.2d 481). The Supreme Court denied that branch of the motion, finding that it was time-barred by virtue of the six-year limitations period set forth in CPLR 213(6), applicable to an action based upon a mistake. The Appellate Divison affirmed, but on different grounds. It pointed out that an action to enforce a distributive award in matrimonial action is governed by the six-year statute of limitations set forth in CPLR 213(1) and (2). Contrary to the plaintiff's contention, however, motions to enforce the terms of a stipulation of settlement are not subject to statutes of limitation (citing Fragin v. Fragin, 80 AD3d 725, 2011 N.Y. Slip Op 00485, \*1 [2d Dept 2011]; Cotumaccio v. Cotumaccio, 171 A.D.2d 723; but cf. Patricia A.M. v. Eugene W.M., 24 Misc.3d 1012). Nonetheless, the former wife was not entitled to the relief sought, but only to the entry of a QDRO, in compliance with the federal Employee Retirement Income Security Act (29 USC 1001 et seq), that accurately incorporates the terms of the stipulation. In interpreting the stipulation of settlement in a manner so as to give full meaning and effect to its material terms the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized. Here, a plain reading of Article V of the stipulation of settlement yields the inescapable conclusion that the former wife agreed to accept, as part of her equitable distribution, the sum of $41,144.15 pursuant to the terms of a QDRO, when the former husband retires from his teaching position. The former husband has yet to retire. Accordingly, the former wife's right to receive this portion of equitable distribution remained inchoate and has not yet vested. Thus, while a request to compel the equitable distribution of the agreed-upon percentage of the former husband's pension pursuant to an ERISA-compliant QDRO was not time-barred, the former wife was not entitled to a present payment of $41,144.15.

"Home State", When Applied to a Child less than Six Months Old, Is Defined as "The State in Which the Child Lived from Birth with Any of the Persons Mentioned

In B.B. v A. B., --- N.Y.S.2d ----, 2011 WL 679324 (N.Y.Sup.) the parties were married on August 18, 2007 in South Lake Tahoe, California. Thereafter, they resided together in Orange County, New York. On November 28, 2010, respondent moved out of the marital residence. She was approximately seven months pregnant at the time. On December 2nd, she filed a family offense petition in Family Court, Orange County and was granted an ex parte Temporary Order of Protection against petitioner. On December 7th, through her attorney, she notified the Family Court that she was withdrawing the family offense petition which had not as yet been served upon plaintiff, and that she was "leaving for the holidays with her family." That same day, she left New York and returned to her parents' home in Alexandria Minnesota. She wrote to plaintiff she would be back by January 1st or 2nd with her parents. Respondent did not return home to the marital residence after the holidays as she had previously indicated. Plaintiff thereupon commenced an action for divorce in this court on January 4, 2011 by filing a Summons with Notice stating "Action for Divorce". Included in the items of relief was an adjudication of custody and visitation as to the yet unborn child. The infant child, F.B. was born on January 29, 2011 in Douglas County Hospital in Alexandria, Minnesota. The Writ of Habeas Corpus was issued by the court on February 1, 2011, and made returnable on February 15th. The writ was adjourned on consent to February 17th, on which date both counsel and plaintiff appeared and oral argument was held. The court waived the appearance of the infant who was only several days old when the writ was issued, and had developed some health issues. In the meanwhile, on February 11th, respondent filed a petition in District Court, Seventh Judicial District, Douglas County, Minnesota, for legal and physical custody, child support, and to schedule parenting time for petitioner. Supreme Court held that a petition for a writ of Habeas Corpus confers subject matter jurisdiction upon this Court to adjudicate the parties' custody dispute when the child is outside the State of New York when the petition was filed. the Uniform Child Custody Jurisdiction and Enforcement Act provides that its provisions are the exclusive jurisdictional basis for making a child custody determination by a court of this state and that physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination. DRL 76 (subds.2, 3). The court then had to determine whether New York or Minnesota the "home state", as that term is defined in 75-a (7) of Article 5-A of the Domestic Relations Law, popularly known as the Uniform Child Custody Jurisdiction and Enforcement Act. The Court noted that DRL, 75-a (7) defines "home state" as follows: “Home state" means the state in which the child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period." The court could not overlook the clear and unambiguous language in DRL 75-a (7) that "home state", when applied to a child less than six months old, is defined as "the state in which the child lived from birth with any of the persons mentioned." The court found, based upon the totality of the circumstances, the infant's "home state" was Minnesota. Petitioner's application for a Writ of Habeas Corpus, requiring the return of the parties' infant child, F.B., born January 29, 2011, from the State of Minnesota to the State of New York, was denied, and the petition dismissed.

Appellate Division Affirms Family Court's Determination That Child's Best Interests Would Be Served by Awarding Sole Custody to Father and Permitting Him to Return with the Child to Their Native Country of Peru

In Matter of Ortega-Bejar v Morante, --- N.Y.S.2d ----, 2011 WL 668110 (N.Y.A.D. 2 Dept.) the mother and the father were married in 2000, and after the birth of the child later that year, they lived together in their native country of Peru. After an altercation with the father in January 2006, the mother left the marital home with the child. In May 2006, during the pendency of a custody proceeding commenced by the father in Peru, the mother took the child to the United States and settled on Long Island with her boyfriend and his family, without informing the father of their whereabouts. In March 2008, after discovering the whereabouts of the mother and the child, and after learning that the mother had, in May 2007, obtained an order from the Family Court, Queens County, awarding her custody of the subject child upon the father's default, the father commenced this proceeding in the same court, seeking custody of the subject child. The Family Court conducted a hearing on the father's petition, at which it heard testimony from the father and the mother, as well as a court-appointed forensic psychologist who, inter alia, interviewed the parties and the subject child and rendered a comprehensive evaluation specifically addressing the impact on the subject child of a change in custody. After the hearing, the Family Court granted the father's petition and, inter alia, awarded him sole custody of the child. The Appellate Divison affirmed. By removing the child from the marital home and relocating to a distant foreign country without informing the father of the subject child's whereabouts, the mother severely interfered with the relationship between the subject child and the father, and thus committed 'an act so inconsistent with the best interests of the child as to per se raise a strong probability that the offending party is unfit to act as a custodial parent. In addition, the parties' testimony-- viewed in light of the Family Court's assessment of their credibility, which is entitled to deference --as well as the testimony of the forensic psychologist, amply supported the Family Court's finding that the father is "far superior [to the mother] as a parent." Accordingly, the Family Court's determination that the subject child's best interests would be served by awarding sole custody to the father and permitting him to return with the child to their native country of Peru was supported by a sound and substantial basis in the record . The portion of the order appealed from addressing the issue of visitation provides that the mother "shall have actual visits as she and the father agree," with such visits to be "therapeutic, supervised, or unsupervised as they agree." Based on the evidence presented at the hearing, including the recommendations of the forensic psychologist, the subject child's best interests would be better served by the establishment of a detailed visitation schedule It remitted the matter to the Family Court for determination of a visitation schedule including, if necessary, a hearing.

Family Court Has the Authority to Modify an Existing Permanency Goal Absent a Specific Request by a Party

In Matter of Jacelyn TT,--- N.Y.S.2d ----, 2011 WL 240161 (N.Y.A.D. 3 Dept) the Appellate Division observed that at the conclusion of a permanency hearing, Family Court is required to make findings and enter an order of disposition "upon the proof adduced ... and in accordance with the best interests and safety of the child" (Family Ct Act 1089 [d] ). Where the court determines that the child is not to be immediately returned to the parent, it must indicate whether the permanency goal for the child "should be approved or modified " (Family Ct Act 1089[d][2][i] ) and may select among various alternatives including, among others, the child's eventual return to the parent or placement for adoption (see Family Ct Act 1089 [d][2][i][A]-[E] ). Notably, Family Ct Act 1089(c)(5)(i) characterizes petitioner's proposed permanency goal as a "recommendation." While the statute does not explicitly permit the court to modify a permanency goal in the absence of an application by one of the parties, it suggests such authority and does not expressly constrain the court from doing so . It concluded that Family Court has the authority to modify an existing permanency goal absent a specific request by a party.

March 16, 2011

Right to Receive Child Support Belongs to the Custodial Parent, Not to the Child

In Miller v Miller, --- N.Y.S.2d ----, 2011 WL 781377 (N.Y.A.D. 1 Dept.) the Appellate Division observed that the 1975 stipulation pursuant to which plaintiffs claimed entitlement to their deceased father's pension death benefits was superseded by the stipulation entered into between their parents in 1990. The 1990 stipulation was expressly intended "to settle all of the demands, claims, counterclaims, set-offs and defenses in the above-captioned matter [the divorce action], and to settle all disputes, claims, and agreements between the parties, and to once and for all put this matter to rest," and therefore encompassed the parents' ongoing dispute over the father's obligation to name plaintiffs as irrevocable beneficiaries under his pension. Furthermore, the 1990 stipulation provided that it "contain[ed] the entire agreement of the parties and supersede[d] and replace[d] any and all prior agreements or Court Orders previously entered in the above captioned matter." Thus, it was clear that the parents intended to replace the 1975 stipulation with the 1990 stipulation. In noted that in any event, the pension death benefits that the father promised plaintiffs when they were young children were his active service benefits, which would have been payable only if he had died before retiring. When he retired in 2001, he applied for "Option II" post-retirement death benefits, which entitled him to reduced payments during his lifetime and payments in the same amount for his designated beneficiary after his death for the remainder of the beneficiary's life (see Administrative Code of City of N.Y. 13-558). The Teachers Retirement System was obligated by law to honor his choice of beneficiary (see id.; see generally Matter of Creveling v. Teachers' Retirement Bd., 255 N.Y. 364, 372-373 [1931] ). Plaintiffs contended that their parents had no authority to extinguish the father's obligation, originally agreed to in the 1975 stipulation, to name them as irrevocable beneficiaries without their consent. To the extent they claimed entitlement to the benefits as third-party beneficiaries of a child support obligation embodied in the 1975 stipulation, their argument failed because the right to receive child support belongs to the custodial parent, not to the child ( citing Kendall v. Kendall, 200 App.Div. 702 [1922] ). To the extent they claimed entitlement to the benefits as third-party beneficiaries of non-support obligations under the 1975 stipulation, their argument failed because they had no right to enforce a superseded agreement--even one superseded without their consent--when the benefit they seek to enforce had not yet vested before the agreement was modified and the superseded agreement did not prohibit its modification.

Cruel and Inhuman Treatment Divorce Affirmed Based upon Pattern of Emotional Neglect, Dominion and Control Which Endangered Plaintiff's Mental Well-being

In Bennett v Bennett, --- N.Y.S.2d ----, 2011 WL 722261 (N.Y.A.D. 3 Dept.) the parties were married in 1980 and had six children. Plaintiff left the marital residence in May 2004 and commenced this action for divorce in October 2006. Following a bench trial, Supreme Court granted plaintiff a divorce on the ground of cruel and inhuman treatment. The Appellate Divison affirmed. It observed that action for divorce on the basis of cruel and inhuman treatment requires a showing of serious misconduct and, with a long-standing marriage, a high degree of proof showing a pattern of cruel and inhuman treatment affecting the plaintiff's physical or mental health such that continued cohabitation would be unsafe or improper. Supreme Court, as the trier of fact, has broad discretion in determining whether a spouse's conduct rises to the level of cruel and inhuman treatment and its factual determinations and assessment of witness credibility are entitled to great deference. As such, the court's determination will not be lightly overturned on appeal. The credible evidence adduced at trial revealed that plaintiff was subjected to authoritarian, demeaning and controlling treatment by defendant throughout their 26-year marriage. According to plaintiff's detailed and uncontradicted testimony, defendant enforced a strict, hierarchical structure of the household and expected her to be fully submissive to him. Defendant's conduct also included calling plaintiff names, isolating her from family and friends, undermining her authority as a parent, ridiculing and making disparaging comments about her and her physical appearance in front of the children, and preventing her from leaving the marital residence by, among other things, disabling the family vehicle. Moreover, defendant refused to engage in sexual relations with plaintiff for several years prior to her leaving the marital residence in 2004. Plaintiff offered evidence, which Supreme Court deemed credible, that defendant's conduct caused her to feel disrespected, emotionally broken-down, depressed and to have suicidal thoughts. She also vacated the marital residence on more than one occasion due to defendant's conduct and, ultimately, sought counseling. In light of this proof, there was a sufficient basis for Supreme Court's conclusion that defendant engaged in a pattern of emotional neglect, dominion and control which endangered plaintiff's mental well-being, thereby rendering it improper for her to continue to cohabit with him.

Failure to File a Current Statement of Net Worth Does Not Render Cross Motion for Enforcement Defective as Determination of Arrears Does Not Implicate Plaintiff's Financial Circumstances

In Shachnow v Shafer,--- N.Y.S.2d ----, 2011 WL 722403 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which denied defendant wife's application for an upward modification of basic child support under the parties' settlement agreement, reallocated the parties' future responsibilities for certain add-on expenses, denied defendant's request for child support arrears and attorney's fees, and granted plaintiff husband's cross motion for child support arrears to the extent of directing defendant to pay plaintiff the sum of $48,445.41 for tuition payments made by plaintiff on defendant's behalf. It held that the court properly granted plaintiff's cross motion for arrears for the child's private school tuition owed by defendant under the separation agreement. Plaintiff's failure to file a current statement of net worth did not render the cross motion defective as determination of the amount of arrears does not implicate plaintiff's financial circumstances. In addition, defendant's admitted receipt of multiple notices of default sent by plaintiff contradicted her claim that plaintiff waived his right to defendant's contribution of 50% toward the child's private school tuition. It also found that Defendant had not demonstrated that the child's diagnosis of attention deficit hyperactivity disorder following execution of the parties' separation agreement resulted in medical and educational expenses that impacted defendant's ability to meet the needs of the child, and defendant failed to make a prima facie showing that a substantial, "unanticipated and unreasonable change in circumstances had occurred resulting in a concomitant need" such that an upward modification in child support is warranted (citing Merl v. Merl, 67 N.Y.2d 359, 362 [1986] ). In the absence of evidence that the child's needs are not being met, a hearing is unnecessary.

Support Magistrate Has No Authority to Hear Case When Respondent Raised Visitation as a Defense

In Matter of Barney v Van Auken, 916 N.Y.S.2d 533 (3d Dept 2011) Petitioner and respondent were the parents of a daughter. Upon turning 18 in November 2008, the child left respondent's home where she had resided as per a 2004 custody order and moved in with petitioner. Her reasons for leaving respondent's home included his disapproval of her 26-year-old boyfriend. In May 2009, petitioner commenced a proceeding seeking child support. Respondent asserted as defenses that petitioner had acted to alienate the child from him, the child was emancipated, and the child had abandoned her relationship with him. The Support Magistrate rejected respondent's defenses and directed that he pay $170 biweekly child support. Family Court denied respondent's objections. The Appellate Divison reversed. One of the issues that [Support Magistrates] are not empowered to hear and determine is contested visitation, which includes visitation as a defense, alleged here as an abandonment. Although the Support Magistrate had authority to issue a temporary order of support (see Family Ct. Act 439[c] ), when respondent raised visitation as a defense, the matter should have been immediately referred to Family Court for resolution of such issue

Fourth Department Holds That Matter of Oswego County Support Collection Unit v. Richards Should No Longer Be Followed.

In Matter of Huard v Lugo, --- N.Y.S.2d ----, 2011 WL 455295 (N.Y.A.D. 4 Dept.) Respondent father appealed from an order confirming the determination of the Support Magistrate that he willfully violated an order of child support and sentencing him to a term of incarceration of 90 days. The father contended that the Support Magistrate erred in allowing him to proceed pro se at the fact-finding hearing. The Appellate Divison noted that the father did not file any objections to the Support Magistrate's order. In Matter of Oswego County Support Collection Unit v. Richards (305 A.D.2d 1101, lv denied 100 N.Y.2d 637), it determined that, because the respondent failed to file objections to the Hearing Examiner's order finding willfulness and recommending commitment pursuant to Family Court Act 439 (former [e] ), he "waiv[ed] his right to appellate review of the finding of a willful violation. Section 439(e), however, was revised in 2004 by providing that a determination of willful violation of a support order where commitment is recommended does not constitute a final order. A determination by a support magistrate that a person is in willful violation of a support order and recommending commitment has no force and effect until confirmed by a Judge of the Family Court Such a determination by a support magistrate does not constitute a final order to which a party may file written objections. A party's "sole remedy" is to appeal from the final order of Family Court (Dakin, 75 AD3d at 640). It held that to the extent that Matter of Oswego County Support Collection Unit v. Richards required a party to file objections in order to preserve a contention regarding such a determination, it should no longer be followed. The Court concluded however, that the father failed to preserve his contention for review under the "normal rules of preservation" because he failed to raise it before Family Court at the confirmation proceeding, where he was represented by counsel. In any event, it found that the father's contention lacked merit.

Equitable Distribution Law (Domestic Relations Law 236[B] ) Not Applicable to a Stipulation of Settlement Entered During Proceedings Pursuant to MHL Article 81

In Matter of Donald LL,--- N.Y.S.2d ----, 2011 WL 458711 (N.Y.A.D. 4 Dept.) the Appellate Division held that the Equitable Distribution Law (Domestic Relations Law 236[B] ) is not applicable to a stipulation of settlement, entered during proceedings pursuant to article 81 of the Mental Hygiene Law, that divides property in a manner similar to equitable distribution but does not involve the dissolution of a marriage. Donald L.L. (defendant) and his wife, the person for whom plaintiff was, inter alia, appointed guardian ( defendant's wife), were married in 1966. In May 2005, defendant's wife suffered a stroke that caused severe brain damage and left her unable to care for herself. Defendant was also in poor health and not capable of caring for his wife. Thus, defendant's wife lived in the home of plaintiff, who provided 24-hour care for defendant's wife. In October 2007, defendant commenced a proceeding pursuant to Mental Hygiene Law article 81, seeking, inter alia, an order naming the Catholic Family Center as the guardian of his wife's person and property. Plaintiff cross-petitioned for an order naming himself as guardian of defendant's wife and her property. During proceedings in Supreme Court on January 24, 2008, plaintiff and defendant entered into an oral stipulation of settlement whereby plaintiff would be named the guardian of the person and property of defendant's wife, which the court converted into an order naming plaintiff as the guardian. With plaintiff acting as guardian of defendant's wife, plaintiff and defendant immediately entered into a second oral stipulation of settlement whereby defendant and his wife would live separately, with defendant having the right to visitation. Plaintiff and defendant further stipulated, inter alia, that the marital property of defendant and his wife would be divided between them and that defendant would make weekly "maintenance and support" payments to his wife. The second stipulation included the following statement: "[Plaintiff and defendant] would like to stipulate to settle issues of property settlement and spousal support in the nature of an opting[-]out agreement as the same is provided for under the Domestic Relations Law. [They] do not intend to make this a divorce proceeding but would like [the stipulation] to serve as their agreement as to the issues ... set forth [herein] and to that extent would also like to sign a written adoption of the oral stipulation." After the terms of the second oral stipulation were read into the record, plaintiff and defendant signed a written adoption of the oral stipulation. In an order and judgment entered April 21, 2008, the court, inter alia, determined that defendant's wife was an incapacitated person, appointed plaintiff as the guardian of the person and property of defendant's wife and incorporated by reference the terms of the stipulation of settlement. In September 2008, plaintiff commenced am action seeking to enforce the stipulation of settlement with respect to the "maintenance and support" payments by defendant and to void various allegedly fraudulent transfers between defendant and defendant Patricia Fitzgerald. Plaintiff moved for, inter alia, a preliminary injunction enjoining defendants from "dealing" with any of their property pending resolution of the action. Defendants cross-moved for, inter alia, an order vacating and setting aside the stipulation of settlement. In an order entered January 28, 2009, the court denied the motion and cross motion. On Appeal the Defendants contended that the court erred in granting relief in the form of equitable distribution without conducting a hearing on the economic issues between defendant and his wife. The Appellate Division rejected that contention inasmuch as those economic issues were resolved by the stipulation of settlement. Furthermore, the record demonstrated that the stipulation of settlement was the product of extensive negotiations conducted after full disclosure of economic information. Therefore, there was no need to remit the matter for the resolution of economic issues. It held that the Equitable Distribution Law does not require a different result. Domestic Relations Law 236(B) is "applicable to actions for an annulment or dissolution of a marriage, for a divorce, for a separation, for a declaration of the nullity of a void marriage" and other similar actions (236[B][2][a] ). Thus, the concept of equitable distribution is written into the laws of the State so as to apply only in certain cases involving the abrogation of the marital status.. In the absence of an action for the abrogation of the marital status, a court cannot "hold [a party] liable to [another party] ... solely on the basis of equitable distribution" (Yedvarb, 92 A.D.2d at 592). Here, however, the court did not hold any party liable solely on the basis of equitable distribution because plaintiff, as the guardian of defendant's wife, and defendant resolved all economic issues through a negotiated settlement agreement that included an explicit statement that defendant and his wife were not divorcing. Therefore, the Equitable Distribution Law was not applicable to this case. In light of the determination, it did not address defendants' contention that the written adoption of the stipulation of settlement did not meet the requirements of Domestic Relations Law 236(B)(3).

March 1, 2011

To Establish That an Family Offense Has Occurred Does Not Require Proof Beyond a Reasonable Doubt Unless the Remedy to Be Imposed Is Punitive

In Matter of Schneider v Arata, --- N.Y.S.2d ----, 2011 WL 337962 (N.Y.A.D. 2 Dept.) the Appellate Division observed that Family offense proceedings, in general, provide for remedies that are civil in nature and to establish that an offense has occurred does not require proof beyond a reasonable doubt unless the remedy to be imposed is punitive. The respondent's acquittal of the criminal charge related to the same conduct alleged in the family offense petition does not have res judicata effect with respect to the family offense proceeding, as the acquittal did not decide an identical issue material to the petition. Accordingly, the Family Court erred in dismissing the petition on this basis. Likewise, the constitutional protection against double jeopardy presents no bar to the family offense proceeding, as no punitive remedy is sought therein. As the record was insufficient to permit the Court to determine whether the parties had an intimate relationship within the meaning of Family Court Act 821(1)(e) the matter was remitted to the Family Court for a hearing to determine whether the Family Court has subject matter jurisdiction under Family Court Act 812(1)(e) and, if so, whether a family offense had been committed.

Family Ct Act 413(1)(G) Does Not Limit the Accrual of Arrears During Relevant Period Absent Respondent's Affirmative Request for and Successfully Obtaining Relief from Original Order

In Matter of Madison County Commissioner of Social Services v Felker, --- N.Y.S.2d ----, 2011 WL 240138 (N.Y.A.D. 3 Dept.) Pursuant to a May 2007 order Respondent father was obligated to pay the child's mother, Mary Chafee, $25 per week in child support. The order noted that respondent, though unemployed at that time, had held full-time employment in the past and was "healthy and capable of working." Since entry of that order, respondent never paid support as required therein. In December 2008, petitioner commenced a violation proceeding on behalf of Chafee. A Support Magistrate found respondent in willful violation of the support order and recommended a sentence of incarceration be imposed if he did not begin to make regular payments in accordance with the May 2007 order. The Support Magistrate entered a money judgment directing payment of $3,325 in arrears. Following a confirmation hearing held in accordance with Family Ct Act 439(a), Family Court confirmed the finding that respondent had willfully failed to obey the support order and ordered that respondent be incarcerated for 180 days unless he purged himself of the contempt by payment of the arrears--which then totaled $3,650--in their entirety. The Appellate Division affirmed. While respondent testified that he was indigent and earned no income since the issuance of the May 2007 order due to his inability to obtain work, he did not provide any competent evidence of either a physical or mental condition prohibiting him from earning income. Although he also claimed that he had unsuccessfully applied for numerous jobs since entry of the May 2007 order, he failed to provide documentation of his alleged job search and his testimony was not credited. Respondent also admitted that, although he was ordered to attend the career center and the Worker Parents Initiative, he failed to follow-up with attendance after his initial meeting. The Appellate Division rejected Respondent’s contention that Family Court erred in failing to cap his arrears at $500 pursuant to Family Ct Act 413(1)(g) because his income was below the federal poverty guidelines. While respondent testified that he continued to be unemployed and was attempting to apply for public assistance, if he wished to "invoke the cap on arrears provided by Family Ct Act 413(1)(g), his remedy was to make an application to modify, set aside or vacate the earlier order". Respondent admitted that he has never sought a modification of the May 2007 order of support. Thus, inasmuch as Family Ct Act s 413(1)(g) will not limit the accrual of arrears during the relevant period absent respondent's affirmative request for and successfully obtaining relief from the original order (Matter of Cortland County Dept. of Social Servs. v. VanLoan, 77 AD3d at 1136; see Family Ct Act s 451; see also Matter of Moore v. Abban, 72 AD3d at 973; Matter of Martinez v. Torres, 26 AD3d 496, 497 [2006] ), the court did not err in confirming the Support Magistrate's determination.

Absent Amendment Order of Protection May Not Be Based Upon Post-Petition Incidents

In Matter of Ungar v Ungar, --- N.Y.S.2d ----, 2011 WL 256559 (N.Y.A.D. 2 Dept.) petitioner (son) filed a family offense petition dated September 19, 2008, against the appellant (father). The petition alleged harassment and that the most recent incident had occurred on September 11, 2008. The Family Court issued a temporary order of protection and thereafter denied the father's motion to dismiss the petition. On February 9, 2010, a fact-finding hearing was held and the Family Court heard testimony from both the son and the father. The Family Court granted the petition and issued an order of protection against the father, based, in part, upon a post-petition incident purportedly occurring in October 2008. The Appellate Division held that as the son specifically acknowledged that the petition had not been amended, the Family Court improperly issued the order of protection based, in part, upon allegations of acts that occurred in October 2008 (citing Matter of Czop v. Czop, 21 AD3d 958, 959; Matter of Cavanaugh v. Madden, 298 A.D.2d 390; Matter of Whittemore v. Lloyd, 266 A.D.2d 305). Considering the other allegations set forth in the petition, the testimony proffered at the hearing before the Family Court failed to establish, by a preponderance of the evidence, the necessary elements of the offenses of harassment in the first degree or harassment in the second degree. Since the record did not support the Family Court's determination that the father committed family offenses warranting the issuance of the order of protection, the order of protection was reversed, the petition denied, and the proceeding dismissed (see Family Ct Act 841).

Supreme Court Grants Declaratory Judgment Dissolving Vermont Civil Union

In Parker v Waronker, --- N.Y.S.2d ----, 2010 WL 5653528 (N.Y.Sup.) the matter was commenced as an action for divorce on April 16, 2010. The defendant filed and served an affidavit consenting to the relief requested. After reviewing the submissions of the parties, the Court, on its own motion, elected to convert the action to one for declaratory relief and the defendant submitted written consent to such relief. The Court found that the parties were two female adults who entered into a civil union in the State of Vermont on June 18, 2004. Such civil unions are authorized in that State under Vt Stat Ann, Tit 15, s 1201. In the years that followed, their relationship deteriorated to the point that the defendant left their mutual residence on June 30, 2007, and the parties have lived apart since that time. The plaintiff was a resident of the State of New York. The defendant was a resident of the State of Ohio. The resumption of their relationship as a civil union was not reasonably probable. The parties were preluded from obtaining a dissolution of their civil union in the State of Vermont because neither party was currently a resident of Vermont as required by Vermont Law. See Vt Stat Ann, Tit 15, s 592. There were no children born of this relationship. Both parties waived any claims for any ancillary relief. The Court pointed out that in Dickerson v. Thompson, 73 AD3d 52 (3d Dept 2010), the Court held that the Supreme Court has subject matter jurisdiction over an action for declaratory and equitable relief seeking dissolution of a civil union validly entered into in another state. The decision was based on principles of comity and the emerging public policy of the State of New York to protect the rights of individuals in same sex relationships in a variety of contexts. The Court in Dickerson v. Thompson, supra, left undecided, however, the issue of what relief could be afforded to the litigants in such an action, concluding its opinion with the comment that "our conclusion that subject matter jurisdiction exists does not in any way determine the ultimate question of what, if any, relief is available on the merits." Having concluded that it had jurisdiction to determine whether this civil union should be dissolved, the court found that plaintiff demonstrated grounds for such dissolution under the applicable Vermont Statutes. Vt Stat Ann, Tit 15, s 1206 provides, inter alia, that "the dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage in accordance with chapter 11 of this title...." Vt. Stat Ann, Tit 15 s 551 provides that "(a) divorce from the bond of matrimony may be decreed: ... (7) When a married person has lived apart from his or her spouse for six consecutive months and the court finds that the resumption of marital relations is not reasonably probable. As this Court made a finding that the parties lived apart for a period of more than six consecutive months and that the resumption of this civil union was not reasonably probable, as a matter of law the plaintiff was entitled to a judgment dissolving the civil union entered into by the parties on June 18, 2004.

Family Court Has Authority to Modify an Existing Permanency Goal Absent Specific Request by a Party

In Matter of Jacelyn TT,--- N.Y.S.2d ----, 2011 WL 240161 (N.Y.A.D. 3 Dept.) Petitioner initiated proceedings seeking continuation of placement. Family Court held a permanency hearing at which petitioner and the mother agreed that placement of the children should continue, with a goal of return to a parent. Carlton TT. (the father) appeared but presented no evidence and did not seek custody. In two subsequent permanency hearing orders pertaining solely to Jacelyn TT. and Sasha TT., the court continued placement of the children but modified the goal of their permanency plans from reunification to placement for adoption. The mother appealed from both orders and the father appeals only from the order relating to Jacelyn TT. (the child). The father argues that Family Court abused its discretion by modifying the permanency goal without any request from the parties. The Appellate Division disagreed. It observed that at the conclusion of a permanency hearing, Family Court is required to make findings and enter an order of disposition "upon the proof adduced . . . and in accordance with the best interests and safety of the child" (Family Ct Act 1089 [d] ). Where the court determines that the child is not to be immediately returned to the parent, it must indicate whether the permanency goal for the child "should be approved or modified " (Family Ct Act 1089[d][2][i] ) and may select among various alternatives including, among others, the child's eventual return to the parent or placement for adoption (see Family Ct Act 1089 [d][2][i][A]-[E] ). Notably, Family Ct Act 1089(c)(5)(i) characterizes petitioners’ proposed permanency goal as a "recommendation." While the statute does not explicitly permit the court to modify a permanency goal in the absence of an application by one of the parties, it suggests such authority and does not expressly constrain the court from doing so. It concluded that Family Court has the authority to modify an existing permanency goal absent a specific request by a party. It also concluded that Family Court's determination was supported by a sound and substantial basis in the record.

February 16, 2011

Whether a Breakdown of a Marriage Is Irretrievable Is a Question to Be Determined by the Finder of Fact

In Strack v Strack, --- N.Y.S.2d ----, 2011 WL 356058 (N.Y.Sup.) the parties were married on May 25, 1963 and plaintiff sought a divorce based upon the no fault grounds contained within Domestic Relations Law s 170(7). This was the third divorce action plaintiff has commenced. She commenced divorce actions in 1986 and 1990, respectively, both of which were voluntarily discontinued. In lieu of an answer, defendant moved to dismiss the complaint, contending (1) that the complaint lacks specificity (see CPLR 3016[c] ); (2) that the conduct alleged in the complaint was barred by the five-year statute of limitations (see Domestic Relations Law § 210[a] ); and (3) that the complaint failed to state a cause of action for divorce under Domestic Relations Law § 170(7). The Supreme Court observed that Domestic Relations Law § 170(7) permits divorce where "[t]he relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath.". The allegations in the complaint were as follows: "The relationship between husband and wife has broken down such that it is irretrievable and has been for a period of at least six months. For a period of time greater than six months, Defendant and Plaintiff have had no emotion in their marriage, and have kept largely separate social schedules and vacation schedules. Each year Plaintiff and Defendant live separately throughout most of the winter months. Though they share the residence for several months out of the year, Plaintiff and Defendant have not lived as husband and wife for a period of time greater than six months. Plaintiff believes the relationship between she and Defendant has broken down such that it is irretrievable and that the relationship has been this way for a period of time greater than six months." The Court found that the allegations were specific and met the additional pleading requirement of having been "stated under oath" (Domestic Relations Law § 170[7] ). With reference to defendant's claim that the statute of limitations had run against plaintiff's cause of action, Domestic Relations Law § 210(a) provides that "[n]o action for divorce ... may be maintained on a ground which arose more than five years before the date of the commencement of that action for divorce ...except where ... the grounds therefor are one of those specified in [Domestic Relations Law § 170](2), (4), (5) or (6)...." The grounds specified in Domestic Relations Law § 170(7) are absent from Domestic Relations Law § 210(a), which absence allows no conclusion other than it was the Legislature's intent to exclude it. The Court therefore found that the grounds set forth in Domestic Relations Law § 170(7) were subject to the five-year statute of limitations. As the record revealed several instances of matrimonial discord that occurred within the past five years, the Court found that plaintiff's cause of action was not barred by the applicable statute of limitations. Additionally, to the extent that some instances of matrimonial discord occurred more than five years ago, the Court found such instances to be part of a continuing course of conduct. The Court observed that the legislative history pertaining to Domestic Relations Law § 170(7) contains a wide ranging catalogue of submissions from numerous private individuals, organizations, legislators, and agencies throughout New York State. It appeared that Domestic Relations Law s 170(7) was simply a new cause of action subject to the same rules of practice governing the subdivisions which have preceded it. Specifically, Domestic Relations Law § 173 provides that "[i]n an action for divorce there is a right to trial by jury of the issues of the grounds for granting the divorce" and, here, the Legislature failed to include anything in Domestic Relations Law § 170(7) to suggest that the grounds contained therein are exempt from this right to trial. Had it intended to abolish the right to trial for the grounds contained within Domestic Relations Law § 170(7), it would have explicitly done so. Insofar as the phrase "broken down such that it is irretrievable" is nowhere defined in the statute, the determination of whether a breakdown of a marriage is irretrievable is a question to be determined by the finder of fact. The Court held however, that whether a marriage is so broken that it is irretrievable need not necessarily be so viewed by both parties. Accordingly, the fact finder may conclude that a marriage is broken down irretrievably even though one of the parties continues to believe that the breakdown is not irretrievable and/or that there is still some possibility of reconciliation. Having found that Domestic Relations Law § 173 was applicable to Domestic Relations Law § 170(7), the Court ordered that there be an immediate trial on the issue raised in defendant's motion, namely whether "[t]he relationship between husband and wife has broken down irretrievably for a period of at least six months."

Mandatory Pendente Lite Maintenance Guidelines and Pendente Lite Counsel Fee Statutes Should Be Deviated from Where Calculations Result in the Payee Spouse Having More Monies Available than the Payor Spouse

In Scott M v Ilona M., --- N.Y.S.2d ----, 2011 WL 285640 (N.Y.Sup.) Supreme Court found that the new mandatory pendente lite maintenance guidelines and pendente lite counsel fee statutes enacted by the legislature should be deviated from where the calculations will result in the payee spouse having more monies available than the payor spouse as a result of the calculation. The Court also determined that the shift in financial resources that results from the guideline calculation rebuts the presumption of the payor spouse being the "monied" spouse. The Court performed a number of calculations in order to explain the options and consequences of the calculation (see DRL 236 B[5-a] ). The husbands gross income was $155,590.00 and the wife’s gross Income was $33,705.36. The court noted that the new statute changes the philosophy and purposes of pendente lite support. No longer is the standard to tide over the "more" needy spouse. The standard is a shift in resources pre-trial by automatic calculation. After considering the statutory factors, the Court found that the presumptive amount of temporary maintenance of $37,016.14 (which was $3,097.00 per month) would be unjust and inappropriate because (1) the Court must consider the existence and duration of the pre-divorce joint household of both parties and (2) the child care expense obligation of the parties. This determination cannot be made in a vacuum. In the case at bar and under the formula enunciated by the recent legislation, the shift in resources from the payor spouse to the payee spouse resulted in the payor spouse having a substantial reduction in resources and thus, could not maintain his pre-separation household. The Court recognized that the purpose of a pendente lite award is no longer to "tide over the more needy party", and deviated and determined that temporary maintenance in the amount of $24,667.42 per annum pendente lite implemented the intent and language of the new law. The court deviated in order for the plaintiff to meet his pre-divorce household expenses and taking into account the parties expenses, child care costs and net available resources. The wife requested an award of interim counsel fees in the amount of $10,000.00. The Court noted that the legislation also changed the methodology for the ordering of counsel fees pendente lite. DRL 237 has been amended to provide that: "[t]here shall be rebuttable presumption that counsel fees shall be awarded to the less monied spouse. The husband earned $155,590.00 and the wife earned $33,705.36. The husband was the monied spouse. In accordance with the new statutory scheme there is a rebuttable presumption that counsel fees shall be awarded to the less monied spouse, the wife. However, based upon the temporary maintenance and child support award, even with the deviation, the court could no longer consider the husband as a "monied spouse". Even with the deviation, there was a substantial shift in actual financial resources. The re-allocation of financial resources articulated in the decision shifted the burden from the husband from being considered the monied spouse, and rebutted the presumption. There was no doubt that the plaintiff earned more than the defendant , and there was a disparity in gross income, but under the financial shift as a result of the mandatory Child Support Standards Act and Maintenance guidelines, even with the maintenance deviation of one-third, the defendant would have more available resources for her and the child than plaintiff. The Court could not hold that just because one party "earns more" than the other that they automatically become the "monied spouse".

Supreme Court May Use its Contempt Powers to Enforce Automatic Orders

In P.S. V R.O., --- N.Y.S.2d ----, 2011 WL 322465 (N.Y.Sup.) the Supreme Court held that it may use its contempt powers to enforce the automatic orders set forth in DRL§ 236(B)(2)(b) and 22 NYCRR 202.16-a, rejecting the one reported case on point, Buoniello v. Buoniello (5/7/10 NYLJ 28, col. 3 [Sup Ct Suffolk Co] ). Nonetheless, it denied the motion because the movant, defendant Husband, had not proven that plaintiff Wife in fact violated the orders. The Wife commenced the divorce action on October 13, 2010 by filing a Summons with Notice, along with a "Notice of Automatic Orders," which sets out the statutory automatic orders verbatim, refers to the section of the Domestic Relations Law establishing the automatic orders, and notifies the recipient that the orders are effective as to the plaintiff (the Wife in this case) upon her filing of the Summons, and that they are effective as to the defendant (the Husband) upon service of the Summons and the Notice of Automatic Orders upon him. The Summons with Notice and the Notice of Automatic Orders were subsequently served on the Husband. The parties jointly owned a vacation home in Vermont (the Vermont House). They had a joint bank account with HSBC (the Joint Account), which they used during the marriage to pay joint expenses. After they separated, they continued to deposit rental income from the Vermont House into the Joint Account and to pay expenses for the Vermont House from it. On or about December 15, 2010, the rental broker for the Vacation House deposited rental income of $6,000 into the Joint Account. On the same day, the Wife transferred these funds into a bank account in her sole name. On or before January 4, 2011, she transferred those funds back to the Joint Account. The Husband claimed in his affidavit in support of his motion that, since May 2009, he has only used funds in the Joint Account for Vermont House expenses. However, the Wife pointed out, and the Husband did not deny, that in June 2009 he spent approximately $500 from the Joint Account at the Borgata Casino Hotel in Atlantic City, New Jersey, and transferred an additional $10,000 from the Joint Account to an account in his sole name. From May 2009 until her withdrawal of $6,000 in December 2010, the Wife made one deposit into the Joint Account of $5,000, and did not make any withdrawals. The Wife claimed that she transferred the $6,000 out of the Joint Account on December 15, 2010 because she feared that the Husband would not spend the funds on the Vermont House expenses and would dissipate them. She claimed that she moved them into her separate account in order to preserve them. The Wife cited to Buoniello v. Buoniello (5/7/10 NYLJ 28, col. 3 [Sup Ct Suffolk Co] ), in which the court found that "the directive in the Summons does not constitute a clear and unequivocal order" and that the automatic orders set forth in Domestic Relations Law Section 236(B)(2)(b) "are statutory mandates and do not constitute orders issued by a Court". Based on that reasoning, the court held that contempt was not an appropriate remedy for Mr. Buoniello's withdrawal of $180,000 of retirement funds in his name the day after he had been served with the divorce summons. The Court noted that Buoniello was the only reported decision dealing with the automatic orders cited by the parties or located by the court. However, was not binding on the court, and this court declined to follow it because the Buoniello decision did not describe the form of the notice of the automatic orders served upon Mr. Buoniello. It may well be that the court in that case perceived that he had not been given adequate notice of the existence and enforceability of the automatic orders. In contrast, in this case, it was the Wife who served the notice of the automatic orders, and she could not be heard to complain that she herself was not on adequate notice. In any event, the notice she served was complete and tracked the statutory language. Moreover, while the court in Buoniello correctly pointed out that the Domestic Relations Law section dealing with automatic orders is not a "lawful mandate of the court," the Court Rule (22 NYCRR 202.16-a), which requires service of a copy of the "automatic orders" on defendant, and contains language identical to that found in DRL 236(B)(2)(b), certainly is. The Court Rules are promulgated by the Chief Administrator of the Courts on behalf of the Chief Judge of the Court of Appeals under the authority vested in them by Judiciary Law Sections 211(1)(b) and 212(2)(b), and by Article Six, Section 30, of the New York State Constitution, to adopt rules to regulate practice and procedure in the courts. Thus, the court rules constitute lawful mandates of the court. Furthermore, the legislative history of Domestic Relations Law Section 236(B)(2)(b) made it clear that the legislature intended that a violation of the automatic orders would be redressed by the same remedies available for violations of any order signed by a judge. The New York State Assembly Memorandum in Support of the legislation states that the statute was intended: to place upon the plaintiff a duty to serve upon the defendant automatic orders which would bind both parties from the commencement of a matrimonial action. The Chief Judge effectuated these legislative goals by promulgating and publishing the Court Rule. Accordingly, the court found that civil contempt is available as a remedy for violation of the automatic orders, provided that the plaintiff has served the defendant with adequate notice of the automatic orders, as has been done in this case. In relevant part, the first paragraph of the automatic orders states: ... neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property ... individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action..... It was undisputed that the Wife did not spend any of the withdrawn funds, and the Husband had not shown that she intended to or did spend them for any purpose prohibited by the automatic orders. The automatic orders specifically permit the expenditure of assets during matrimonial litigation in the ordinary course of business and on "household" expenses. The Wife claimed that she moved the funds to preserve them and to prevent the Husband from dissipating them, and she replaced them without spending any of them. Therefore, the Husband had not shown that she violated the automatic orders. In addition, the Husband fails to show that his rights were "defeated, impaired, impeded or prejudiced" (DRL 753[A] ) by the brief removal from the Joint Account of the funds which were withdrawn, and promptly replaced, by the Wife. Consequently, the Husband failed to make out his claim for contempt.

February 1, 2011

Prohibition Against Double Counting Did Not Apply to the Distribution of a Tangible, Income-producing Asset

In Weintraub v Weintraub, --- N.Y.S.2d ----, 2010 WL 5094373 (N.Y.A.D. 2 Dept.) the Appellate Division held that the maintenance award to the defendant of $3,000 per month until the plaintiff retires was a provident exercise of the Supreme Court's discretion . The award of an attorney's fee to the defendant was likewise proper. Contrary to the plaintiff's argument, the prohibition against double counting did not apply to the distribution of the parties' plumbing and fire sprinkler contracting company, which was a tangible, income-producing asset (see Keane v. Keane, 8 NY3d 115, 119) The Supreme Court properly determined that the plaintiff's contention that he overpaid pendente lite support in a prior action for a divorce which was dismissed, should have been raised and resolved in that action, and therefore, that he was not entitled to a credit for the purported overpayment. It agreed with the Supreme Court's determination that the defendant did not wastefully dissipate asserts by paying the parties' daughter's graduate school expenses from marital funds (citing Raynor v. Raynor, 68 AD3d 835). It declined to disturb the Supreme Court's determination not to credit the plaintiff for his withdrawal from marital funds of $100,000 paid to his mother. That determination was expressly based upon the finding that the plaintiff's unsubstantiated testimony that it was repayment of a loan used to pay a marital debt lacked credibility. It agreed with the plaintiff, however, that the Supreme Court erred in determining that the Jefferson Life Insurance Policy on the defendant's parents, of which the defendant is the beneficiary, was the defendant's separate property. The policy was purchased during the marriage and the premiums were paid, in part, with marital funds; it was, therefore, marital property. It modified the judgment accordingly and awarded the plaintiff a credit of $35,359.23, representing 50% of the net value of the policy.

Not Necessary to Conduct a Hearing When Court Possesses Sufficient Relevant Information to Render an Informed Determination in the Child's Best Interest

In Feldman v Feldman,--- N.Y.S.2d ----, 2010 WL 5095332 (N.Y.A.D. 2 Dept.) the Appellate Division pointed out that generally, visitation should be decided after a full evidentiary hearing to determine the best interests of the children. However, it is not necessary to conduct such a hearing when the court already possesses sufficient relevant information to render an informed determination in the child's best interest. Here, the parties were divorced in 2003 by a judgment which incorporated, but did not merge, the terms of a stipulation providing that the father would have visitation with the children. In 2009, the father commenced an enforcement proceeding in the Family Court, alleging that the mother was interfering with his visitation. On the date scheduled for trial, the parties informed the Family Court that they had come to an agreement regarding the father's visitation. The agreement was read into the record and the parties waived their right to a hearing. The Family Court permitted the attorney for the children to elicit testimony from the mother and the father. The Family Court had already interviewed the children in camera, and had a forensic evaluation conducted of the parties and the children. It held that under these circumstances, the Family Court had adequate information before it to determine that it was in the children's best interests to have visitation with the father as outlined in the parties' agreement. Accordingly, contrary to the contention of the attorney for the children, the Family Court did not err in failing to conduct an evidentiary hearing.

Attorney Not Entitled to Charging Lien if Bills Not Sent Every Sixty Days

In Hovanec v Hovanec, --- N.Y.S.2d ----, 2010 WL 5095419 (N.Y.A.D. 2 Dept.) the Appellate Division pointed out that the court rules imposing certain requirements upon attorneys who represent clients in domestic relations matters (see 22 NYCRR part 1400) were designed to address abuses in the practice of matrimonial law and to protect the public. The failure to substantially comply with those rules will preclude an attorney's recovery of a legal fee. Here, Supreme Court correctly determined, upon reargument, that there was no basis to change the original determination that the appellant had failed to make a prima facie showing, by submitting the requisite documentary evidence, that it substantially complied with the requirement of providing itemized bills for legal services to its client at least every 60 days (see 22 NYCRR 1400.2, 1400.3). Accordingly, the Supreme Court properly adhered to its original determination that the appellant had failed to establish its entitlement to a charging lien.

Order of Protection Issued for Lurching Car toward Father

In Matter of Kobel v Holiday, 910 N.Y.S.2d 752 (4th Dept, 2010) the Appellate Division concluded that the court properly found that petitioner father met his burden of establishing by a preponderance of the evidence that the mother committed the family offense of reckless endangerment in the second degree (see Family Ct. Act 812[1]; Penal Law s 120.20), thus warranting the issuance of an order of protection, by lurching her car forward and stopping within inches of the father and the parties' child.

Support Magistrate Required to Provide Clear Record of Source from Which Income Is Imputed and Reasons for Imputation

In Matter of Rohme v Burns, --- N.Y.S.2d ----, 2010 WL 5021330 (N.Y.A.D. 2 Dept.) the Appellate Division pointed out that a court need not rely upon a party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated future potential earnings . The court may impute income to a party based on the party's employment history, future earning capacity, educational background, or money received from friends and relatives. Where a party's account is not credible, the court may impute an income higher than claimed. However, "in exercising the discretion to impute income to a party, a Support Magistrate is required to provide a clear record of the source from which the income is imputed and the reasons for such imputation". Where the Support Magistrate fails to specify the sources of income imputed and the actual dollar amount assigned to each category, the record is not sufficiently developed to allow appellate review. The Court agreed with Family Court that the father's testimony regarding his income and earning capacity was not credible. However, the Support Magistrate failed to state how he arrived at the imputed income figure of $100,000 per year. It therefore remitted the matter to the Family Court for a report from the Support Magistrate on the issues of the specific sources of income imputed to the father, the actual dollar amounts assigned to each category, and the resultant calculations pursuant to Family Court Act 413(1)(c), and thereafter a new determination of the objections.

January 16, 2011

Defendant Not Entitled to Maintenance Retroactive to the Date of Her Pendente Lite Application Where Her Applications for Pendente Lite Relief Were Denied and Only Request for Maintenance Was Made at Trial

In Massirman v Massirman, --- N.Y.S.2d ----, 2010 WL 4807680 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed a judgment which, inter alia, awarded the wife five years of maintenance, awarded her a distributive share of 25% of the plaintiff's interest in a business, and awarded her an attorney's fee of $20,000. It found no basis to disturb the Supreme Court's conclusion that the defendant's credibility was "diminished by her failure to produce business records, and her failure to list significant assets on her initial net worth statement," including any mention of her business, Alchemy Fashions. Moreover, the paucity of information provided and the minimal efforts expended by the defendant in attempting to provide documentation of her finances, clearly displayed a lack of good faith on her part. The defendant contended that the Supreme Court improvidently exercised its discretion in failing to either award her maintenance for life or for a duration longer than five years. However, the Supreme Court found that the defendant offered no evidence of ill health and that there was no evidence that she "reduce[d] or [lost] lifetime earning capacity as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage" . Except for several years before and after the parties' son was born, the defendant continuously worked in the field of high-end clothing retail, operating her own businesses for most of the marriage. Supreme Court credited the plaintiff's testimony regarding the declining state of his business, and rejected the defendant's testimony that her business did not yield any profits in light of her failure to provide the requisite documentation. Under all of the circumstances, the maintenance award was proper. Contrary to the defendant's contention, she was not entitled to maintenance retroactive to the date of her pendente lite application. The purpose of a maintenance award is distinct from that of pendente lite relief. The record indicated that the defendant's applications for pendente lite relief were denied and that no appeals were taken therefrom. Although an award of maintenance can be made retroactive "as of the date of the application therefor", since the defendant did not commence this divorce action, her only request for maintenance was made at the trial. Therefore, the Supreme Court properly directed that its maintenance award to the defendant would commence as of April 23, 2008, the date of the decision after trial (see DRL 236[B][6][a] ). The Supreme Court providently exercised its discretion in awarding the defendant a distributive award of only 25% of the plaintiff's interest in a business. The evidence adduced at trial demonstrated that the defendant's role in the plaintiff's career was minimal, that she continued her own career, and that she made only indirect contributions to the plaintiff's business.

Voluntary Discontinuance with Prejudice Should Be Granted in Custody Case to Prevent Plaintiff from Harassing Defendant with Further Litigation.

In Matter of Fiacco v Engler, --- N.Y.S.2d ----, 2010 WL 4903886 (N.Y.A.D. 3 Dept.) the father filed a petition seeking full custody of the child, claiming that the mother had unreasonably restricted his contact and communication with the child. At the first appearance on this petition in June 2009, the father notified Family Court that he had filed complaints against his assigned counsel, as well as against the court and the attorney for the child. As a result, his counsel sought, and was permitted, to be relieved of the assignment. The father failed to appear at the next two scheduled court appearances and newly assigned counsel moved, by order to show cause, to be relieved. A third attorney was assigned to represent the father and a trial date of January 22, 2010 was set. Before the trial date, Family Court conducted a Lincoln hearing with the child. However, the day before trial, the father's counsel sent a letter on the father's behalf indicating that he wished to withdraw the custody petition. The mother, as well as the attorney for the child, advised that they would consent to a dismissal of the petition, but only on the condition that it be entered with prejudice. The court dismissed the petition without prejudice. The Appellate Division modified on the facts by dismissing the petition with prejudice. It held that generally, a voluntary discontinuance is without prejudice, unless the order, notice, or stipulation of discontinuance states otherwise. An order of discontinuance with prejudice is appropriate where such is necessary to prevent the plaintiff from harassing the defendant with further litigation. Since the Family Court Act does not address voluntary discontinuances, the Court held that the provisions of the CPLR must govern this aspect of the proceeding (Family Ct Act 165[a] ). Whether an application to discontinue an action pursuant to CPLR 3217(b) should be granted lies within the sound exercise of the court's discretion, and such should be entered "upon terms and conditions, as the court deems proper" (CPLR 3217[b]; see Siegel, N.Y. Prac 298 [4th ed] ). Here, the father's request to discontinue this proceeding came on the eve of trial and only after the child had been compelled to participate in a Lincoln hearing . The attorney for the child reported that the child suffered a "panic attack" as a result of the Lincoln hearing. Moreover, the father's persistent failure to appear as required at regularly scheduled court appearances provided ample support for the mother's contention that this petition was filed by him principally as a means by which he could harass and annoy her. As a result, it found that the discontinuance should have been with prejudice.

Right to Exclusive Occupancy and Restriction on Partition Must Be Reasonable.

In Pando v Tapia, --- N.Y.S.2d ----, 2010 WL 5187739 (N.Y.A.D. 2 Dept.) the defendant, Maria Theresa Tapia, and her husband, as tenants by the entirety, purchased certain real property. There were no children of the marriage and, in 1979, they were divorced. The judgment of divorce awarded exclusive possession of the subject property to the defendant. In 2005 the defendant's former husband died. His sole surviving heirs were a son and a daughter from a prior marriage who inherited his interest in the subject property. On April 29, 2008, they sold their interest in the property to the plaintiff, Thanas Pando. In February 2009 the plaintiff commenced an action for partition. The Appellate Division pointed out that as a result of the 1979 divorce, the defendant and her former husband owned the subject property as tenants in common, since their ownership as tenants by the entirety was extinguished as a matter of law. After the death of the defendant's former husband in 2005, his interest in the subject property passed to his two surviving heirs, and they, in turn, sold their interest to the plaintiff. Thus, the plaintiff and the defendant became owners of the subject property as tenants in common, with each owning a one-half undivided interest. Pursuant to Real Property Actions and Proceedings Law 901(1), a tenant in common may maintain an action for the partition of real property and for a sale if a partition cannot be made without great prejudice to the owners (see RPAPL 901[1] ). While partition is governed by statute, the actual remedy is subject to the equities between the parties. In a partition action where, as here, one of the tenants in common was previously awarded exclusive possession pursuant to a judgment of divorce, the right of exclusive occupancy and the restriction on partition which results therefrom, must be deemed limited to a reasonable duration absent an express or implied agreement to the contrary. Here, the plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the complaint and dismissing the first and second counterclaims by submitting a duly executed deed demonstrating his ownership and the right to possession of the subject property as a tenant in common and evidence that the defendant's right to exclusive possession under the judgment of divorce had expired with the passage of a reasonable period of time. In opposition, the defendant failed to raise a triable issue of fact rebutting the plaintiff's prima facie showing or as to the merit of the affirmative defense of laches and the first and second counterclaims. She failed to raise a triable issue of fact as to whether partition was barred by express or implied agreement or as to whether her right to exclusive possession, which had no stated duration in the judgment of divorce, had not expired after the passage of approximately 30 years (citing Sherman v. Sherman, 168 A.D.2d 550, 551; Surlak v. Fulfree, 145 A.D.2d at 81; Luvera v. Luvera, 119 A.D.2d at 812). Accordingly, Supreme Court should have granted plaintiff's motion for summary judgment.

January 3, 2011

Court of Appeals Amends Rules to Reduce Number of Briefs and Require Submission of Records, Appendices and Briefs in Text Searchable Portable Document Format (Pdf) on Compact Disc (Cd) or Digital Video Disc (Dvd)

The Court of Appeals amended its Rules of Practice effective December 8, 2010. Former section 500.2 was repealed in its entirety and a new section 500.2 was substituted for it. Sections 500.11, 500.12, 500.14 and 500.23 were amended. The number of paper copies of records, appendices and briefs has been reduced to 20 instead of the current 25 for normal coursed appeals and certified question reviews. In addition, parties are required to file on disk digital versions of each paper filing. Appeals to be considered under section 500.11 of the Rules are subject to a similar digital filing requirement.The companion briefs and record material in digital format must comply with the current “technical specifications“ available from the clerk's office. The requirements regarding submission in digital format apply to all appeals for which the preliminary appeal statement is filed on or after the December 8, 2010 effective date

Policy Implications Fraud Being Perpetrated on the Court Warrants a Hearing

In Augustin v Augustin , --- N.Y.S.2d ----, 2010 WL 5292609 (N.Y.A.D. 1 Dept.) the Appellate Division modified an order which denied plaintiff's motion to vacate a judgment of divorce entered by the Clerk of the court in 1985. It pointed out that a motion to vacate a judgment upon the ground of fraud pursuant to CPLR 5015(a)(3) must be made within a reasonable time. The IAS court found that the wife was aware of the defendant husband's alleged misconduct by July 1990, and that she waited until 2008 to move to vacate the judgment. It determined that the wife's 18-year delay was unreasonable. The Appellate Division pointed out that although the wife never argued in the Court below that the 1985 judgment should be vacated for lack of jurisdiction pursuant to CPLR 5015(a)(4) it may review that argument since it is a legal argument which appears upon the face of the record and could not have been avoided if brought to the husband's attention at the proper juncture. The wife's argument, however, lacked merit. Although a motion to vacate a judgment for lack of jurisdiction may be made "at any time", such a motion should be denied if the movant acted as if the judgment were in effect before moving to vacate it. Here, the IAS court determined that because the wife did not deny that she submitted the 1985 divorce judgment to the Queens County Family Court in 1992 to obtain support for herself and her children, she waived any objection to the court's jurisdiction over her. However, inasmuch as each party contended that the other surreptitiously procured the 1985 judgment by some form of deceit, and given the policy implications of a fraud being perpetrated on the court, it exercised its independent discretion and remanded for an evidentiary hearing. It stated that if it is found that it was the wife who wrongfully obtained the divorce, her motion to vacate the judgment should be denied. If, however, it was the husband who was fraudulent, then Supreme Court can reach the issue of whether the wife's delay in seeking to vacate the judgment was reasonable, or whether she waived any challenges to the validity of the judgment by relying on it in seeking maintenance and support in Family Court in 1992. The need for an evidentiary hearing was manifest by the IAS's court characterization of the wife's lack of "credibility and bona fides" and the concurrence's assertion that "there is a substantial basis for believing that the husband fraudulently obtained the divorce".

Appellate Division Holds that Ineffective Assistance of Counsel in Termination Proceeding Requires Reversal and Cites Examples of Why Counsel Was Ineffective

In Matter of Eileen R., --- N.Y.S.2d ----, 2010 WL 5185802 (N.Y.A.D. 3 Dept.) Petitioner commenced an abandonment proceeding in January 2009. Respondent was unable to attend the proceedings because he was incarcerated in Pennsylvania, so Family Court assigned counsel who provided representation throughout the hearing. Petitioner presented proof establishing that respondent had made no attempt to contact the children, petitioner or the foster parents during the relevant six-month period and had not been prevented from doing so. At the conclusion of the hearing, the court found that the children were abandoned and terminated respondent's parental rights.

Respondent appealed, arguing that his counsel was ineffective and that his right to due process of law was violated because he was prevented from participating in the termination hearing. The Appellate Division agreed with him, in a unanimous opinion written by Justice McCarthy. He pointed out that the Due Process Clauses of both the U.S. and N.Y. Constitutions protect a parent's right to be present throughout a proceeding implicating the termination of parental rights. This right to be present is not absolute and must be balanced with the child's right to a prompt and permanent adjudication. Due process considerations are relevant to protecting the rights of parents who are unable, because of their incarceration, to personally attend proceedings concerning parental rights. Some examples of steps that courts have taken to protect the due process rights of unavoidably absent parents include permitting telephonic testimony or attendance, testimony by other means such as depositions, periodic adjournments to permit the incarcerated parent to review transcripts of testimony, and appointing counsel who can fully participate in the proceeding on behalf of the parent. If such alternative means of participation can be implemented without unduly delaying the proceeding, the court is able to simultaneously protect a parent's right to be present and the child's right to a prompt and permanent adjudication. Family Court assigned counsel to represent respondent. Indigent parents facing termination of parental rights are entitled to the assignment of counsel and such counsel must provide effective assistance comparable to that afforded to criminal defendants (see Matter of Brenden O., 20 A.D.3d 722, 723 [2005] ). Once counsel is assigned, it is the duty of that attorney to protect the client's rights, but the court is obliged to ensure that the proceeding is fair and that due process is afforded to an individual whose parental rights may be terminated. While there is no due process violation in a case where the parent "was represented at the hearing by counsel who fully participated therein" (citing Matter of Keyanna AA., 35 A.D.3d 1079, 1081 [2006] ), respondent's counsel did not meet that standard, resulting in a violation of respondent's due process rights. Before counsel was assigned, Family Court had predetermined that respondent could not testify telephonically. The court allowed respondent to make an initial appearance by telephone for arraignment on the petition, when he was unrepresented, but informed respondent that the court did not "allow testimony over the telephone" and would therefore proceed in his absence and "make a decision based on the testimony presented by [petitioner]." Such an announcement by the court--that it would make a decision based on petitioner's evidence alone--indicated that respondent would not be permitted to present any evidence; this was improper and contrary to the fundamental aspects of our adversary system. Although the court made these determinations before counsel's assignment, counsel did not later object or request that respondent be able to present evidence or his own testimony, either by telephone, deposition or any other means. Counsel also did not attempt to utilize other permissive alternatives designed to reduce the prejudice caused by respondent's absence, such as requesting adjournments to permit counsel to review transcripts of testimony with respondent prior to cross-examining petitioner's witnesses. Counsel attempted to cross-examine the witnesses, but he was apparently unable to comprehensively do so without respondent's input. Had counsel requested adjournments or other opportunities to confer with respondent during the hearing, counsel may have been better equipped to conduct cross-examination. Although Family Court granted two adjournments, under the circumstances here those breaks were insufficient to protect respondent's rights. The first adjournment was granted before the hearing even began because respondent's counsel was recently assigned, was unaware that his client was still incarcerated and expected respondent to be present; he therefore needed time to prepare for the hearing. The second adjournment was granted because, during disclosure, petitioner did not supply certain records; this adjournment should have been granted even if respondent was present at the hearing. While one witness had given direct testimony prior to the second adjournment, counsel did not request that transcripts be supplied so that respondent could review that testimony. The remaining testimony was given without further adjournments. Other than for the one witness, counsel was unable to discuss the direct testimony with respondent to prepare for cross-examination of petitioner's witnesses. Not only was respondent prevented from adequately defending himself by effectively cross-examining witnesses, he was also prevented from putting on a case. Counsel did not present any evidence on respondent's behalf. Respondent's unsworn statements at arraignment and some of counsel's questions demonstrate that respondent may have been the only witness who could support his defense that he had attempted to contact the children. Yet respondent was unable to present that defense due to Family Court's apparent blanket policy and counsel's failure to challenge that policy or advocate for respondent's right to present his case in some feasible manner.

The Appellate Division pointed out that contrary to Family Court's blanket policy against telephonic testimony, it is permitted under the Family Ct Act in both child support and paternity proceedings where an incarcerated parent cannot be present (see Family Ct Act 433[c][ii]; 531-a [ii]; 580-316[f]; see also 22 NYCRR 205.44). Even though these statutes do not apply to the type of hearing held in this matter, and do not mandate such accommodations, but are only permissive, in proceedings where they do apply, courts have similarly authorized the use of testimony by telephone, where available and feasible, to protect the due process rights of parents who are physically absent from termination proceedings. While Family Court is not required to permit testimony by telephone or other electronic means in any particular case, it stated that it did not condone any court implementing a blanket policy against such a practice rather than carefully considering the available options based upon the circumstances of each individual case. Unfortunately, counsel acquiesced in this policy. Counsel not only failed to object or make a request for some accommodation, he essentially waived his client's right to be present, stating, "I've had contact with [respondent] and he understands, judge, that this matter is going forward without his participation." Had counsel objected and provided some argument against the blanket policy, Family Court would have had an opportunity to reevaluate its policy and work with counsel to implement a reasonable method to accommodate respondent's participation despite his physical absence. By not objecting or seeking some accommodation, counsel failed to protect respondent's rights. It went on to find that Counsel missed another opportunity to protect his client's rights by ignoring Family Court's actions in response to its own prior order. The court not only allowed respondent to appear by telephone initially--establishing the availability and feasability of that option--but also issued an order authorizing respondent to appear by telephone on the first day scheduled for the hearing. On that date, however, Family Court abruptly changed its position, stated that the order was "inadvertently unfortunately" issued, failed to contact respondent at the scheduled time and made no further efforts to comply with the order. The court did not explain why the order was initially issued, why its issuance constituted a mistake or why the court was not going to comply with its own order. Despite being aware of this order, counsel did not ask the court to comply with it, seek another order for his client's testimony or even object to the court's unexplained treatment of its own order. Again, counsel's inaction deprived respondent of an opportunity to participate in the hearing.

The Court noted that appellate courts have denied due process violation claims in Family Court proceedings only where the hearing court ensured that an unavoidably absent parent had some opportunity to participate in a meaningful way. Despite Family Court's assignment of counsel, respondent did not enjoy a meaningful opportunity to participate in this case. By neglecting to seek any accommodations to protect respondent's right to be present or participate in some way, counsel's representation was less than meaningful and respondent was prejudiced by counsel's ineffectiveness (see Matter of Templeton v. Templeton, 74 A.D.3d 1513, 1513-1514 [2010]; Matter of Martin v. Martin, 46 A.D.3d 1243, 1246-1247 [2007]. Because respondent's counsel cannot be deemed to have "fully participated" in the hearing under the circumstances here, the assignment of counsel was insufficient to protect respondent's due process rights . Accordingly, respondent was entitled to a new hearing, with new counsel assigned to represent him. The order was reversed, on the law, and the matter remitted to the Family Court for further proceedings not inconsistent with the Court's decision.

Finding of Wilfulness Not Supported by Record Where Respondent Lost His Business, Had Been Evicted from His Offices and Had Qualified for Food Stamps

In Matter of Davis-Taylor v Davis-Taylor, --- N.Y.S.2d ----, 2010 WL 4977769 (N.Y.A.D. 3 Dept.) the Appellate Division affirmed an order, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 4, to hold respondent in willful violation of a prior order of support. The parties were the parents of three children (born in 1993, 1996 and 1997). When they divorced in 2002, respondent was directed to pay $850 per week in child support. At that time, respondent owned and operated an ostensibly financially successful investment company and had annual income of approximately $185,000. It was undisputed that starting prior to the divorce and continuing through August 2008, respondent met his child support obligation. With the nationwide financial downfall in 2008, respondent lost his business and, by late 2008, he had been evicted from his offices and he (and his current spouse) had qualified for food stamps. His failure to make child support payments after August 2008 resulted in this violation petition. Respondent cross-petitioned for modification of his child support obligation. Following a hearing, a Support Magistrate dismissed respondent's modification petition, found that he had willfully violated the support order and, among other things, recommended a 30-day jail sentence. Family Court directed entry of a judgment of $85,100 for arrears and, confirming the finding of willfulness, imposed a 90-day suspended jail sentence. The Appellate Division pointed out that the failure to pay support as ordered provides prima facie proof of a willful violation (FCA 454[3][a]; Matter of Powers v. Powers, 86 N.Y.2d 63, 69 [1995] ). The burden then shift[s] to respondent to rebut the evidence of willfulness by 'offering some competent, credible evidence of his inability to make the required payments. A finding of willfulness, which can result in incarceration, must be supported by clear and convincing evidence. Here, respondent had made the required child support payments for over six years and had paid $338,650 toward such obligation during those years. He presented uncontroverted proof that his business failed during the economic downturn of 2008 and that, thereafter, he pursued numerous job possibilities, but was only able to obtain a commission position that had resulted in very low income. His educational background is a high school graduate, and the area in which he had developed an expertise was particularly hard hit during economic decline that commenced in 2008. He looked for jobs both in his field and in other areas. There was no proof that his loss of income was self-imposed in any fashion. He produced documentary proof that, as of September 2009, his household was receiving food stamps and there was a past due payment amount of over $45,000 on the mortgage on the house where he resided. He owned a 10-year-old vehicle that was inoperable because of needed repairs. There was no evidence that he had other assets or income from any other sources. In light of his fairly lengthy history of consistently making all of his considerable child support payments, which were interrupted at a time when uncontroverted and documentary proof substantiated a significant loss of income, the Appellate Division was not persuaded that the record established by clear and convincing evidence the willful nonpayment of his obligation. The order was modified, on the law by reversing so much thereof as found respondent in willful violation of a prior order of support and imposed a suspended jail sentence.

On Motion to Dismiss for Failure to Establish a Prima Facie Case, the Petitioner's Evidence must Be Accepted as True

In Matter of Awoleke v Awoleke, --- N.Y.S.2d ----, 2010 WL 5022580 (N.Y.A.D. 2 Dept.), On April 12, 2007, Salimata Awoleke (petitioner) filed a family offense petition against Samuel Awoleke ( respondent) alleging, that on April 11, 2007, he had followed and verbally threatened her after the parties left the Supreme Court, Queens County, upon settling their divorce action. After the petitioner concluded her testimony, she rested her case. The Family Court granted the respondent's motion to dismiss the petition on the ground that the petitioner failed to establish a prima facie case. The Appellate Division reversed. It pointed out that on a motion to dismiss for failure to establish a prima facie case, the petitioner's evidence must be accepted as true and afforded the benefit of every reasonable inference which may be drawn from it. Moreover, such a motion should not be granted merely because there is an issue of credibility or there are inconsistencies in the proof. Here, the Family Court failed to properly apply this standard in dismissing the petition for failure to establish a prima facie case. Viewing the petitioner's testimony and other evidence in a light most favorable to her, and accepting all the evidence she presented as true, she established a prima facie case (citing Matter of Ramroop v. Ramsagar, 74 AD3d 1208). Accordingly, the Family Court should have denied the respondent's motion. Therefore, it reinstated the petition and remitted the matter to the Family Court, for a new fact-finding hearing and determination of the petition before a different Judge.

Family Court Has Jurisdiction to Award Attorneys Fee Pursuant to DRL 237

In Dempsey v Dempsey, --- N.Y.S.2d ----, 2010 WL 4909629 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order of the Family Court which directed the father to pay the mother an attorney's fee in the sum of $13,000. It held that Family Court has the power to award an attorney's fee in a custody matter pursuant to Domestic Relations Law §237(b). Note: Family Court Act § 651 grants the Family Court the same powers possessed by the Supreme Court in custody and visitation matters.

December 16, 2010

Error to Admit Evidence at Family Offense Dispositional Hearing Concerning Incident Not "Relatively Contemporaneous”

In Matter of Pearlman v Pearlman, --- N.Y.S.2d ----, 2010 WL 4366900 (N.Y.A.D. 2 Dept.) the Appellate Division held that a family offense must be established by a fair preponderance of the evidence ( Family Ct Act 832) and the evidence adduced at the fact-finding hearing proved by the requisite preponderance of the evidence that the appellant committed acts constituting disorderly conduct. However, it agreed with the appellant that the Family Court erred in admitting evidence at the dispositional hearing concerning an incident that was not "relatively contemporaneous". However, its finding of aggravating circumstances was based on numerous other factors, including its own observation of the appellant's "wildly erratic and inappropriate behavior and affect in the courtroom," that were sufficient to support the finding, even without the incident of domestic violence that occurred three or five years prior to the filing of the family offense petition (Family Ct Act 827 [a][vii] ). It found no merit to the appellant's argument that he was subjected to double jeopardy because the petitioner filed a criminal complaint regarding an alleged violation of the temporary order of protection issued by the Family Court, and was then permitted to testify about the alleged violation during the dispositional hearing. While double jeopardy concerns may come into play where a person allegedly wilfully violates an order of protection, those considerations are not relevant where, as here, the petitioner is merely seeking an order of protection, a remedy which is not punitive and does not involve, at this stage, incarceration. Contrary to the appellant's contention, the Family Court properly permitted the petitioner to testify, during the dispositional hearing, regarding incidents that had been alleged in violation petitions not then before the court. "A broader standard of admissibility of evidence is available on the dispositional hearing than at the fact-finding hearing, and evidence may be admitted as long as it is 'material and relevant' (Family Ct Act 834), including hearsay and other evidence otherwise incompetent.

Conduct So Inconsistent with the Child's Best Interests Raises Strong Probability That Parent Unfit

In Matter of McCLurkin v Bailey, --- N.Y.S.2d ----, 2010 WL 4366912 (N.Y.A.D. 2 Dept.) the Appellate Division found that Family Court's determination that there had been a sufficient change in circumstances since the issuance of its prior custody order such that it would be in the best interests of the child to award the father sole custody had a sound and substantial basis in the record. Although the prior custody order awarded the mother sole custody of the child, the Family Court had warned her that continued attempts to prevent the father from fostering a relationship with the child could result in a change of custody. The hearing testimony demonstrated that after the issuance of the prior order, the mother interfered with the father's visitation rights by repeatedly failing to bring the child to scheduled visitations and to accommodate court-ordered phone contact between the father and the child. There was also evidence that the mother made unfounded reports of child abuse against the father, and that she continued to be uncooperative and unsupportive of his efforts to foster a relationship with the child. This conduct was so inconsistent with the child's best interests that it per se raised a strong probability that the mother was unfit to act as a custodial parent.

Defendant Wastefully Dissipated Marital Assets by Engaging in Excessive Spending, Making Various Unsecured Loans and Investing in Businesses That Resulted in No Economic Benefit Parties.

In Noble v Noble, --- N.Y.S.2d ----, 2010 WL 4643080 (N.Y.A.D. 3 Dept.) the parties were married in 1986 and had two children (born in 1988 and 1991). In July 2008, plaintiff commenced this action for divorce. Supreme Court, in adopting specific proposed findings of fact and conclusions of law submitted by the parties, ordered an equal division of the marital equity in the marital residence and the value of the real estate owned by defendant's businesses, distributed the debt associated with those businesses to defendant and classified the remaining assets as separate property. The court also directed defendant to pay both child support and nondurational maintenance and granted plaintiff's application for counsel fees.

The Appellate Division pointed out initially, that "it is well established that the trial court must hear sufficient evidence in order to intelligently make the necessary findings and must state the reasons therefore in accordance with Domestic Relations Law 236(B). Here, the parties submitted nearly 100 pages of proposed findings of fact and conclusions of law, each of which cited to the record for support and was marked "found" or "not found" by Supreme Court. It held that the court did not abdicate its responsibilities by adopting the parties' findings and conclusions wholesale, but rather edited them by deleting, adding or modifying language and inserting additional reasoning and awards. Although the statutory factors were not specifically cited to, the court's factual findings revealed that it did consider the relevant factors and adequately set forth the reasons for its decision . Under these circumstances, it found that Supreme Court's decision sufficiently complied with the requirements of Domestic Relations Law s 236(B). It stated that while Supreme Court did not violate the statute in this case, the practice of editing and then adopting proposed findings of fact and conclusions of law is not recommended. Particularly when utilized in the context of an equitable distribution determination, the practice has the potential to create confusion and inconsistencies within the overall decision--as it did here with respect to the distribution of plaintiff's personal account with RBC Wealth Management. Specifically, the court's conclusions of law state that plaintiff's RBC account is separate property associated with "significant debt[ ]" and not subject to equitable distribution while, at the same time, also state that the RBC account is subject to 50% distribution. Inasmuch as it was unclear as to how the court intended to distribute that asset, it remitted for clarification.

Supreme Court's finding that defendant wastefully dissipated marital assets, a factor which it was entitled to consider in equitably distributing the marital property (see DRL 236[B][5][d][12] ), was amply supported by evidence that defendant engaged in excessive spending, made various unsecured loans without plaintiff's knowledge and invested in two businesses that resulted in no economic benefit to the parties. Defendant had been employed with NBT Bank earning an annual income in excess of $80,000, but he resigned in 2007 after being faced with dismissal for simultaneously operating businesses that acted in direct competition with his employer. Defendant then liquidated his 401(k) account, invested the approximately $110,000 into his two businesses and borrowed over $700,000 to cover start-up and other business costs. While obligated on these debts and with the businesses operating at a loss, he made unsecured loans to friends and business associates in amounts totaling over $165,000, none of which had been repaid. Moreover, at a time when it was clear that his businesses were suffering and notwithstanding his court-imposed restrictions on spending, defendant spent an inordinate amount of money. He engaged in extensive travel-- funded by proceeds he received through an insurance settlement involving one of his companies--in the months preceding the trial, spent nearly $10,000 in country club dues in 2009 and thousands of dollars on restaurants, additional golf expenses, hotels, furnishings for his apartment and Internet Web sites, all while failing to pay the mortgage on the marital home, court-ordered child support and maintenance and notwithstanding his court-imposed restriction on spending. Thus, it could not say that the finding of wasteful dissipation was improper or that the court abused its discretion in apportioning all debt associated with defendant's businesses to defendant and declining to credit him with an equitable share of the marital home furnishings as a consequence.

It rejected the defendant’s argument that Supreme Court erred in refusing to impute as income to plaintiff the monthly sums of money that she received from her mother during the two years preceding the trial. These funds were given to plaintiff to assist with her day-to-day needs and payment of bills during the time when defendant left his employment at NBT and, subsequently, the marital home, as well as during the pendency of this action when defendant failed to provide support for plaintiff and the children. Moreover, plaintiff testified that there was no agreement that her mother continue to give her such sums of money. Considering the timing and discretionary nature of the gift-giving, the decision not to impute these funds as income was not an abuse of discretion.

Similarly unavailing was defendant's assertion that Supreme Court improperly gave plaintiff a separate property credit for funds used to make the down payment on the marital home. The trial evidence established that plaintiff was given $200,000 from her mother, in the form of two $100,000 checks made out to her only, as a gift for use as a down payment on the marital home. Plaintiff then deposited these funds into the parties' joint account and they were subsequently used for that purpose. Defendant did not dispute that the money was a gift to plaintiff that constituted her separate property when given, but claimed that the funds were converted to marital property when they were deposited into the parties' joint checking account. Although the transfer of separate property into a joint account raises a presumption that the funds are marital property, "this presumption may be rebutted by proof that such deposits were made 'as a matter of convenience, without the intention of creating a beneficial interest' ". To that end, plaintiff testified that she did not have a traditional individual checking account, and Supreme Court credited her testimony that she deposited the moneys into the joint checking account because this was the only account she readily had access to for this purpose. Furthermore, the funds were transferred into the joint account for a mere six weeks in anticipation of the closing on their home. It found no basis to disturb its conclusion that plaintiff overcame the presumption that she intended to commingle her funds by depositing them in the parties' joint account. Accordingly, plaintiff was entitled to this credit reflecting the investment of her separate funds into the marital residence.

The court found no error with regard to the counsel fee award. Considering the income imputed to defendant as a result of his earning potential and his interests in real property, he was in a better financial position than plaintiff who, having not been employed for more than 20 years while raising the children, just began a new job and has not yet realized any income additional to that which she receives from her trust accounts. Furthermore, defendant failed to pay court-ordered support and maintenance during the seven months leading up to the trial, thereby leaving plaintiff to bear the burden of all household, child and living expenses. Contrary to defendant's contention, the mere fact that plaintiff may have been able to pay her own fees is but one factor to be considered.

Once "A Court Converts a Specific Stream of Income into an Asset, That Income May No Longer Be Calculated into the Maintenance Formula and Payout"

In Haspel v Haspel, --- N.Y.S.2d ----, 2010 WL 4676468 (N.Y.A.D. 2 Dept.) the plaintiff former wife and the defendant former husband were married on May 16, 1982. There were two children of the marriage. During the course of the marriage, the defendant obtained various professional licenses, including, inter alia, several securities dealer's licenses and a real estate broker's license. The defendant left the marital residence on January 29, 2005. In March 2005 the plaintiff commenced this action for a divorce and ancillary relief. At the time of trial, the plaintiff was 52 years old and the defendant was 49 years old. Supreme Court determined that the plaintiff was entitled to a 50% share of the defendant's enhanced earnings. It accepted the conclusion of the plaintiff's expert that the defendant's enhanced earnings were $75,000 per year and then awarded the plaintiff $37,500, representing her 50% share. For purposes of determining child support and maintenance, the Supreme Court imputed an income of $180,000 to the defendant. The Supreme Court then reduced the defendant's imputed income by the $37,500 enhanced earning award, leaving $142,500 as the defendant's net income. The Supreme Court then awarded the plaintiff $2,500 in maintenance per month. In its decision, the Supreme Court explained that it intended to deny the plaintiff's application for an award of an attorney's fee, but, in the judgment appealed from, the Supreme Court did not expressly address that issue.

The Appellate Division modified. It pointed out that enhanced earnings from degrees and professional licenses attained where only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree or professional license, and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit the distributed amount of that enhanced earning capacity. However, the record did not support an award to the plaintiff of 50% of the defendant's enhanced earning capacity. An award to the plaintiff of 25% of the defendant's enhanced earning capacity was equitable. The plaintiff correctly contended that the Supreme Court improperly calculated the total amount of the defendant's enhanced earning capacity from which her share derived. The plaintiff's expert, as credited by the Supreme Court, calculated that the defendant, in obtaining his various professional licenses, enhanced his earnings by the sum of $75,000 per year. In awarding the plaintiff a share of the defendant's enhanced earning capacity, the Supreme Court used this $75,000 sum as the total enhanced earning capacity from which the plaintiff's share would derive. Instead, the Supreme Court should have determined the value of the defendant's enhanced earning capacity over the 15-year period preceding his attainment of the age of 65. According to the expert evidence at trial, such sum would equal $1,125,000, or $75,000 multiplied by 15 years. The Supreme Court should thereafter have reduced this $1,125,000 sum to its net present value after taxes (citing O'Brien v. O'Brien, 66 N.Y.2d at 588), which comes to $484,000. The plaintiff's equitable share of the defendant's enhanced earning capacity should then have been derived from this net present value. It concluded that the plaintiff was entitled to an award of 25% of $484,000, or $121,000, as her share of the defendant's enhanced earning capacity.

The Supreme Court properly determined the duration of the defendant's maintenance obligation and properly determined that the amount representing her share of the defendant's yearly enhanced earning capacity should be excluded from his income for the purpose of calculating her yearly award of maintenance. This is so because once "a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout" (Grunfeld v. Grunfeld, 94 N.Y.2d 696, 705). In light of this he plaintiff's share of the defendant's yearly enhanced earning capacity, which sum was $75,000 per year, had to be reduced from 50% to 25% of $75,000, or $18,750. Thus, for the purpose of determining the plaintiff's yearly award of maintenance, the defendant's income had to be recalculated in order to exclude 25% (or $18,750) of his yearly enhanced earning capacity of $75,000. The defendant's imputed income of $180,000 had to thus be reduced to a net income of $161,250. It remitted the matter to the Supreme Court for a recalculation of the plaintiff's award of maintenance.

Given the disparity between the incomes of the parties in this case, the Supreme Court improvidently exercised its discretion in denying the plaintiff's request for an award of an attorney's fee. It remitted the matter for a determination of a proper award of an attorney's fee. It pointed out that “[I]n evaluating what constitutes a reasonable attorney's fee, factors to be considered include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained' " (Matter of Massey, 73 AD3d 1179, 1179, quoting Matter of Goliger, 58 AD3d 732, 732 [internal quotation marks omitted]; see Matter of Potts, 213 App.Div. 59, 62, affd 241 N.Y. 593).

December 1, 2010

Mother Held In Contempt for Violating Anti-Alienation Provision of Judgement.

In Rubin v Rubin, --- N.Y.S.2d ----, 2010 WL 4539522 (N.Y.A.D. 2 Dept.) the parties October 30, 2003 stipulation of settlement was incorporated, but not merged, into their judgment of divorce dated March 26, 2004. With respect to custody and visitation, the stipulation of settlement provided that the parties would share legal custody of the two children, that the mother would have sole physical custody of the children, and that the father would have certain visitation. In addition, pursuant to those provisions, each party was specifically prohibited from doing anything that would have the effect of alienating the children from the other party. The Appellate Division affirmed an order which held the mother in contempt for failure to comply with this provision. It held that to prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the party charged with contempt willfully violated a clear and unequivocal mandate of a court's order, with knowledge of that order's terms, thereby prejudicing the movant's rights. Where, a period of incarceration is imposed to vindicate the authority of the court or to compel respect for the court's mandate, the contemnor's willful violation of the court's mandate must be proven beyond a reasonable doubt The father met this burden. At the hearing it was established, among other things, that the mother violated the custody and visitation provisions of the stipulation of settlement by intentionally doing certain things which would have the natural effect of "turn [ing]" the children "away from" the father, and which actually had that effect. However, under the particular facts of this case, a sentence directing the mother's immediate incarceration "would serve no purpose"and the court held that it was appropriate to suspend the sentence subject to the mother's future compliance with the custody and visitation provisions of the stipulation of settlement.

Child Support Payments May Be Suspended Where Noncustodial Parent Establishes Right of Reasonable Access to Child Unjustifiably Frustrated by Custodial Parent

In Thompson v Thompson, --- N.Y.S.2d ----, 2010 WL 4540329 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order which granted the father's petition alleging a violation of a previous order of visitation and suspended the father's obligation to pay child support and related expenses regarding the child, nunc pro tunc from December 24, 2008, unless and until a determination was made that visitation between the father and the child has resumed. In January 2004 the father commenced a proceeding seeking visitation with the parties' who was born in 1996. After a hearing, by order entered January 11, 2006, the Family Court granted the father's petition for therapeutic visitation. On appeal, the Appellate Division modified that order by adding a directive that the father and the child submit to individual therapy (Matter of Thompson v. Yu-Thompson, 41 AD3d 487). Soon after the Family Court entered its order, the father filed a petition alleging violation of the order by the mother. Visits finally commenced in December 2006 and went well, but one month later, the father filed this petition alleging that the mother was not responding to repeated requests to schedule further visitations. During the proceedings on the petition, visitations resumed, but interactions between father and son became progressively more strained, with the child refusing to visit with his father at all or to engage with his father when visits did occur. After a hearing, the Family Court found that the child was so closely allied with his mother and her negative view of the father that "it appears that the hoped-for reconnection between [the child] and his father" was unlikely at that time. Finding that the mother had failed to encourage, and had interfered with, visitation, the Family Court granted the father's violation petition and suspended the father's child support payments until visitation resumes. The Appellate Division held that where the noncustodial parent establishes that his or her right of reasonable access to the child has been unjustifiably frustrated by the custodial parent, child support payments may be suspended. Such suspension of child support is warranted only where the custodial parent's actions rise to the level of 'deliberate frustration' or 'active interference' with the noncustodial parent's visitation rights. The evidence at the hearing supported the Family Court's finding that the mother deliberately frustrated the child's court-ordered visitation with his father such that suspension of child support payments until visitation resumed was warranted. There was evidence that the mother communicated her enmity towards the father to the child, made inappropriate disclosures concerning the parties' history, and failed to encourage and facilitate regular visitation, missing numerous scheduled visitations and ultimately supporting the child's decision to refuse visitation. The evidence supported the finding that the mother, by her example, her actions, and her inaction, deliberately frustrated visitation by manipulating the child's loyalty and orchestrating and encouraging the estrangement of father and son.

Abuse of Discretion to Make Awards of Maintenance and Child Support Retroactive to the Date of Commencement Where Defendant Never Requested Pendente Lite Relief, and the Plaintiff for the Needs During the Pendency of the Action

In Hendry v Pierik, --- N.Y.S.2d ----, 2010 WL 4540546 (N.Y.A.D. 2 Dept.) Supreme Court awarded the defendant nondurational maintenance of $2,150 per month until the later of either the plaintiff reaching the age of 62 or permanently retiring, retroactive to the filing of the complaint on August 3, 2007, set the valuation date of the parties' pension and retirement accounts for equitable distribution purposes as the date of commencement of the action, and awarded the defendant 50% of the proceeds of his stock options. The Appellate Division held that under the circumstances of this case, including the parties' ages, respective earning potentials, pre-divorce standard of living, relative incomes and available assets, the Supreme Court did not improvidently exercise its discretion in awarding nondurational maintenance to the defendant. However, it agreed with the plaintiff that the Supreme Court improvidently exercised its discretion in making the defendant's awards of maintenance and child support retroactive to the date of the commencement of the action. The defendant never requested any pendente lite relief, and the plaintiff voluntarily and adequately provided for the needs of the defendant and the parties' children during the pendency of the action. Under these circumstances, it did not appear that the parties contemplated a retroactive award of maintenance or child support. (Citing Northway v. Northway, 70 AD3d 1347, 1348; quoting Grumet v. Grumet, 37 AD3d 534, 536; Lobotsky v. Lobotsky, 122 A.D.2d 253, 255; see also Fleischmann v. Fleischmann, 24 Misc3d 1225[A] ). It held that Supreme Court properly valued the parties' pension and retirement accounts as of the date of commencement of the action, despite their physical separation almost two years prior. In the absence of a separation agreement, the commencement date of a matrimonial action demarcates the termination point for the further accrual of marital property and the valuation date must be between the date of commencement of the action and the date of trial. Moreover, under the circumstances, in which the plaintiff received the subject stock options during the marriage and exercised them eight months after the commencement of the action as a result of the termination of his employment, the Supreme Court did not improvidently exercise its discretion in distributing the proceeds equally between the parties .

Wife Awarded Zero Percent of the Marital Residence Where She Contributed Little Financial Support to the Marriage

In Alper v Alper, 909 N.Y.S.2d 131 (2d Dept, 2010) the Appellate Division affirmed a judgment of the Supreme Court which awarded the wife zero percent of the marital residence and certain other marital assets. It saw no basis for disturbing the Supreme Court's determinations regarding the equitable distribution of the parties' property. The record supported the Supreme Court's determination that, although both parties worked throughout the marriage, the plaintiff contributed little, if any, financial support to the marriage, and did not contribute at all to the purchase, and only minimally to the maintenance, of the marital home, the Supreme Court providently exercised its discretion in denying her any interest in the marital residence. Likewise, the Supreme Court providently exercised its discretion in rejecting the plaintiff's claim that she was entitled to equitable distribution of the appreciation in value of the marital residence and the defendant's country home, bought prior to the marriage. In order to obtain equitable distribution of the appreciation in value of the defendant's interest in the property, the plaintiff was required to demonstrate the manner in which her contributions resulted in the increase in value and the amount of the increase which was attributable to her efforts. The parties' conflicting testimony as to the plaintiff's direct contribution of time and labor toward the improvements made to these assets presented a question of credibility which the Supreme Court resolved in favor of the defendant. Such a credibility determination is afforded great weight on appeal. With regard to the defendant's cash and securities, the Supreme Court properly found that the plaintiff had failed to proffer any documentary or testimonial proof regarding whether these assets were separate or marital. In any event, the Supreme Court concluded, and the record showed, that the plaintiff made little or no financial contribution to the marriage, but rather, spent all her money on herself and her daughter from a prior marriage. Under these circumstances, and where both parties worked throughout the marriage, there were no children of the marriage, and the parties were separated for 10 of their 20 years of marriage, to award the plaintiff any equitable share in the defendant's cash and securities would provide her with an economic advantage merely by virtue of the fact that she was married to the defendant. With regard to the vacant land in Greene County, while it was undisputedly marital property, the plaintiff, as the nontitled spouse, had the burden of proving the asset's value so as to afford the court a sufficient basis upon which to make a distributive award. As the plaintiff failed to meet her burden, the Supreme Court properly declined to make a distributive award regarding the property.

November 16, 2010

Objections Deemed Filed When Received and "Date Stamped" by the Family Court.

In Matter of Bruckstein v Bruckstein, --- N.Y.S.2d ----, 2010 WL 4367015 (N.Y.A.D. 2 Dept.) the Appellate Division held that pursuant to Family Court Act 439 (e), objections to an order of a Support Magistrate must be filed within 35 days after the mailing of the order to the aggrieved party and that the objections are deemed filed when received and "date stamped" by the Family Court. The father established that, although the March 11, 2009, order of the Support Magistrate stated that it was mailed to him on March 12, 2009, it was not actually mailed until March 13, 2009. However, the objections were date stamped as received by the Family Court on April 20, 2009, which is more than 35 days after March 13, 2009. Accordingly, the Family Court properly denied the objections as untimely.

Family Court Has Subject Matter Jurisdiction over Family Offense Proceedings Where Alleged Acts Occurred Outside State

In Matter of Richardson v Richardson, --- N.Y.S.2d ----, 2010 WL 4366892 (N.Y.A.D. 2 Dept.) the Appellate Division, in an opinion by Judge Levanthal, held that the Family Court has subject matter jurisdiction over family offense proceedings where the alleged acts occurred outside of the state and even outside of the country. It held that Family Court t Act §812 grants the Family Court subject matter jurisdiction to hear such proceedings and that the Family Court properly exercised jurisdiction over the parties' petitions, despite the fact that the acts alleged occurred on the island territory of Anguilla. On March 4, 2009, Annette P. Richardson and her sons Aaron J. Hourie and Andrew G. Hourie (respondents) filed three separate family offense petitions seeking the entry of orders of protection in favor of them and against Dorothy E. Richardson (appellant), Annette's mother, and her sons' grandmother. The alleged family offenses included, inter alia, assault, harassment, and menacing. In their respective petitions, the respondents described how they were related to the appellant and asserted that the parties all resided together in a home in Elmont, Nassau County. The petitions detailed certain incidents which allegedly occurred on February 19, 2009, on the island of Anguilla. According to the respondents, the appellant pushed Annette to the floor twice, causing her to hurt her back and hit her head. The appellant allegedly was screaming, yelling, and cursing at Annette during the assault. In addition, the appellant allegedly used a glass bowl to strike Andrew on the head, causing injuries. Further, the appellant allegedly chased Aaron with a meat cleaver and threw an ashtray at him, which hit him in the back. On March 6, 2009, the appellant filed three of her own family offense petitions seeking orders of protection in her favor and against the respondents. The appellant alleged that on or about February 14, 2009, also in Anguilla, the respondents committed the family offenses of, inter alia, aggravated harassment in the second degree, harassment in the first degree, attempted assault, and menacing in the third degree. During an initial appearance before the Family Court, the appellant's counsel objected to the court's exercise of subject matter jurisdiction because the alleged offenses occurred in Anguilla. The Family Court held that "the fact that this took place in the West Indies is no different from it taking place in Pennsylvania, Virginia, or Vermont. They're [all residents] of Nassau County and they're entitled to protection from future occurrences. Family Orders of Protection… are to prevent further hostility and further assault, attempted assault,… et cetera."On June 24, 2009, after a hearing, the Family Court found that the respondents proved by clear and convincing evidence that the appellant had committed certain family offenses against them and granted the respondents' respective petitions. The Family Court also entered three two-year orders of protection on behalf of the respondents and against the appellant. The orders of protection directed the appellant to stay away from each of the respondents and to refrain from assaulting, stalking, and similar conduct. In addition, the Family Court issued three orders of dismissal which dismissed the appellant's three petitions. As a threshold matter, the court held that Family Court acquired personal jurisdiction over the appellant, as she appeared before the Family Court without challenging personal jurisdiction. Additionally, the appellant affirmatively sought the entry of orders of protection against the respondents (citing Family Ct Act §167; CPLR 320; cf. Matter of El-Sheemy v. El-Sheemy, 35 AD3d 738 [by appearing in article 6 proceeding and seeking custody, the mother waived her claim that the Family Court did not acquire personal jurisdiction over her]). It indicated that appellant's contentions provided the Court with an opportunity to address an issue which did not appear to have been previously addressed by an appellate court in this state: the limits of the subject matter jurisdiction of the Family Court with respect to family offenses which occurred outside of the state, and even outside of the country. In its analysis the court started with the proposition that the Family Court is a court of limited jurisdiction constrained to exercise only those powers conferred upon it by the state Constitution or by statute. Family Court Act §812(2)(b) provides: "[t]hat a family court proceeding is a civil proceeding and is for the purpose of attempting to stop the violence, end the family disruption and obtain protection." Here, the plain language of Family Court Act §812 provides that the Family Court has jurisdiction over family offense proceedings where the petitions allege the commission of certain proscribed acts that occur between spouses or former spouses, or between parent and child or between members of the same family or household. There is no geographic limitation in Family Court Act §812, or elsewhere in the Family Court Act, as to where a family offense is to have occurred in order to confer subject matter jurisdiction upon the Family Court. The next issue was whether the geographic or territorial limitation on the jurisdiction of the criminal court (see generally People v. McLaughlin, 80 NY2d 466, 472 [stating that "for the State to have criminal jurisdiction, either the alleged conduct or some consequence of it must have occurred within the State"]) also limits the jurisdiction of the Family Court. Criminal Procedure Law §20.40(1)(a) provides, in pertinent part, that "[a] person may be convicted in an appropriate criminal court of a particular county, of an offense… when [c]onduct occurred within such county sufficient to establish [a]n element of such offense." The Appellate Division pointed out that Family Court is not a criminal court. Whereas the criminal court's subject matter jurisdiction over family offenses is limited by geography, there is no statutory provision which states that such a geographic limitation also applies to the Family Court. Nothing in the state Constitution, Family Court Act §812, or the legislative history of Family Court Act article 8 requires the predicate acts of a family offense to have occurred in a particular county, state, or country in order for the Family Court to possess subject matter jurisdiction. It noted that its decision was generally consistent with various decisions of the Family Court. However, it held that to the extent that those cases relied upon a "minimum contacts analysis," or suggest that a residual injury within this state is necessary in order to confer subject matter jurisdiction upon the Family Court pursuant to New York's long arm statute (see CPLR 302), such reasoning should not be followed.

Since it Was Petitioner's Burden to Establish Change in Circumstances, Family Court Erred in Taking Judicial Notice of Financial Disclosure Affidavits in Family Court file in 1999, Which Were Neither Offered Nor Admitted into Evidence

In Grange v Grange, --- N.Y.S.2d ----, 2010 WL 4342101 (N.Y.A.D. 3 Dept.) the parties were married in 1958, but had been living apart since about 1990. In March 1999, petitioner was awarded spousal support of $500 per month. In 2007, petitioner commenced a proceeding seeking an upward modification in spousal support. In September 2008, Family Court vacated the Support Magistrate's decision (for the third time) finding that petitioner established a sufficient change in circumstances of both her and respondent's financial situations to warrant an increase in respondent's monthly spousal support obligation to $800. The Appellate Division reversed. The Court pointed out that the provisions of Family Ct Act 412 require a delicate balancing of each party's needs and means taking into consideration the duration of the marriage, income disparity and the ability of a petitioner to support himself or herself. In order to obtain modification of such an award, the moving party must establish that there has been a substantial change in circumstances since the prior award ( Domestic Relations Law 236[B][9][b]). It agreed with respondent that, since it was petitioner's burden to establish a change in circumstances, Family Court erred in taking judicial notice of the contents of financial disclosure affidavits filed with Family Court in 1999, which were neither offered nor admitted into evidence at any of the hearings. The mere presence of those documents in the court file does not mean that judicial notice properly can be taken of any factual material asserted therein (see Walker v. City of New York, 46 A.D.3d at 282, 847 N.Y.S.2d 173; Weinberg v. Hillbrae Bldrs., 58 A.D.2d 546, 546 [1977] ). The Appellate Division found that petitioner failed to establish that either her or respondent's financial situation has significantly changed since the date of the prior award so as to warrant a change in spousal support. Petitioner testified that she had increased medical expenses and her monthly debts, of $1,300, exceed her monthly income by approximately $200, thus requiring her to borrow an additional $400 per month from her two daughters. Yet, there was no indication that petitioner's current financial hardship is any different than the hardships that she may have faced in 1999. Furthermore, there was an indication that some of petitioner's listed medical expenses are temporary and may be reduced by medical benefits made available to petitioner through respondent's pension. The record also reflected that, while respondent's 2007 pension and Social Security income (in the amount of $40,000) increased slightly (by approximately $4,000) from his 1999 income, his monthly expenses, including his monthly spousal support obligation and payments for federal and state back taxes owed, total approximately $3,100. As the Support Magistrate found in its September 2008 determination, this essentially equalized the parties' disposable income. The record also reflected that, although respondent was self-employed as a computer consultant in 2007, and Family Court imputed additional income to him of $12,000, his business expenses (in the amount of $16,366) that year exceeded his reported business income of $15,918. It noted that while Family Court took into consideration certain assets acquired by respondent prior to the 1999 award of spousal support, including a 1997 Lincoln car with 212,000 miles (worth an estimated $2,700), a 1995 BMW motorcycle with 100,000 miles (worth an estimated $1,500) and a 1989 Catalina sailboat (worth an estimated $20,000), it failed to consider the value of petitioner's ownership interests in certain parcels of real property-one parcel owned jointly by the parties and estimated to be worth $300,000 and the second parcel owned solely by petitioner, which respondent valued at $15,000. Accordingly, petitioner failed to establish her entitlement to an upward modification in spousal support.

November 1, 2010

Husband Denied Order of Protection Prohibiting Paramour From Sleeping with Wife While Child in House

In Dodd v Colbert, --- N.Y.S.2d ----, 2010 WL 4008533 (N.Y.A.D. 3 Dept.) the parties physically separated in October 2005, and plaintiff commenced an action for divorce in February 2008. In August 2009, plaintiff sought an order prohibiting defendant from permitting her alleged paramour, or any other unrelated adult male, to reside or sleep in the former marital residence or elsewhere during such time when the parties' minor child was in her physical custody. Defendant oppose plaintiff's application contending that the child had a positive relationship with her male friend and that plaintiff engaged in similar behavior when the child was in his physical custody. Family Court denied plaintiff's application and the Appellate Division affirmed. It pointed out that Domestic Relations Law 240(3)(a)(5) permits a court to issue an order of protection directing a party to refrain from any act that creates an "unreasonable risk to the health, safety or welfare of a child." Although plaintiff's affidavit was replete with allegations of defendant's purported misdeeds, only two of the cited incidents, one where the child apparently reported to plaintiff that "there was a strange man in Mommy's bed" and one where the child expressed some hesitancy at being transported from a visitation by defendant's male friend, in any way related to the alleged paramour and, hence, had any relevance to the sought-after prohibition. Although the child's pediatrician recommended that the child receive counseling, she in no way attributed the child's need for therapy to the alleged paramour and/or his admitted presence in the former marital residence. Plaintiff's dire predictions of trauma to the child were significantly undercut by the fact that he became aware of the alleged paramour's presence in the former marital home within weeks of moving out in October 2005 and yet did not seek injunctive relief until nearly four years later. As plaintiff's proof fell far short of establishing or even alleging an unreasonable risk to the child's health, safety or welfare, his application for injunctive relief was properly denied.

Loss of Income for Reasons Beyond Control, Increased Expenses Due to an Uninsured Hospital Stay, and Change in Custody Is an Unanticipated Change in Circumstances for Downward Modification Purposes.

In Matter of Elegante v Elegante, --- N.Y.S.2d ----, 2010 WL 3910568 (N.Y.A.D. 2 Dept.) the Appellate Division reversed, on the law an order which denied the fathers application for a downward modification of child support, and remitted to Family Court for further proceedings. It held that a court may modify the child support provisions of a separation agreement incorporated but not merged into a judgment of divorce when a party has alleged and proven an unanticipated change in circumstances since entry of the judgment. Family Court erred in concluding that the father's loss of income for reasons beyond his control, increased expenses due to an uninsured hospital stay, and the change in the custody arrangement from the mother having primary residential custody of the parties' two children to split residential custody, was not an unanticipated change of circumstances creating the need for modification of his child support obligation.

For Purposes of UIFSA a Person Is a "Resident" of New York State When He or She Has a Significant Connection with Some Locality in the State as the Result of Living There for Some Length of Time During the Course of a Year

In Matter of Deazle v Deazle, --- N.Y.S.2d ----, 2010 WL 3910573 (N.Y.A.D. 2 Dept.), the mother, who at the time resided in Ithaca, filed a petition for child support in December 1998 in the Family Court, Tompkins County, for child support. At the time, the father resided out of state. Pursuant to an order dated November 22, 1999, the Family Court, Tompkins County, directed the father to pay the mother certain child support. On November 23, 2005, the mother, who stated that she was residing in Brooklyn, filed a petition in the Family Court, Kings County, for an upward modification of child support against the father, who continued to live outside of New York State. The Support Magistrate dismissed the mother's petition on the ground that Family Court lacked subject matter jurisdiction to modify the child support order because New York had not remained the "residence" of the mother and/or the parties' child for purposes of Family Court Act 580-205(a). Family Court granted the mother's objections to the extent of remitting the matter to the Support Magistrate to issue supplemental written findings of fact and a new determination on the issue of subject matter jurisdiction. The Appellate Division agreed with the Family Court that the Support Magistrate's order was not supported by the evidence presented at the hearing, but the Family Court erred in not granting the mother's objection in its entirety since the record was sufficiently developed to establish the existence of subject matter jurisdiction. The Uniform Interstate Family Support Act, adopted in New York as article 5-B of the Family Court Act, grants "continuing, exclusive jurisdiction over" a child support order to the state that issued the order ( Family Ct Act 580-205[a]). The issuing state loses such jurisdiction where none of the parties or children continue to reside in that state. Here, New York was the issuing state for the child support order. As such, New York had continuing, exclusive jurisdiction over that order. Although the father did not reside in the state, New York would retain continuing, exclusive jurisdiction if New York continued to be the residence of the mother and/or the subject child at the time she commenced this proceeding for a modification of child support. The Court held that although the UIFSA does not define the terms "reside" or "residence", it has been determined that a person is a "resident" of New York State when he or she has a significant connection with some locality in the State as the result of living there for some length of time during the course of a year (citing Antone v. General Motors Corp., Burick Motor Div ., 64 N.Y.2d 20, 30; Wittich v. Wittich, 210 A.D.2d 138, 139). An individual may establish his or her residency with documentary evidence, such as a lease, rent receipts, phone bill, utility bills, voter's registration card, or driver's license (citing Ellis v. Wirshba, 18 AD3d 805, 805; Schaefer v. Schwartz, 226 A.D.2d 619, 620; McKenzie v. MAJ Tr., 204 A.D.2d 154, 154). Despite the fact that the mother also maintained a residence in Philadelphia where she worked and where the parties' child attended school, she submitted documentary evidence that supported her testimony that Brooklyn had been and continued to be her place of residence at the time the proceeding was commenced. She presented, among other things, a lease for a Brooklyn apartment which listed herself and the child as tenants during the relevant time period; a check for partial payment of the monthly rent payable from her bank account held at a New York credit union, which listed her address as being in Brooklyn; New York driver's licenses issued to her in 2002 and in 2008; and New York Voter Registration Card indicating that she had been registered to vote in Kings County since April 1996. In view of the documentary evidence, the mother demonstrated that New York remained her residence, allowing New York to retain continuing, exclusive jurisdiction over the child support order.

October 18, 2010

Error to Find "Double Counting" Where Defendant's Wages Not Capitalized

In Ripka v Ripka, --- N.Y.S.2d ----, 2010 WL 3818500 (N.Y.A.D. 4 Dept.) on appeal from a judgment of divorce, the Appellate Division agreed with plaintiff’s contention that Supreme Court erred in determining that it would be "double counting" to award a portion of defendant's businesses to plaintiff where, as here, defendant's wages had not been capitalized in the valuation of those businesses (citing Grunfeld v. Grunfeld, 94 N.Y.2d 696). It concluded, however, that the court rectified that error by awarding maintenance based solely upon defendant's income. Property distribution and maintenance should not be treated as two separate and discrete items, but rather should each be considered with a view toward the other in an effort to arrive at a fully integrated and complete financial resolution that is best suited to the parties' particular financial situation. Although plaintiff was correct that her overall award would have been greater had she received both maintenance and a portion of defendant's businesses, it concluded that, in that event, the amount of her award of maintenance would be insufficient to enable her to maintain her standard of living. Based on the impropriety of treating a distributive award as an additional source of maintenance, rather than as a division of marital property it concluded that the court properly awarded maintenance to plaintiff based on defendant's income. Contrary to plaintiff's contention, the court was not required to explain the reasons for its discretionary application of the $80,000 cap pursuant to Domestic Relations Law 240(1-b)(c), particularly in light of its finding that defendant's pro rata share of child support was appropriate and plaintiff's failure to contend that the amount of child support awarded was insufficient. It concluded, however, that the court erred in failing to order that child support be adjusted upon the termination of maintenance, pursuant to Domestic Relations Law 240(1-b)(b)(5)(vii)(C). It modified the order and remitted the matter to Supreme Court to determine, following a hearing if necessary, the proper amount of the upward adjustment of child support. Also contrary to plaintiff's contention, it concluded that the court properly determined the values of defendant's businesses and the marital assets. The court accepted the valuation of the businesses provided by defendant's expert, with which plaintiff's expert agreed, and the court was not required to accept plaintiff's unsupported allegations that the businesses were worth more than the amounts reported by defendant. Similarly, the court properly accepted defendant's valuation of the vehicles, where plaintiff 'presented no expert testimony that would support a different valuation. Finally, the court was entitled to credit the valuation of defendant's expert over that of plaintiff's with respect to the marital residence, using the "as repaired" valuation of the marital residence. Plaintiff admittedly used nearly $13,000 out of a $20,000 pendente lite award made specifically for house repairs and real property taxes for other personal expenses.

Mothers Acts of Domestic Violence Supported Custody Award to Father

In Costigan v Renner--- N.Y.S.2d ----, 2010 WL 3786101 (N.Y.A.D. 2 Dept.) Supreme Court awarded the father custody of the parties' two children, did not award the wife maintenance and pendente lite arrears of maintenance and child support, directed the wife to pay child support of $303 per week and a pro rata share of the children's private school tuition, directed that all property subject to equitable distribution be distributed in accordance with the parties' stipulation of settlement, failed to award the wife counsel fees and expert fees, and denied the husbands request to reallocate expert fees and fees for the attorney for the children. The Appellate Division affirmed. It pointed out that there is overwhelming authority that a child living in a home where there has been abuse between the adults becomes a secondary victim and is likely to suffer psychological injury. Moreover, that child learns a dangerous and morally depraved lesson that abusive behavior is not only acceptable, but may even be rewarded. The trial court credited the father's allegations of abuse by the mother and found that the mother's denials thereof lacked veracity. The acts of domestic violence committed by the mother against the father demonstrated that the mother was ill-suited to provide the children with moral and intellectual guidance. The Court also held that Supreme Court did not err in declining to award her maintenance. Although the mother argued that the Supreme Court's decision failed to discuss the parties' pre-divorce standard of living, under the circumstances of this case, such consideration was of little determinative value, especially in light of the fact that the parties only lived together for less than three years after their marriage in 1999. Considering that the mother had the ability to be self-supporting and was not the custodial parent, the record supported the Supreme Court's decision to deny an award of maintenance to the mother. In determining child support, a court need not rely upon the party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential. Supreme Court properly imputed income to both the father and the mother based upon the past income of the father and the earning potential and extrapolated past annual earnings of the mother.

Supreme Court Did Not Abuse its Discretion in Awarding Counsel Fees Without Conducting a Hearing.

In Sharlow v Sharlow, --- N.Y.S.2d ----, 2010 WL 3820035 (N.Y.A.D. 4 Dept.) the Defendant appealed from a judgment of divorce that directed him to pay $825.90 per month in child support and $650 per month in maintenance for a period of 36 months, distributed the parties' debts and assets and ordered him to pay counsel fees to plaintiff in the amount of $1,000. The Appellate Division held that Supreme Court did not abuse its discretion in imputing income of $45,000 to defendant for the purposes of calculating his maintenance and child support obligations. Contrary to defendant's contention, a court is not required to find that a parent deliberately reduced his or her income to avoid a child support obligation before imputing income to that parent, and a court may properly find a true or potential income higher than that claimed where the party's account of his or her finances is not credible. The record established that defendant consistently underreported his income as a plumber, and the testimony of defendant and documentary evidence presented at trial concerning his income was less than credible. For example, defendant failed to list any income on his 2007 Statement of Net Worth, despite the fact that he earned wages and collected employment benefits during that year. The $45,000 in imputed income was based upon the average salaries of plumbers as reported by the New York State Department of Labor, defendant's history of earnings, and the evidence that defendant worked "under the table." Inasmuch as the record supported the court's imputation of $45,000 in income to defendant, there was no basis to disturb that determination. It also concluded that the maintenance award did not constitute an abuse of discretion. The record established that the court considered the factors set forth in Domestic Relations Law 236(B)(6)(a) and based its award on the length of the marriage, the age of the parties, the disparate incomes of the parties and defendant's superior earning capacity as compared to that of plaintiff. Plaintiff, who was 44 years old at the time of the trial, had been out of the workforce for more than a decade because of a disability and her responsibilities as caretaker of the parties' children. In 2006 plaintiff obtained a job as a clerk at a rate of $10 per hour, but she testified that it was difficult to work full-time because of her child care responsibilities and her inability to afford daycare. The monthly expenses of plaintiff exceed her monthly income, and she had substantial debts, including approximately $7,000 to $10,000 in medical bills from periods when she and the parties' children were uninsured. Defendant's contention that the court erred in its valuation of real property located at West Court Street in Utica was without merit. Marital assets may be valued at "anytime from the date of commencement of the action to the date of trial , and the appropriate date for measuring the value of marital property is left to the sound discretion of the ... court. The court properly exercised its discretion in valuing the property as of approximately two months before trial. The court properly valued the property at $24,900 in accordance with the testimony of plaintiff's expert, a licensed real estate agent with over 20 years of experience, who based her valuation on comparable sales over a six-month period and a visual inspection of the property. It concluded that the court did not abuse its discretion in requiring defendant to pay a portion of plaintiff's counsel fees . Defendant contended that the court erred in awarding counsel fees without conducting a hearing because the parties did not consent to a determination of that issue upon written submissions. That contention was not preserved for our review inasmuch as defendant failed to request a hearing with respect to the ability of plaintiff to pay her own counsel fees or the extent and value of the legal services rendered to her (citing Petosa v. Petosa, 56 AD3d 1296, 1298). In any event, defendant's contention lacked merit. Unlike the case relied upon by defendant (citing Redgrave v. Redgrave, 304 A.D.2d 1062, 1066-1067), the court awarded counsel fees in this case after a trial in which the financial condition of the parties was amply explored and documented. Moreover, it concluded that the evidence presented by the parties concerning their respective financial conditions supported the award of counsel fees to plaintiff.

October 1, 2010

Summary of 2010 Family Law Legislation

Chapter 446

Amends Family Court Act 153-b; amends Domestic Relations Law 240 (3-a) in relation to service of orders of protection including applications to extend and petitions for violations of orders of protection and temporary orders of protection in family court.

Clarifies that litigants have the same options of peace and police officer service for orders and temporary orders and legal papers issued in later stages of family offense proceedings including service of extended orders and for petitions alleging violations of orders of protection as they have for original orders and accompanying pleadings. Makes it clear that such service must be available without fee to the litigants. The provision prohibiting fees from being charged by police and peace officers for service of all orders of protection, whether issued upon default, temporary, modified, final, or extended as well as associated petitions and summonses, emphasizes legislation enacted in 2007. That statute amended section 8011 of the Civil Practice Law and Rules to prohibit sheriffs from charging the statutory $45 fee and any mileage fees for service of orders of protection and related orders or papers when service has been directed by the court. See L. 2007, c. 36. The statute is essential to ensure compliance by New York State with The Federal Violence Against Women Act. 42 U.S.C.A. S3796hh(c)(4). Effective August 30, 2010.

Chapter 509

Amends Domestic Relations Law 110 to permit two adult unmarried intimate partners to adopt a child together. It also clarifies that all married couples may adopt a child together. In Matter of Jacob and Matter of Dana, the Court of Appeals ruled that the unmarried partner of a child's biological mother, whether heterosexual (Jacob) or homosexual (Dana), who is raising the child together with the child's biological parent, has standing to become the child's second parent by means of adoption. The decision of the court stated that the statute uses the word "together" simply to insure that one spouse does not adopt a child without the other spouse's knowledge or over the other's objection. The court determined that the statute does not preclude an unmarried second parent from adopting his or her partner's children and that this principal applies regardless of the couple's marital status or sexual orientation. Sec Matter of Jacob, 86 N.Y.2d 651 (1995). This legislation codifies the Court of Appeal's decision in Matter of Jacob and Matter of Dana, and will help ensure that unmarried adult couples may jointly adopt a child together where neither is the biological parent of the child - a question that was not addressed by the court of appeals decision. See In re Adoption of Carolyn B., 774 N.Y.S.2d 227 (N.Y. App, Div. 2004). Effective September 17, 2010

Exclusive Occupancy Modified to Balance the need of the custodial parent to occupy the marital residence against the financial need of the parties

In Gahagan v Gahagan, --- N.Y.S.2d ----, 2010 WL 3155342 (N.Y.A.D. 2 Dept.) the parties were married in 1986 and had four daughters: the oldest, Katherine, born October 2, 1994; Elaine, born September 11, 1995; Elizabeth, born June 26, 1997; and Allaire, born July 22, 1998. The plaintiff commenced this matrimonial action on January 15, 2003. At the time of the trial in May 2008, Katherine was in the eighth grade, Elaine was in the seventh grade, Elizabeth was in the fifth grade, and Allaire was in the fourth grade, all attending a private school. Pursuant to a so-ordered stipulation the defendant was awarded residential custody with liberal visitation to the plaintiff. The Appellate Division noted that the parties had enjoyed a relatively lavish lifestyle during their marriage. The proof at trial showed that this lifestyle was supported mainly by the plaintiff's income from his family trust funds as well as payments, gifts, or forgiven loans from his mother, all continuing regularly throughout the course of the marriage. This enabled the parties, inter alia, to send their children to private school, to renovate and keep the marital residence, and to enjoy vacations at the family compound in Cape Cod and the family home in Delaware. While there was some additional income from the plaintiff's architectural practice, it was clearly insufficient to allow the parties to live in the style to which they had become accustomed. The defendant did not have a full-time job during the marriage, nor did she earn more than $5,000 per year since the children were born. Supreme Court, inter alia, (a) awarded monthly maintenance to the defendant of $4,533, (b) directed him to pay monthly carrying costs for the marital residence of $10,467, and (c) awarded the defendant exclusive occupancy of the marital residence, with all three of these awards to continue, in effect, until the last of the parties' children reached her majority or was sooner emancipated, (d) awarded the defendant annual child support of $24,800, (e) awarded the defendant an attorney's fee, and (f) equitably distributed the marital property. The Appellate Division found that the initial award of maintenance, as well as the award to the defendant of the exclusive occupancy of the marital residence and the direction to the plaintiff that he pay all the carrying costs for the marital residence, in effect, until at the latest, the marital residence was sold, was a provident exercise of discretion. However, under the circumstances of this case, it was an improvident exercise of discretion to delay the sale of the marital residence until the parties' youngest child reached her majority or was sooner emancipated. Instead, an appropriate point to balance the disruption that a move would inevitably cause with the financial needs of the parties was to direct that the marital residence be sold by December 31st of the year the parties' second oldest daughter, Elaine, graduated from high school. At that time, the two oldest children should have graduated from high school and the two youngest children will have at least graduated from grammar school. Therefore, a sale at that point would appropriately balance "the need of the custodial parent to occupy the marital residence ... against the financial need of the parties" . It also held that a more appropriate distribution of the net proceeds of the sale would be 60% to the defendant and 40% to the plaintiff, if the defendant fully cooperated in effectuating the sale. If not, the distribution of the net proceeds would be split equally. In either instance, the defendant would remain obligated to pay $84,854 to the plaintiff from her share of the net proceeds for her failure to cooperate with regard to the filing of a prior tax return. The Appellate Division held that after the marital residence wass sold an adjustment in the maintenance to $7,500 per month, to be paid to the defendant until the parties' youngest child, Allaire, reached the age of 21 on July 22, 2019, was appropriate. Additionally, after the sale of the marital residence, the child support payable by the plaintiff had to be adjusted to reflect the fact that a portion of the prior payment for housing costs was, in effect, child support. Accordingly, it directed that after the sale of the marital residence, the plaintiff must pay the defendant child support in accordance with the Child Support Standards Act. If the parties could not agree as to what the proper amount of child support required thereunder is, it provided that either or both of them may apply to the appropriate court for the recalculation of that obligation. The plaintiff still remained responsible for payment of 100% of various expenses of the children including, inter alia, their tuition through college. That also included, among other things, payment of room and board, and other college expenses.

September 16, 2010

Summary of Laws of 2010 Family Law Legislation

Chapter 421

Amends Family Court Act 352.3 to add (1-a).

Authorizes family courts to issue orders of protection for the protection of witnesses. Provides that upon the issuance of an order pursuant to Family Court Act 315.3 or the entry of an order of disposition pursuant to Family Court Act 352.2, a court may, for good cause shown, enter an order of protection against any respondent requiring that the respondent refrain from engaging in conduct, against any designated witness specifically named by the court in the order, that would constitute intimidation of a witness pursuant to section 215.15, 215.16 or 215.17 of the penal law or an attempt thereof provided that the court makes a finding that the respondent did previously, or is likely to in the future, intimidate or attempt to intimidate such witness in such manner. Effective November 28, 2010

Chapter 446

Amends Family Court Act 153-b; amends Domestic Relations Law 240 (3-a) in relation to service of orders of protection including applications to extend and petitions for violations of orders of protection and temporary orders of protection in family court. Clarifies that litigants have the same options of peace and police officer service for orders and temporary orders and legal papers issued in later stages of family offense proceedings including service of extended orders and for petitions alleging violations of orders of protection as they have for original orders and accompanying pleadings. Makes it clear that such service must be available without fee to the litigants. The provision prohibiting fees from being charged by police and peace officers for service of all orders of protection, whether issued upon default, temporary, modified, final, or extended as well as associated petitions and summonses, emphasizes legislation enacted in 2007. That statute amended section 8011 of the Civil Practice Law and Rules to prohibit sheriffs from charging the statutory $45 fee and any mileage fees for service of orders of protection and related orders or papers when service has been directed by the court. See L. 2007, c. 36. The statute is essential to ensure compliance by New York State with The Federal Violence Against Women Act. 42 U.S.C.A. S3796hh(c)(4). Effective August 30, 2010.

Third Department Holds Retainer Fee May Be Restrained

In Potter v MacLean,--- N.Y.S.2d ----, 2010 WL 2606315 (N.Y.A.D. 3 Dept.), after the parties separation, a court order was issued in 2005 requiring defendant to pay $800 per month in child support, plus $200 in monthly maintenance to plaintiff. He was ultimately found to have willfully violated that order and, in 2007 when a divorce action was commenced, defendant was found to owe more than $20,000 in arrears on this obligation. Defendant subsequently retained the law firm of Thaler & Thaler to represent him in the divorce action and paid them a $15,000 advance on their fee. Later, the amount that defendant owed on his support and maintenance obligation had increased to $33,000 and, in an effort to satisfy that arrearage, the Tompkins County Support Collections Unit served a restraining notice and an information subpoena on Thaler & Thaler in regard to the $15,000 retainer fee (see CPLR 5222, 5224). Defendant moved to quash the subpoena and vacate the restraining notice on the retainer fee. Supreme Court denied defendant's motion, and the Appellate division affirmed. The Appellate Division rejected Defendant’s argument that the retainer fee held by Thaler & Thaler was not subject to restraint because these funds were used to ensure that he has legal representation in the divorce action. However, CPLR 5222(a) provides that a restraining notice may be issued upon any person, except for a judgment debtor's employer, and funds held in escrow for the purpose of retaining an attorney are not included in the statutory list of money and property exempt from such restraint. Moreover, funds held by an attorney as a retainer for legal services to be rendered have been found to be subject to a preattachment restraining order. Such funds, even if deposited in an escrow account, may be attached as long as they are subject to the judgment debtor's "present or future control," or are required to be returned to the judgment debtor if not used to pay for services rendered. Defendant retained an interest in the funds that were not used to pay for the legal services rendered by Thaler & Thaler, and the retainer agreement governing the disposition of such a fee specifically provided that such funds would ultimately be returned to defendant. Defendant also claimed that the funds used for the retainer were borrowed from family and friends and, therefore, should not be subject to a restraining notice. The Appellate Division held that any any legal right to the return of any portion of the retainer fee belonged to defendant--and not to his family or friends--and it is that interest that provides a legal basis for restraint of the funds. While not unmindful of the impact this decision may have on defendant's ability to retain counsel, it noted that a party in a matrimonial proceeding does not have a constitutional right to counsel ( Matter of Smiley, 36 N.Y.2d 433, 438 [1975] ). Moreover, it reached this conclusion solely upon the factual circumstances presented in this case, as well as the longstanding significance and emphasis placed upon a parent's duty to provide child support for his or her children. Therefore, under the circumstances presented here, specifically the fact that defendant has willfully violated his obligation to provide financial support for his children and the retainer fee was paid to Thaler & Thaler in a manner in which defendant has access to any unused funds, the Court concluded that the restraining order was properly placed on the retainer funds. The Court rejected defendant's claim that the information subpoena was "totally inappropriate and serves no useful, justifiable purpose,". It noted that the details regarding a client's fee arrangement with his or her attorney "is a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment, is not privileged" (Matter of Priest v. Hennessy, 51 N.Y.2d 62, 69 [1980])

Court May Grant Relief Not Requested in Motion Papers Under Limited Circumstances

In Matter of Myers v Markey, --- N.Y.S.2d ----, 2010 WL 2606507 (N.Y.A.D. 2 Dept.) on September 18, 2007, when the child was three years old, the parties consented to the entry of an order which awarded joint legal and residential custody of the child and provided for equal residential parenting time. The order did not contain a provision regarding the school district where the child would eventually attend kindergarten. When the parties could not agree as to which school the child would attend, the father filed a petition seeking an order "grant[ing] petitioner's school district-RVC [Rockville Centre]." The petition specifically stated that all parts of the prior order were to "remain intact." In response, the mother filed a petition requesting an emergency hearing to prevent the father from taking the child on September 8, 2009, to the school of the father's choice. Neither petition sought a modification of the prior order. Nevertheless Family Court modified the prior order by changing the child's legal residence, limiting the father's residential parenting time, and carving out specific areas of decision-making authority. The Appellate Division vacated the order. It held that generally, a court may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party. The relief directed by the Family Court was completely different from the relief requested by the parties. Moreover, since no request was made to modify the prior order, the parties had no notice and were not afforded an opportunity to address the necessity of such modification. Under these circumstances, the Family Court erred in, sua sponte, granting such relief as was not requested by the parties.

September 1, 2010

The 2010 Divorce Reform Amendments by Joel R. Brandes, Bari Brandes Corbin and Evan B. Brandes

The 2010 Session of the legislature has resulted in legislation that is intended to bring significant reform New York’s divorce process, increase the amount of temporary maintenance awards, and compel New York courts to promptly make counsel and expert fee awards to the non-monied spouse. The purpose of this article is to provide the reader with a clear and concise explanation of the 2010 Divorce Reform Amendments, including the new Temporary Maintenance Guidelines which are codified in new Domestic Relations Law § 236 [B][5-a]. (See separate article included with this issue of Bits and Bytes™ which requires Adobe Acrobat Reader to view)

Summary of Laws of 2010 New York Family Law Legislation

Chapter 32

Amends Domestic Relations Law §236

Grants an exemption to provisions prohibiting transfer of any retirement plan upon commencement of a matrimonial action when the retirement plan is already paying benefits. Effective date March 30, 2010

Chapter 41

Amends CPLR 1101; Amends Domestic Relations Law §§ 236 75-f, 76-f, 112-b, 113, 115-b, 240 & 254, ; Amends Executive Law §§ 503 & 508; Amends Judiciary Law §§ 35 & 35-a; Amends Family Court Act, generally; Amends Public Health Law §§ 2306 & 2782; Amends Social Services Law §§ 358-a, 372, 383-c, 384, 384-a, 384-b, 409-e, 409-f & 422.

Replaces the term "law guardian" with the term "attorney for the child" to more accurately reflect the attorney's role. Effective date April 14, 2010.

Chapter 325

Family Court Act § 842

Authorizes the family court in family offense proceedings to extend an order of protection upon the showing of good cause or consent of the parties. Effective date August 13, 2010. ( § 3.This act shall take effect immediately, and shall apply to all orders entered prior to such effective date, and to all actions and proceedings pending on or commenced on or after such effective date.) Laws of 2010, Ch 325 (8.13.10)

Chapter 329

Amends Domestic Relations Law § § 237 & 238.

Laws of 2010, Ch 329, as amended by Laws of 2010, Ch 415, effective October 12, 2010, amended Domestic Relations Law §§ 237 and 238 to create a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. It adds actions to obtain maintenance or distribution of property after a foreign judgment of divorce to the actions for which such fees shall be awarded. In exercising the court's discretion, the court is required to seek to assure that each party is adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis pendente lite, so as to enable adequate representation from the commencement of the proceeding. In addition the court is authorized to order expert fees to be paid by one party to the other to enable the party to carry on or defend the action. The parties and their attorneys are also required to submit an affidavit to the court with financial information to enable the court to make its determination. The monied spouse is now required to disclose how much he has agreed to pay and how much he has paid his attorney. The affidavit must include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses. In addition, Domestic Relations Law § 238 was also amended to add to the actions for which such fees shall be awarded “actions to enforce a court order”.

Chapter 341

Amends Family Court Act §§ 446, 551, 656, 759, 812, 842 & 1056; Amends Domestic Relations Law §240.

Provides that orders of protection shall not be denied, in support proceedings, paternity proceedings, termination of parental rights proceedings, person in need of supervision proceedings, family offense proceedings and child protective proceedings, solely on the basis that the events alleged are not contemporaneous with the application therefor or the conclusion of the action. Effective date August 13, 2010. Laws of 2010, Ch 341 (8.13.10)

Chapter 341 was designed to overturn a series of Appellate Division court rulings that appeared to impose a statute of limitations on the filing of domestic violence claims. Sponsors said the rulings, including Yoba v. Yoba , 183 AD2nd 418 (1992), and Loriann Q. v. Frank R. , 53 AD3d 735 (2008), impose no such limitations on the filing of suits based on past abuse.

Chapter 342

Amends Family Court Act §§1055, 1087, 1088, 1089 & 1090; Adds Article 10-B, Section 109; Amends Social Services Law § § 371 & 409-a.

Relates to trial discharges of children in foster care and voluntary re-placements of older adolescents in foster care; amends the provisions of Articles 10 and 10-A of the Family Court Act to extend trial discharges at court permanency hearings for successive periods of up to six months until a child turns 21. The trial discharges require the consent of the child. The law also adds a new Article 10-B to permit youths between 18 and 21 who have opted to leave state care within the past 24 months to seek to return voluntarily. In such cases, the court must find that the youth has no reasonable alternatives to foster care, that he or she consents to an appropriate vocational or educational program and that a return would be in his or her best interests. Attorneys who previously represented the youths would continue to do so.

Chapter 343

Adds Family Court Act Article 6 Part 1-A, Sections 635 - 637; Amends Family Court Act §1089; Amends Social Services Law §384-b.

Provides a process for a petition to restore previously terminated parental rights under certain circumstances. Effective date November 11, 2010(§ 4. This act shall take effect on the ninetieth day after it shall have become a law. Laws of 2010, Ch 343).

Chapter 363

Repealed & Added Judiciary Law §212 sub 2 P(n).

Extends for two years authorization of courts to designate referees to determine order-of-protection applications by Family Courts based, in part, on ex parte conversations. The state empowered the referees to issue the orders when first approving their use against non-family members in 2008. Grants the chief administrator of the courts the authority to allow referees to determine applications to a family court for an order of protection when such application is made ex parte or without the presence of all the parties except the applicant; specifies that such provisions shall only apply during those hours that the family court is in session and after 5:00 p.m. Effective date August 13, 2010. (Laws of 2010, Ch 363 effective 8.13.10 (This act shall take effect immediately; provided that paragraph (n) of subdivision 2 of section 212 of the judiciary law, as Added by section one of this act, shall expire and be deemed repealed September 1, 2012.)

Chapter 371

Amends Domestic Relations Law § 236.

Laws of 2010, Ch 371, effective October 12, 2010, amends Domestic Relations Law § 236 [B][6] to add a subdivision 5-a which revises the process for setting awards of temporary maintenance during the pendency of a matrimonial action, by creating a formula and list of factors that presumptively govern such awards. It amends Domestic Relations Law § 236 [B][1][a] to update the definition of “maintenance” by cross-referencing it to Domestic Relations Law § 236 [B] [6] subdivision 5-a. It also amends Domestic Relations Law § 236 [B][6] to add 5 new factors for the court to consider in determining the amount and duration of maintenance. Subdivision 3 directs the law revision commission to study the effects of divorce and maintenance. Effective date August 13, 2010. (Laws of 2010, Ch 371 (8.13.10) (§ 6. This act shall take effect immediately; provided, however, that sections one, two and four of this act shall take effect on the sixtieth day after this act shall have become a law and shall apply to matrimonial actions commenced on or after the effective date of such sections. )

Chapter 384

Amends Domestic Relations Law 170 to add subdivision 7.

Provides that spouses may be granted a judgment of divorce in a timely fashion provided the relationship between husband and wife is irretrievably broken” for a period of at least six months, provided that one party has so stated under oath. No judgment of divorce may be granted unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce. Effective date October 12, 2010. Laws of 2010, Ch 384, (8.13.10) (§ 2. This act shall take effect on the sixtieth day after it shall have become a law and and shall apply to matrimonial actions commenced on or after such effective date.)

Chapter 415

Amends Chapter 329 of the Laws of 2010 to change its effective date from 120 days after it shall have become a law to 60 days after it shall have become a law. Effective date August 13, 2010. Laws of 2010, Ch 415. (8.13.10)

August 16, 2010

Governor Signs Sweeping Bills into Law.

According to a Press Release issued by his office on August 15, 2010 New York Governor Paterson signed into law a package of four bills that would bring significant reform to New York's outdated divorce laws. The Governor signed into law A.9753A/S.3890, which would make New York the last State of the fifty to adopt no-fault divorce. The bill would end the requirement that a party seeking a divorce had to claim one of a limited set of reasons as the basis for doing so, a rule that forced parties to invent false justifications, and that prolonged and aggravated the painful divorce process. The reform package also included legislation that would revise the process for setting awards of temporary maintenance while a divorce is pending, by creating a formula and list of factors that would presumptively govern such awards (A.10984/S.8390 and A11576/S.8391). This would allow for speedy resolution of the maintenance issue, and prevent less well-off parties to divorce proceedings from falling into poverty during litigation, because they lack the resources to obtain a temporary maintenance order. Another bill (A7569-A/S4532-A) would create a presumption that a less monied spouse in a divorce case is entitled to payment of attorneys' fees. Under current law, a party that cannot afford to secure representation in a divorce proceeding must make an application for fees at the end of the process, which can force a poor individual to proceed without a lawyer, or to surrender on important issues due to lack of means. Note that (S8391/A 11576:) amends S. 4532-A and A. 7569-A, relating to counsel and expert fees in matrimonial actions, to change the effective date to 60 days after enactment.

Second Department Applies "Implied Promise-equitable Estoppel Approach" to Support Cause of Action for Child Support Where Same-sex Partner and Mother Bring Child into the World Through Aid.

In Matter of H.M. v E.T.,--- N.Y.S.2d ----, 2010 WL 3023919 (N.Y.A.D. 2 Dept.) the petitioner, H.M., a Canadian citizen, and the biological mother of the subject child, filed a petition pursuant to the Uniform Interstate Family Support Act (Family Ct Act art 5-B), seeking to obtain child support from E.T., her former same-sex partner with whom she allegedly agreed to conceive a child through artificial insemination by donor (AID), and upon whose promise of support she allegedly relied in so conceiving the child. The allegations of the petition, which in the present procedural posture had to be accepted as true were set forth in the opinion of the Court of Appeals in Matter of H.M. v. E.T. (14 NY3d 521). In its prior decision, the Appellate Division concluded that the Family Court lacked subject matter jurisdiction to entertain H.M.'s petition, reversed the order of the Family Court, denied H.M.'s objections, reinstated the order of the Support Magistrate, and vacated two subsequent orders of the Family Court dated March 25, 2008, and February 9, 2009, which had invoked equitable estoppel and imposed a support order payable by E.T. to H.M. for child support, respectively (see Matter of H.M. v. E.T., 65 AD3d 119, revg 16 Misc.3d 1136[A] ).

By opinion dated May 4, 2010 ( Matter of H.M. v. E.T., 14 NY3d 521), the Court of Appeals reversed the determination that the Family Court lacked subject matter jurisdiction, and remitted the matter to the Appellate Division for consideration of the question, raised but not determined upon appeal to the Appellate Division, of whether H.M.'s petition sufficiently stated a cause of action for child support pursuant to Family Court Act articles 4 and 5-B . The Appellate Division noted that H.M.'s petition sought an order of support predicated upon a determination, through the application of the doctrines of equitable estoppel and implied contract, that E.T. was chargeable with the support of the child, and was not entitled to disclaim that obligation. The Appellate Division evaluated this claim for relief in accordance with the Court of Appeals' holding that such a claim lies within the Family Court's "article 4 jurisdiction," pursuant to which the "Family Court also has the inherent authority to ascertain in certain cases whether a female respondent is, in fact, a child's parent" . It concluded that H.M. stated a viable cause of action for the invocation of equitable estoppel to determine whether her former same-sex partner should be compelled to pay child support pursuant to Family Court Act articles 4 and 5-B. The Court pointed out that the doctrine of equitable estoppel has long been invoked to prevent a putative father, who has established a relationship with a child, from denying paternity in order to avoid paying support (citing, inter alia, Matter of Shondel J. v. Mark D., 7 NY3d 320, 326). The paramount concern in such cases has been and continues to be the best interests of the child. Consistent with this principle, the Court had previously acknowledged that application of the doctrine of equitable estoppel would be appropriate, if determined to be in the best interests of the child, even under circumstances in which the child's "true paternity was not in issue" (citing Matter of Charles v. Charles, 296 A.D.2d at 549).

The Court noted that it and other courts have employed the doctrine of equitable estoppel, sometimes in conjunction with that of implied contract, to hold parties responsible for paying child support, not only in the absence of a biological or adoptive connection to the subject child, but in the absence of an established parent-child relationship, where those parties agreed either to adopt the child or to cause the child's conception through AID (citing Laura WW. v. Peter WW., 51 AD3d 211, 218; Wener v. Wener, 35 A.D.2d 50, 53; Matter of Karin T. v. Michael T., 127 Misc.2d 14; Gursky v. Gursky, 39 Misc.2d 1083, 1088). Its decision in Wener, holding that a husband could be required, under the "dual foundation" of equitable estoppel and implied contract, to support a child whom he had neither fathered nor adopted, was later sanctioned by the Court of Appeals in Matter of Baby Boy C. (84 N.Y.2d 91, 101-103). In permitting a husband to revoke his consent to joint adoptions of children already taken into his wife's care, the Court of Appeals, relying upon Wener, reasoned that "denial of the adoptions by [the husband] [would] not leave the children or [the wife] as their guardian without recourse to an appropriate economic remedy”.

The Appellate Division pointed out that it had previously employed the "implied promise-equitable estoppel approach" (Wener, 35 A.D.2d at 53) to preclude a man with no biological or adoptive connection to a child from disavowing a relied-upon, implied promise to support the child, thus preventing the man from leaving the child without the support of two parents, as originally contemplated. By parity of reasoning, it held that where the same-sex partner of a child's biological mother consciously chooses, together with the biological mother, to bring that child into the world through AID, and where the child is conceived in reliance upon the partner's implied promise to support the child, a cause of action for child support under Family Court Act article 4 has been sufficiently alleged. In accordance with the foregoing, it concluded that sufficient allegations had been raised in H.M.'s petition, warranting a hearing in the Family Court on the issue of whether E.T. should be equitably estopped from denying her responsibility to support the subject child. Therefore, it affirmed the order entered September 11, 2007, and reinstated the two subsequent orders dated March 25, 2008, and February 9, 2009.

Third Department Holds that Lincoln Rule Does Not Apply to Article 10 Fact Finding Hearing

In Matter of Justin CC, 903 N.Y.S.2d 806 (3d Dept, 2010) the Appellate Division held that testimony taken from a child during the fact-finding stage of a Family Ct. Act article 10 proceeding, outside the presence of the respondent, but with counsel present, is not entitled to the same protections of confidentiality afforded to Lincoln testimony in a Family Ct. Act article 6 proceeding. Petitioner commenced neglect and abuse proceedings alleging that respondents subjected the children to corporal punishment and the father had sexual intercourse with the daughter on at least 20 occasions. Prior to the fact-finding hearing, the attorney for the daughter requested that a "modified Lincoln hearing" be held with the daughter in the presence of all counsel, but outside the presence of respondents, citing to the Third Department’s decision in Matter of Randy A., 248 A.D.2d 838 [1998] as authority for such a procedure. Respondents consented to their exclusion while the daughter testified. Thereafter, in what was termed a "Lincoln hearing," the daughter provided sworn testimony; respondents were excluded but their attorneys were permitted to be present and afforded a full opportunity to cross-examine her. At the conclusion of the fact-finding hearing, Family Court found that the father abused the daughter and derivatively abused the sons, and that both the mother and the father neglected all four children. The transcript of the daughter's testimony was marked confidential by Family Court and was forwarded under seal to the Appellate Division for purposes of the appeal. While the appeal was being perfected, appellate counsel for the father moved for, among other things, an order unsealing the transcript of the daughter's testimony for inclusion in the record on appeal and for purposes of reference in counsel's brief and appendix. In that motion, counsel asserted that, inasmuch as this is not a custody proceeding and all counsel were present during the daughter's testimony and permitted to cross-examine her, the daughter's testimony was not in fact obtained during the course of a true Lincoln hearing and, consequently, is not confidential. Counsel also argued that her inability to reference and make fact-specific arguments based upon that testimony hampered her ability to adequately represent the father on appeal. The Appellate Division denied the motion to unseal the daughter's testimony. On appeal, appellate counsel for the father again asserted that the daughter's testimony should not be maintained confidential since it was not obtained during the course of a true Lincoln hearing and that she could not effectively represent her client without the ability to specifically challenge such testimony. Finding that this type of testimony taken at the fact-finding stage of a Family Ct. Act article 10 proceeding is fundamentally different from Lincoln testimony and is not entitled to the protections afforded by Lincoln, the Appellate Division, upon reconsideration, vacated its prior decision on the motion and granted the motion to unseal.

In explaining its rationale for the decision the Appellate Division noted that in Matter of Lincoln v. Lincoln, 24 N.Y.2d 270,[1969], the Court of Appeals held that a court deciding the issue of custody has the right to conduct a confidential interview with the child, outside the presence of the parents and their attorneys, because its first responsibility is and must be the welfare and interests of the child. In so concluding, the Court emphasized the importance of protecting the child from having to choose openly between parents or publicly relate his or her difficulties with them. Although there are sound reasons for maintaining confidentiality of a child's testimony in a custody proceeding, the court found no basis for providing such a protection at the fact-finding stage of a neglect/abuse proceeding. While the issue at the fact-finding stage of a custody proceeding is what custodial arrangement is in the best interest of the child, the issue at the fact-finding stage of a Family Ct. Act article 10 proceeding is whether the petitioner has proved by a preponderance of the evidence that the child is neglected and/or abused and that the respondent is responsible for the neglect and/or abuse. Most significantly, unlike a custody proceeding, the position of the allegedly neglected or abused child in an article 10 proceeding may be adverse to the respondent. The Court pointed out that a litigant does not have an absolute right to be present at all stages of a civil proceeding, such as a Family Ct. Act article 10 proceeding. As such, in the context of a Family Ct. Act article 10 proceeding, this Court had concluded that, in balancing the due process right of the accused with the mental and emotional well-being of the child, a court may exclude the respondent during the child's testimony but allow his or her attorney to be present and question the child. It is only after such a balancing of these interests-- a respondent's right to be present/confront the victim and the psychological danger to the child of testifying in the respondent's presence--that a court may properly exclude a respondent from such testimony .This balancing procedure, or the reasons obviating the need to engage in it (for example, the parties consent to their exclusion), should be performed on the record so as to permit adequate appellate review. In its view, the underlying purpose for excluding a respondent during the testimony of a child victim in a Family Ct. Act article 10 proceeding is to ensure the child's ability to testify accurately and without inhibition, thus fostering open and truthful testimony. Unlike a custody proceeding, where the purpose of a Lincoln hearing is to corroborate information acquired through testimonial or documentary evidence adduced during the fact-finding hearing, it has been held that the testimony of a child--sworn or unsworn--taken outside the presence of the respondent in a Family Ct. Act article 10 proceeding can, by itself, support a finding of neglect or abuse. Although neither this Court nor the Court of Appeals has spoken on that issue, and it did not now pass on it, it is well settled that such testimony can, at a minimum, provide the requisite corroboration of a child's out-of-court statements (Family Ct. Act s 1046[a][vi]). To then drape such testimony with the veil of confidentiality, thus precluding appellate counsel from both referring to that testimony by specific reference and making legal arguments based upon it, raises fundamental due process concerns for the purposes of an appeal. Furthermore, if such testimony were to remain confidential, appellate counsel's ability to effectively represent his or her client would be even more constrained than that of trial counsel. The Court held that “where a child provides testimony during the fact-finding stage of a Family Ct. Act article 10 proceeding, outside the presence of the respondent but with all counsel present and afforded a full opportunity to cross-examine the child, the child's testimony may not be sealed. If an appeal is taken, the transcript of the child's testimony shall be provided to all counsel, and counsel may refer to the child's testimony in both the brief and at oral argument. In light of its determination, it held the appeal in abeyance and permitted the parties to rebrief the issues raised in their initial briefs on appeal in accordance with the conditions set forth in the decision.

August 1, 2010

Additional Expenses for Child Care and Medical Expenses Which must Be Awarded When Child Support Is Determined Pursuant to FCA413(1)(C), Need Not Be Awarded If Child Support Is Determined Pursuant to FCA 413(1)(g)

In Matter of Hudgins v Blair, --- N.Y.S.2d ----, 2010 WL 2510985 (N.Y.A.D. 2 Dept.) the father was married, and had two children of thatmarriage. At issue was the father's obligation to support his child with the petitioner mother, born February 21, 2008 ( subject child). Themother worked 30 hours per week. After deducting social security and medicare taxes from the annual income of the mother and thefather, the Family Court determined that the combined parental income for the subject child was $37,844.45, the basic child supportobligation of both parents was 17% of $37,844.45, or $124 per week, and the father's share of the basic child support obligation was 55% of$124, or $136 every two weeks. The father also was directed to pay 55% of the mother's child care expenses, which constituted anadditional $220 every two weeks. In determining whether the father's child support obligation was unjust or inappropriate in light of hisobligation to support his other two children, the Support Magistrate concluded that the father's wife's annual gross income was$12,747.28. Adding that figure to the father's annual gross income of $22,649.58, the Support Magistrate concluded that the father's annualhousehold income was $35,396.86, while the annual household income of the subject child was the annual gross income of the mother of$18,330. Since the household income of the children of the father and his wife, as determined by the Family Court, exceeded thehousehold income of the subject child, the father was denied any adjustment for his obligations to his other two children. Thereafter, inwritten findings of fact, the Support Magistrate stated that she denied the father any "deviation from the presumptively correct amount" ofchild support based upon his obligations to his other two children, on the ground that the father failed to present evidence that he had alegal obligation to support those children, and failed to submit proof that he was, in fact, providing support for them. The SupportMagistrate issued an order dated January 29, 2009. The father filed timely objections to the Support Magistrate's order, claiming, inter alia,that the Support Magistrate did not take into consideration his obligation to support his other two children. In the order appealed from, theFamily Court stated that these objections were without merit. The Appellate Division stated that one of the factors to consider in determining whether the basic child support obligation pursuant toFamily Court Act 413(1)(c) is unjust or inappropriate, is: "The needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action and whose support has not been deducted fromincome pursuant to subclause (D) of clause (vii) of subparagraph five of paragraph (b) of this subdivision [ child support actually paidpursuant to a court order], and the financial resources of any person obligated to support such children, provided, however, that thisfactor may apply only if the resources available to support such children are less than the resources available to support the children whoare subject to the instant action" (Family Ct Act s 413[1][f][8] ). If the basic child support amount computed pursuant to Family Court Act413 (1)(c) is unjust or inappropriate, child support is to be determined pursuant to Family Court Act 413(1)(g), based upon "such amountof child support as the court finds just and appropriate." Further, additional expenses for child care and medical expenses which must beawarded when child support is determined pursuant to Family Court Act 413(1)(c), need not be awarded if child support is determinedpursuant to Family Court Act 413(1)(g) (see Callen v. Callen, 287 A.D.2d 818, 820). The Appellate Division held that the Family Court couldonly take the needs of the father's other two children into account if the resources available to support them were less than the resourcesavailable to support the child who was the subject of the proceeding. However, in reaching this threshold determination as to how thefather's resources should be utilized, the Support Magistrate should not have considered the father's resources in determining theresources of either his intact family or the subject child's family. Since the father's wife's income was less than the income of the mother,the resources available to support the children of the marriage were less than the resources available to support the subject child. In herwritten findings of fact, the Support Magistrate made what was, essentially, a finding contrary to her prior conclusion that the father'sincome constituted resources of the children of the marriage, when she found that their needs could not be considered because the fatherfailed to establish that he was, in fact, providing support for them. Since these children were the children of his marriage, he clearly had alegal obligation to support them. Further, the father stated in open court that he gave his wife $150 biweekly in cash for their support. Itreversed the order and sustained the father's objections to the extent that the provisions of the order dated January 29, 2009, directing thepayment of basic child support, child care expenses, and arrears, were vacated, and remitted the matter to the Family Court, for a newhearing and determination, and for findings of fact as to whether the child support obligation imposed was unjust or inappropriate in lightof the father's obligation the support the children of his marriage.

An Order Directing Genetic Testing Should Not Be Entered Prior to a Hearing on the Child's Best InterestsIn Andrew T v Yana T, --- N.Y.S.2d ----, 2010 WL 2572407 (N.Y.A.D. 1 Dept.) The Appellate Division reversed an order which granted plaintiffformer husband's motion to the extent of ordering genetic marker testing be performed on defendant and her child. The parties weregranted an uncontested divorce on the grounds of constructive abandonment, based on the plaintiff's sworn statement that defendantrefused to have sexual relations with him for a period of one year prior to commencement of the divorce action. Just over a year after thedivorce judgment was entered, plaintiff brought the an application seeking to establish his paternity of defendant's child, alleging that hewas unaware that she was pregnant when he commenced the divorce proceeding and that she had given birth some time during their separation. Plaintiff claimed he did not know the child's date of birth and made no affirmative allegations contradicting the affidavit he submitted in support of the divorce petition. Defendant opposed what she characterized as plaintiff's effort to undermine the divorce judgment and establish paternity, stating that she has remarried and established a happy home for the child with her second husband. The Appellate Division held that the order was granted prematurely, based on an inadequate record and without representation of the child's interests. In all cases involving the issue of paternity, the "paramount concern" is the child's best interests, and an order directing genetic testing therefore should not be entered prior to a hearing on the child's best interests, at which the child should be represented by a legal guardian.

Court Authorized to Modify Maintenance Obligations Even after Term for Durational Maintenance in Agreement Has Expired

In Rockwell v Rockwell, --- N.Y.S.2d ----, 2010 WL 2403071 (N.Y.A.D. 2 Dept.) The Appellate Division affirmed an order which, without a hearing, denied the former wife's motion for an upward modification of the plaintiff former husband's maintenance obligation pursuant to the parties' separation agreement, which was incorporated but not merged into the judgment of divorce. It held that in circumstances where a separation agreement has been incorporated, but not merged, into a judgment of divorce, a court is authorized to modify maintenance obligations even after the term for durational maintenance in the agreement has expired (citing Domestic Relations Law 236[B][9][b]; Malaga v. Malaga, 17 AD3d 642, 643; Sass v. Sass, 276 A.D.2d 42, 43). However, a court may only grant such a modification upon the movant's showing of "extreme hardship". The defendant did not make the required showing of extreme hardship. Her net worth statement, provided in support of her motion for an upward modification, showed that she has no debt, her monthly income exceeded her monthly expenses, and she had significant savings in her bank account. Thus, the defendant failed to justify a resumption of the plaintiff's obligation to pay her maintenance in any amount, which obligation expired. It also noted that a court is required to conduct a hearing to determine whether a modification is warranted only when the movant presents genuine issues of fact. Absent a prima facie showing of entitlement to a modification, the party seeking modification has no right to a hearing.

July 16, 2010

Family Court Orders Are Different from Appeals of Other Civil Orders Because Family Court Act 1113 Does Not State That Service of a Notice of Entry Is Necessary to Start the Appeal Time Running

In Matter of Miller v Mace, --- N.Y.S.2d ----, 2010 WL 2196005 (N.Y.A.D. 3 Dept.) Family Court continued joint legal custody, but awarded primary physical custody to the father, with visitation to the mother. The mother appealed and the Appellate Division dismissed her appeal. If found that her notice of appeal was not timely filed. Pursuant to Family Ct Act 1113, an appeal from a Family Court order "must be taken no later than thirty days after the service by a party or the law guardian upon the appellant of any order from which the appeal is taken, thirty days from receipt of the order by the appellant in court or thirty-five days from the mailing of the order to the appellant by the clerk of the court, whichever is earliest." Additionally, when service of the order is made by the court, the time to take an appeal shall not commence unless the order contains a statutorily required statement and there is an official notation in the court record as to the date and the manner of service of the order (Family Ct Act 1113). The Court pointed out that the statute was specifically amended to include time periods for serving a notice of appeal if service of the order was made by the court, either in person or by mailing, rather than requiring service by a party. The mother's principal argument on the timeliness issue was that her time to appeal did not start to run because she was never served with notice of entry of the order. The Appellate Division pointed out that aside from permitting the time for appeal to begin running upon service by the court, appeals from Family Court orders are different from appeals of other civil orders because Family Court Act 1113 does not state that service of a notice of entry is necessary to start the appeal time running. Because the Family Court Act fully addresses the process of appealing from that court, other provisions from the CPLR need not be consulted (citing Family Ct Act 165[a] [stating that where Family Ct Act does not include procedure, CPLR applies to extent appropriate]; 1118 [same for appeals] ). Accordingly, contrary to the mother's contention, service of the Family Court order alone, without notice of entry, was sufficient to start the appeal time running. Family Court's order, entered on July 20, 2009, contained the statutory statement concerning appeals. A notation in the court's database dated July 20, 2009 indicated that the order was signed by the court, "entered, conformed and mailed." In addition, the record contained an August 7, 2009 cover letter transmitting the signed and entered order from the father's counsel to the father, the mother's counsel and the attorney for the child. As the mother was served with the order by the court on July 20 and by opposing counsel on August 7 (see CPLR 2103[b][2] [permitting service of papers on a party by mailing them to counsel] ), her September 23, 2009 notice of appeal was untimely. It dismissed for lack of jurisdiction to consider her appeal a parent's inability to secure new work after losing employment may constitute an unanticipated and unreasonable change of circumstances where the award of support was premised upon a particular amount of income.

Parent's Inability to Secure New Work after Losing Employment May Constitute an Unanticipated and Unreasonable Change of Circumstances Where the Award of Support Was Premised upon a Particular Amount of Income

In Silver v Reiss, --- N.Y.S.2d ----, 2010 WL 2196000 (N.Y.A.D. 3 Dept.) in November 2005, the parties stipulated that the child support obligation of petitioner (father) would be based upon imputed annual income of $28,667. Although the father was then essentially unemployed, two years earlier his income from a business of respondent (mother) had been approximately $60,000. Based on that prior income and the father's hopes for future employment, the parties agreed to his annual income and the corresponding child support amount. This agreement was later incorporated, but not merged, into a judgment of divorce. In 2007, after the father's attempts to obtain steady employment failed, he petitioned for a downward modification of child support. The Support Magistrate dismissed the petition for the father's failure to show a sufficient change in circumstances, but Family Court reversed that determination and reduced the amount of child support after finding a sufficient change in circumstances in the father's unsuccessful efforts to obtain employment and the depletion of his other financial resources. The mother appealed, arguing that because the father had been unemployed when he stipulated to the amount of child support, his continued unemployment did not constitute an unanticipated change in circumstances. The Appellate Division affirmed. It held that a parent's inability to secure new work after losing employment may constitute an unanticipated and unreasonable change of circumstances where the award of support was premised upon a particular amount of income. Although the father was not employed when the amount was agreed upon, the record showed that the child support amount was based upon his agreed-upon imputed income and his expectation that he would soon secure employment. He was only able to meet his support obligations, however, by exhausting the $35,000 distributive award that he had received upon the divorce.

Family Court's Production of its Own Exhibit and Then Relying On It In Disregard to Every Witness and All the Parties Was Improper

In Matter of Blaize F., --- N.Y.S.2d ----, 2010 WL 2196067 (N.Y.A.D. 3 Dept.)Family Court granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to extend the supervision of respondent. (See Matter of Blaize F., 64 AD3d 936 [2009]; Matter of Blaize F., 55 AD3d 974 [2008]; Matter of Blaize F., 50 AD3d 1182 [2008]; Matter of Blaize F., 48 AD3d 1007 [2008] ). Petitioner brought a proceeding to extend supervision regarding respondent's two stepdaughters and, in that petition, it also requested that respondent be granted unsupervised visitation with his son, Blaize F. At the ensuing hearing, both petitioner and the attorney for Blaize advocated for unsupervised visitation. Petitioner's witnesses unequivocally supported permitting respondent to have unsupervised visitation with Blaize and described in detail the positive interaction between respondent and Blaize as well as respondent's successful completion of pertinent programs. With no proof having been presented opposing unsupervised visitation, Family Court nonetheless produced and admitted into evidence its own exhibit, a Canadian study entitled "A Meta-Analysis of the Effectiveness of Treatment of Sexual Offenders: Risk, Need and Responsibility." Subsequently, in the closing statement, petitioner stated that it had erred in including Blaize in the petition and acknowledged that the petition should be dismissed as to him. However, Family Court rendered a decision (that included a lengthy quote from its exhibit) in which it granted the petition as to Blaize and extended the existing requirement for supervised visitation. The Appellate Division reversed as to Blaize. It pointed out that "Family Court is authorized to make successive extensions of supervision 'upon a hearing and for good cause shown' " (Family Ct Act 1054[b] ) it generally does not disturb such an extension "unless it lacks a sound basis in the record". All the witnesses and all the parties supported unsupervised visitation. Petitioner acknowledged that it should not have even brought the proceeding as to Blaize and agreed with respondent that the petition should be dismissed. Family Court's production of its own exhibit and then relying thereon in disregard to every witness and all the parties was improper (see generally People v. Arnold, 98 N.Y.2d 63, 67-69 [2002] ). The court's determination that the witnesses were unreliable and lacked credibility--one of whom it had characterized in an earlier matter involving these parties as "credible and highly reliable"–was unsupported by the record.

Defense of Ineffective Assistance of Counsel Available In Civil Contempt Proceedings

In Matter of Templeton, --- N.Y.S.2d ----, 2010 WL 2302373 (N.Y.A.D. 3 Dept.) Respondent ( father) allegedly sustained injuries in a car accident in May 2008 and, shortly thereafter, ceased making child support payments and sought downward modification of his child support obligation claiming that he was unable to work. Petitioner (mother) commenced an enforcement proceeding. A Support Magistrate found the father in willful violation and assessed arrears. Following a hearing before Family Court, the court did not find credible the father's contention that he could not work because of injuries related to the car accident. Family Court ordered, among other things, that the father reimburse the mother pursuant to Judiciary Law 773 for costs she had incurred in pursuing the violation, including her expense for private investigators as well as her lost wages and travel expenses to attend the hearing. The Appellate Divison accepted the father's contention that he did not receive the effective assistance of counsel. To succeed on his claim, he must demonstrate that, viewed in its entirety, his counsel did not provide meaningful representation ( Matter of Hurlburt v. Behr, 70 AD3d 1266, 1267 [2010]; Matter of Martin v. Martin, 46 AD3d 1243, 1246 [2007] ). Here, it was undisputed that the father received injuries in a car accident, and his sole defense to the willful violation proceeding was that he was unable to work because of the extent of his injuries. His counsel, despite repeated attempts, failed to procure certified medical records, which were apparently extensive. Hence, the father's medical records were not received into evidence and no other competent proof was presented regarding the father's medical condition. Family Court found the lack of such proof fatal to the father's defense. Under these circumstances, the court found merit to the father's ineffective assistance of counsel claim. Although this rendered academic the father's further contention regarding the penalty, the court noted that, in the event a willful violation is found following a new hearing, the specific remedies for a violation of a support order are set forth in Family Ct Act 454. The order and judgment were reversed, on the law and the matter remitted to the Family Court for further proceedings not inconsistent with the decision. Editors Note: In Matter of Martin v Martin, 46 A.D.3d 1243, 848 N.Y.S.2d 433 (3d Dept 2007) the parties were the parents of two children (born in 1990 and 1995). In 2002, petitioner (father) and respondent (mother) were divorced and stipulated to a joint custody arrangement, whereby the father would pay child support of $200 per week. In 2004, the parties each filed petitions on the same day in Family Court, the mother seeking a finding that the father had willfully violated the order of support and the father seeking a modification of his support obligation. In his petition, the father listed verbal agreements and health as the change in circumstances justifying modification. In June 2005, while the trial was in progress, the father filed a second petition seeking modification of child support based on his incarceration in the Albany County Jail. A three-day trial, covering all three petitions, was held before a Support Magistrate on January 11, 2005, February 4, 2005 and June 28, 2005. On the first day of trial, the father's attorney attempted to introduce medical records but, after the mother objected, the Support Magistrate refused to receive the records "at this time," apparently in the absence of proper authentication. The father testified that in the spring and summer of 2003 his business collapsed, he was diagnosed with an illness which crippled his ability to work until approximately January 2005 and, between September 2003 and May 2004, he lived with the mother and their children under an agreement that he would perform the duties of a "stay-at-home parent" in lieu of support payments. On the second day of trial a month later, the father attempted to introduce the testimony of his therapist who was apparently prepared to testify that during an addiction counseling session the parties had "agreed to have [the father] provide services instead of providing child support dollars." However, the mother objected to such testimony on the ground that it was privileged. The Support Magistrate adjourned the trial for research on the issue of whether the mother was entitled to assert a therapist/social worker-client privilege. Thereafter, by written decision, the Support Magistrate determined that the mother was involved in the counseling only for the purpose of assisting with the father's therapy and, therefore, the therapist would be permitted to testify as a fact witness regarding the alleged agreement. On the date of that decision, May 5, 2005, the Support Magistrate set June 28, 2005 as the next date for trial. On June 28, 2005, almost eight weeks after her decision, the Support Magistrate was prepared to accept the therapist's testimony. The father's attorney, however, reported to the court that the therapist was not available and requested that another date be set for the therapist's testimony or, in the alternative, that the mother consent to the receipt in evidence of the therapist's affidavit, which had been submitted previously in support of the father's earlier assertion that the therapist should be allowed to testify. The mother objected to both of these options, and the Support Magistrate agreed. The father's testimony resumed and it was revealed that he had recently been incarcerated on pending criminal charges. He also restated or elaborated on much of his earlier testimony regarding his health problems, work history, and the alleged agreement with the mother to temporarily suspend payments in return for his childcare assistance. The mother testified that the father had resided with her and the children at times and that she had attended therapy sessions with him, but she asserted that they had not entered into any agreement to suspend child support. After again denying the father's requests for an opportunity to call the therapist or introduce the therapist's affidavit, the Support Magistrate ruled from the bench dismissing both modification petitions based on the father's failure to establish a change in circumstances and finding that he had willfully violated a support order. In her ruling, the Support Magistrate noted that no medical evidence of the father's alleged inability to work due to diminished health was introduced, incarceration is not a basis to modify an order of support, and no credible evidence supported his claims regarding the alleged arrangement between the parties. She ultimately issued an order crediting various payments to the father, but finding that he willfully violated an order of support. Family Court subsequently affirmed the findings of the Support Magistrate and directed that, given the finding of willfulness, an award of counsel fees be determined. After a hearing, the Support Magistrate awarded $2,500 in counsel fees to the mother, which was then affirmed by Family Court. The Appellate Division rejected the father's contention that the Support Magistrate's refusal to adjourn the trial so that a key witness could be located amounted to an abuse of discretion and that the decision to not consider the therapist's affidavit in place of his testimony was error. " Here, it was clear that the father's inability to produce the therapist "resulted from his counsel's lack of due diligence in preparing for the hearing. Notably, his counsel conceded that he never spoke directly with the therapist-simply asserting that a letter was sent and it never came back so "he expected him to be there"and there was no indication in the record that any pretrial attempt was made to obtain a continuance or to reschedule. As for the refusal to admit the therapist's affidavit into evidence, the father failed to suggest any basis on which admission of that hearsay document would have been permissible. However, the court was persuaded by the father's ineffective assistance of counsel claim based upon his attorney's failure to present sufficient evidence regarding his medical condition and to ensure that a key witness was present at trial. Under Family Ct Act 262 (a) (vi), a person has the right to the assistance of counsel 'in any proceeding before the court in which an order or other determination is being sought to hold such person in contempt of the court or in willful violation of a previous order of the court'. The standard for effective assistance of counsel here is whether, viewed in its totality, the representation was meaningful and whether actual prejudice was suffered as a result of claimed deficiencies. In this case, the father's initial modification petition and his defense to the willful violation allegations turned on his health-related inability to work due to his treatment for a serious illness and an alleged agreement with the mother to suspend his support payments, and his counsel did not get important evidence admitted that would have advanced these assertions. Specifically, counsel failed to properly obtain authentication for the father's medical records, call any witnesses to testify as to the effects of the father's illness, subpoena the therapist, or otherwise ensure his availability as a witness on the trial date. Family Court made specific reference to the lack of medical evidence in its decision, finding that the father had not refuted the mother's prima facie showing of willfulness, and affirmed the specific finding that no credible proof was offered to support the father's assertions of an agreement between the parties-the precise issue on which the therapist was to testify. Had this proof been admitted into evidence, the father would have had independent verification for his assertions which may have relieved him of several months worth of support obligations and may have undermined the allegation of willfulness. Taken together, the omissions constituted a failure to meaningfully represent the father, and he was entitled to a new hearing on his initial modification petition and the mother's violation petition.

July 1, 2010

Second Department Disapproves of Requirement of Showing Existence of "Special Circumstances" Warranting Discovery from a Nonparty in Order to Successfully Oppose a Motion to Quash a Subpoena Duces Tecum Served on That Nonparty

In Kooper v Kooper, --- N.Y.S.2d ----, 2010 WL 1912142 (N.Y.A.D. 2 Dept.) the appeal considered the principles governing the discovery of documents from nonparties pursuant to CPLR 3101(a)(4). It provides that the party seeking disclosure must give notice stating "the circumstances or reasons such disclosure is sought or required" from the nonparty. The question before the court was whether a party must establish the existence of "special circumstances" warranting discovery from a nonparty in order to successfully oppose a motion to quash a subpoena duces tecum served on that nonparty? Justice Angiolillo, in the opinion for the court, noted that many of the cases of the Second Department continued to apply that standard after CPLR 3101(a)(4) was amended to remove the requirement that discovery from a nonparty be obtained only "where the court on motion determines that there are adequate special circumstances." and concluded: "We hereby disapprove the further application of the "special circumstances" standard in this context." On July 18, 2008, the defendant served subpoenas duces tecum on five nonparty financial institutions, demanding production of documents related to any accounts held by the plaintiff, and on July 21, 2008, the defendant served an amended subpoena on one of the five institutions. The following notice appeared on the face of each subpoena: "The circumstances or reasons said disclosure is sought or required are to identify and value certain marital property, which is material and necessary in the prosecution or defense of this action." Copies of the six subpoenas were served on the plaintiff. After the wife refused to withdraw the six subpoenas duces tecum served on nonparty financial institutions, the husband moved to quash the subpoenas, and the wife filed a cross-motion to compel the husband to comply with discovery demands, for an award of interim counsel fees, and to direct the husband to pay the wife one-half of the proceeds from the rental of the parties' vacation home. The Supreme Court granted the husband's motion to quash on the ground that the defendant had failed to tender a sufficient explanation why the discovery from nonparties was necessary and denied wife's cross-motion in its entirety. On appeal the Appellate Division noted that subsequent document production by three of the five nonparty financial institutions rendered part of defendant's appeal academic. It turned to defendant's contention that the Supreme Court improperly granted plaintiff's motion to quash the subpoenas she served on the two remaining nonparty financial institutions, American Express and Principal Trust Company, f/k/a Delaware Charter Guarantee & Trust Company. The court pointed out that disclosure in New York civil actions is guided by the principle of "full disclosure of all matter material and necessary in the prosecution or defense of an action." (CPLR 3101). The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" ( citing Allen v. Crowell-Collier Publ. Co., 21 N.Y.2d 403). The Court of Appeals' interpretation of "material and necessary" in Allen has been understood "to mean nothing more or less than 'relevant'. To withstand a challenge to a discovery request, therefore, the party seeking discovery must first satisfy the threshold requirement that the disclosure sought is "material and necessary," whether the request is directed to a party or non-party. If a request for discovery from a nonparty is challenged solely on the ground that it exceeds the permissible scope of matters material and necessary in the prosecution or defense of the action, a motion to quash is properly denied if that threshold requirement is satisfied, or properly granted if the discovery sought is not material and necessary. The Court held that in this action for a divorce and ancillary relief in which the parties seek, inter alia, the equitable distribution of marital assets, "the entire financial history of the marriage is open for examination," and "[broad pretrial disclosure enabling both spouses to obtain necessary information regarding the value and nature of the marital assets is deemed critical if the trial court is to properly distribute the marital assets." The two subpoenas at issue sought financial records including periodic statements for any accounts in the plaintiff's name for the time period of "January 1, 2002 to the present." The court found that this information was material and necessary as an aid to the parties in determining the value and nature of the marital assets and an aid to the trial court in properly distributing those assets. Since the defendant met the threshold requirement, an order quashing the subpoenas could not be premised on the ground that the requested disclosure was not material or necessary to the prosecution or defense of this action. Beyond the requirement of materiality and necessity which defines the scope of permissible discovery, a disclosure request directed to a nonparty implicates considerations in addition to those governing discovery from a party. The Court noted that CPLR 3101, entitled "Scope of Disclosure," sets forth general requirements applicable to all discovery. At one time, CPLR 3101 allowed disclosure as against a nonparty only "where the court on motion determines that there are adequate special circumstances. In 1984, the Legislature amended CPLR 3101(a)(4) to eliminate the "on motion" and "special circumstances" language, substituting therefor the requirement that such disclosure be obtained "upon notice stating the circumstances or reasons such disclosure is sought or required." The 1984 amendment, however, did not change the requirement that a party obtain "[a] court order upon a showing of special circumstances" when further disclosure is sought concerning the expected testimony of an expert witness; this is the sole remaining subsection with the "special circumstances" language. After the 1984 amendment, CPLR 3120, which specifically governs document production, continued to require a court order for discovery from a nonparty. Subdivision (b) of that Rule required the party seeking disclosure to obtain the order upon motion with notice to adverse parties and the nonparty from whom disclosure was sought. In 2002, the Legislature amended CPLR 3120, dispensing with the need to make a motion and requiring CPLR 3120, as amended in 2002, requires only service of a subpoena duces tecum for the production of documents in the custody and control of a nonparty witness. The 2002 amendment brought nonparty document production into line with the procedure for compelling a nonparty witness to produce documents during the nonparty's deposition, which requires service of a subpoena without a motion or court order. Justice Angiolillo noted that the Second Department has adhered to the view that a subpoena duces tecum served on a nonparty is "facially defective" and unenforceable if it neither contains, nor is accompanied by, a CPLR 3101(a)(4) notice stating the circumstances or reasons such disclosure is sought or required. However, it has indicated, in dicta, that such a facial defect might be remedied and in a case involving facially defective subpoenas that allegedly, dehors the record, were reissued with the required notice, it considered the merits of the showing in opposition to a motion to quash and found it lacking. The Second Department has not had occasion to consider whether a motion to quash for lack of the required notice may be successfully defeated upon an adequate showing of circumstances and reasons for the requested disclosure. In this case the two subpoenas at issue contained a notice with a statement of circumstances and reasons why the defendant sought the disclosure. The question was whether the "circumstances and reasons" proffered by the defendant were sufficient to withstand the plaintiff's motion to quash. The Court noted that after the 1984 amendment eliminating the "special circumstances" language, the departments of the Appellate Division differed in their interpretations of the "circumstances and reasons" requirement and the sufficiency of the showing necessary to withstand a challenge to disclosure from a nonparty. In 1988, the Second Department held, in a case involving a nonparty deposition, that the "special circumstances requirement survived the 1984 amendment to CPLR 3101(a)(4)". In light of the elimination from CPLR 3101(a)(4) in 1984 of the "special circumstances" language, the Second Department disapproved of further application of the "special circumstances" standard in its cases, except with respect to the limited area in which it remains in the statutory language, i.e., with regard to certain discovery from expert witnesses. It held that on a motion to quash a subpoena duces tecum or for a protective order, in assessing whether the circumstances or reasons for a particular demand warrant discovery from a nonparty, those circumstances and reasons need not be shown to be "special circumstances." Looking to the reasoning in its cases to find guidance with respect to the circumstances and reasons which it considered relevant to the inquiry with respect to discovery from a nonparty, the court noted that since Dioguardi, the Court has deemed a party's inability to obtain the requested disclosure from his or her adversary or from independent sources to be a significant factor in determining the propriety of discovery from a nonparty. A motion to quash is, thus, properly granted where the party issuing the subpoena has failed to show that the disclosure sought cannot be obtained from sources other than the nonparty, and properly denied when the party has shown that the evidence cannot be obtained from other sources. The cases have not exclusively relied on this consideration, however, and have weighed other circumstances which may be relevant in the context of the particular case in determining whether discovery from a nonparty is warranted such as a conflict in statements between the plaintiff and nonparty witness; unexplained discontinuance of the action against the witness, formerly a party; and previous inconsistencies in the nonparty's statements. The Court declined to set forth a comprehensive list of circumstances or reasons which would be deemed sufficient to warrant discovery from a nonparty in every case. Circumstances necessarily vary from case to case. The particular circumstances of each case must always weigh in the trial court's consideration of a discovery request and in our review of the trial court's exercise of its discretion. The Court emphasized that its cases have consistently adhered to the principle that "[more than mere relevance and materiality is necessary to warrant disclosure from a nonparty". Applying these principles to the case at hand, the Court found that the defendant proffered circumstances and reasons in her notice on the face of each subpoena which amounted to no more than a statement that the information would be relevant and material and necessary to the prosecution or defense of the action. In opposition to the plaintiff's motion to quash, the defendant failed to add to this showing, arguing only generally that neither the plaintiff nor the nonparty financial institutions had affirmatively shown prejudice or inconvenience. This proffer was insufficient in the context of this case. The defendant sought discovery from the nonparties prior to expiration of the plaintiff's time to respond to her discovery demands. The defendant conceded that she has since received the plaintiff's voluminous response to her demands, consisting of approximately 27,000 pages of documents. The defendant should have reviewed the material received from the plaintiff to ascertain whether the information sought from the various nonparties was supplied by the plaintiff in his discovery responses. Had that procedure been followed, it may have obviated the need for, or significantly narrowed and focused, the subpoenas served on the nonparties. Accordingly, as the defendant did not make a sufficient showing of the circumstances and reasons discovery from the nonparties was warranted, the Supreme Court providently exercised its discretion in granting the plaintiff's motion to quash the subpoenas served on American Express and Principal Trust Company, f/k/a Delaware Charter Guarantee & Trust Company. The court also found merit, however, in that branch of the defendant's cross motion which was for an award of an interim counsel fee. It held that given the significant disparity in the parties' financial circumstances, the Supreme Court should have granted the defendant's request for counsel fees and directed the plaintiff to pay the defendant an interim counsel fee in the sum of $100,000.

Nonmonied Spouse Not Required to Demonstrate a Likelihood of Success as a "Strict Predicate" to an Award of an Attorney's Fee for Appeal

In Cohen v Cohen, 900 N.Y.S.2d 460 (2 Dept, 2010) the defendant moved in the Supreme Court, pursuant to Domestic Relations Law 237(a), for an award of an attorney's fee and the costs associated with producing an appellate record, so that she could afford to perfect and prosecute three appeals relating to this matrimonial action. Supreme Court granted the defendant's motion and directed the plaintiff to pay the sum of $25,000 as a prospective attorney's fee, and to pay the costs of producing an appellate record. In addition, the Supreme Court awarded the defendant's attorney the sum of $3,000 as a fee for making the motion. The plaintiff moved for leave to reargue and, upon reargument, Supreme Court vacated its original order, finding that there was no reasonable ground to believe that the defendant would be successful on her appeals, and denied the defendant's motion in its entirety. The Appellate Division reversed the order made upon reargument. It held that Supreme Court erred in granting plaintiff's motion for leave to reargue, since the plaintiff failed to demonstrate that the Supreme Court overlooked or misapprehended the facts or law, or for some other reason mistakenly reached its earlier decision (see CPLR 2221[d]). It pointed out that Domestic Relations Law 237(a) permits an award of an attorney's fee and the costs of producing an appellate record so that a spouse may prosecute an appeal. An award of an attorney's fee will generally be warranted where there is a significant disparity in the financial circumstances of the parties" .The purpose of Domestic Relations Law 237(a) is to redress the economic disparity between the monied spouse and the non-monied spouse. In determining whether to award fees, the court should 'review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions. However, the nonmonied spouse is no longer required to demonstrate a likelihood of success as a "strict predicate" to an award of an attorney's fee. It found that an award of an attorney's fee and payment of the costs of producing an appellate record were appropriate in this case, given the significant economic disparity between the parties. The defendant was unemployed and had no independent source of income, while the plaintiff earned approximately $450,000 per year as a partner in a large law firm. Furthermore, the award of $3,000 to the defendant's attorney for making the motion for an award of appellate counsel fees was appropriate.

June 16, 2010

Family Court In New York Metropolitan Area Allows Internet Check in The Family Court in the New York Metropolitan area now allows attorneys to check in by the Internet rather than in person. An electronic check-in system has been introduced in Brooklyn, Manhattan, the Bronx, Staten Island, Queens and Westchester County. It can be accessed at http://www.nycourts.gov/familycourtcheckin/. The electronic check in system allows attorneys to list their schedule of appearances through the court system web site between 5 p.m. the night before they are due in court and 9:30 a.m. the day of their appearance. The instructions indicate that the system may not be used after 9:30 AM. After 9:30 AM, go to the parts to check in. This application is only for informing the court on the day of your appearances that you expect to be present at your scheduled appearances. If you will not be present you must contact the court in person or by fax or e-mail to the judge's court attorney.

Court of Appeals Holds that the Initial Determination of Whether a Particular Asset Is Marital or Separate Property Is a Question of Law, Subject to Plenary Review on Appeal, and DRL 236 Creates a Presumption That All Property, Unless Clearly Separate, Is Deemed Marital Property' and the Burden Rests with the Titled Spouse to Rebut That Presumption.

In Fields v Fields, \_\_NY3d \_\_\_, 6/11/2010 NYLJ 36, (col. 3) the Court of Appeals, in an opinion by Judge Graffeo, observed that, although the manner in which marital property is distributed falls within the discretion of the trial court, 'the initial determination of whether a particular asset is marital or separate property is a question of law, subject to plenary review on appeal' (DeJesus v. DeJesus, 90 NY2d 643, 647 [1997])." Here, the Court concluded that the value of the husband's one-half interest in the parties' residence, a Manhattan townhouse that the husband purchased during the marriage and where the parties had lived for nearly thirty years, was marital property and affirmed the order of the Appellate Division. At the outset Judge Graffeo set forth the applicable principals of law that applied to this case. She pointed out that Domestic Relations Law §236 defines 'marital property' as 'all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, and the definition of marital property includes a 'wide range' of tangible and intangible interests. She indicated that "it is telling that the Legislature chose to initially categorize all property, of whatever nature, acquired after parties marry as marital property." The Equitable Distribution Law 'recognizes that spouses have an equitable claim to things of value arising out of the marital relationship and classifies them as subject to distribution by focusing on the marital status of the parties at the time of acquisition. This marital property designation is in keeping with the fundamental purpose of the Equitable Distribution Law, the recognition of marriage as an economic partnership, in which 'both parties contribute as spouse, parent, wage earner or homemaker. The Legislature did provide for several exceptions to this general classification. Section 236 specifies that marital property does not include 'separate property' and the statute sets forth four categories of property that constitute separate property: '(1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse; (2) compensation for personal injuries; (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; (4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part'. When the Legislature enacted Domestic Relations Law §236, it sought 'to recognize the direct and indirect contributions of each spouse. Hence, the Court has stressed that marital property should be 'construed broadly in order to give effect to the ' economic partnership' concept of the marriage relationship'. By contrast, separate property, denoted as an exception to marital property, should be construed 'narrowly'. The structure of section 236 therefore creates a statutory presumption that 'all property, unless clearly separate, is deemed marital property' and the burden rests with the titled spouse to rebut that presumption. The Husband and the wife, who were 60 and 69 years old, respectively, were married in 1970 and had a son who was born in 1973. In 1978, the parties decided to purchase a home on the Upper West Side of Manhattan, selecting a five-story townhouse with ten apartments and a basement. The Wife agreed to the acquisition of the townhouse only if the husband consented to certain preconditions because she believed that working outside the home and caring for their son, together with maintaining the townhouse, would be too burdensome. Because of the wife's reticence, the husband decided to purchase the townhouse with his mother's assistance. The husband paid $130,000 for the townhouse, making a $30,000 down payment. The down payment came from funds the husband received from his grandparents--half in lieu of a bequest and half on loan, which his mother agreed to repay. The balance of the purchase price was paid through two mortgages held jointly by the husband and his mother. The Husband took title solely in his name but later conveyed a one-half interest in the building to his mother. From 1982 to 2001, the husband and his mother managed the townhouse as a formal partnership. They deposited rent proceeds into a partnership bank account and made mortgage payments from that account. But the partnership bank account was not used exclusively for the building's income and expenses; the husband acknowledged that he commingled marital funds in the account. In September 1978, husband and the Wife moved into the townhouse, initially residing in apartment 2. In 1979, the couple converted the basement into an apartment where they lived together for five months until the wife became ill and moved into apartment 3. In 1983, after apartment 3 was burglarized, the wife relocated to apartment 2. The husband remained in the basement apartment and the couple shared occasional meals until 1997. The husband paid rent to the partnership for the basement apartment until 2002; he used his income from employment to make rental payments. The Wife also paid rent using her wages while she was living in apartment 3. The husband 's mother and stepfather resided in the building as well and paid rent for three apartments that they combined into a single residence. The remaining apartments were leased to various tenants. and the Wife were continuously employed outside of the home, although they each took periods of parental leave to care for their son. The couple shared child care expenses and responsibilities as parents. The Husband commenced this divorce action in February 2005 and Supreme Court referred the matter to a Special Referee. After a hearing on issues of equitable distribution, the Referee found that both parties contributed to the long-term marriage, their son's upbringing and the townhouse. Included in his findings, the Special Referee determined that wife decorated the basement apartment, purchasing a carpet, a Formica counter top, couches, a linen closet, bathroom cabinets, a chandelier, curtains, and rugs. She installed a door in the basement apartment, wallpapered the bathroom and paid for flooring and a mirror for the foyer outside the apartment. The Wife also helped with the townhouse's day-to-day maintenance. She cleaned the basement apartment and purchased the vacuum used to clean the lobby. The wife cleaned the mailbox vestibule, swept the interior and exterior steps, periodically cleaned the sidewalk, raked and bagged leaves in the backyard and planted a garden. She also cleaned lobby windows and washed the curtains, polished the lobby mirror and, during times when the husband was away, disposed of the townhouses refuse. The Referee recommended that the husband 's one-half interest in the townhouse be classified as marital property, less the $30,000 down payment, which the Referee deemed as the husband 's separate property because those funds had been received from the husband 's grandparents. He also found that the husband 's one-half interest in the partnership bank account was marital property. The Referee awarded the Wife 35 percent of the value of all marital assets because he concluded that the Wife had made direct and indirect contributions to the townhouse, including services as a spouse and mother. Supreme Court confirmed the Referee's Report and directed entry of a judgment of divorce. The Appellate Division, with two Justices dissenting, affirmed (65 AD3d 297 [1st Dept 2009]). The court held that the husband 's interest in the townhouse, less the $30,000 down payment, was properly categorized as marital property subject to equitable distribution. The majority emphasized that the husband purchased the townhouse during the parties' marriage, that the couple continuously lived in the townhouse and raised their son in the home, and that the Wife made direct and indirect contributions to the upkeep of the townhouse. Rejecting the husband 's assertion that his interest in the townhouse should be viewed as separate property, the court explained that '[t]he fact that the marital residence can also be used to generate income... does not therefore reclassify marital property into separate property' (id. at 304). The husband argued in the Court of Appeals that his one-half interest in the townhouse was separate property because he owned and managed the building with his mother and because the Wife did not contribute to its purchase or its appreciation in value. The Court of Appeals disagreed and concluded that the value of the husband 's one-half interest in the townhouse was marital property subject to equitable distribution. Judge Graffeo wrote that this case involved the application of the well-settled statutory presumption that all property acquired by either spouse during the marriage, unless clearly separate, is deemed marital property (see DeJesus, 90 NY2d at 652). Here, the husband purchased the townhouse in 1978, approximately eight years into the marriage, and therefore, on the date of acquisition, the presumption of marital property arose. Even where one spouse contributed monies derived from separate property toward the acquisition of the marital residence, this has not precluded its classification as marital property where the other spouse made economic or other contributions to the residence and the marriage; the contributing spouse generally has received a credit for that contribution. Here, the property was purchased eight years into the parties' marriage with the intent that it would be used as the marital residence where the parties would live and raise their son. In fact, that is precisely what occurred, the parties resided in the home with their son and other family members for nearly 30 years. Thus, the statutory presumption that a residence acquired during the marriage is marital property clearly applied in this case. Once the statutory presumption was triggered, the burden shifted to the husband to rebut that presumption (DeJesus, 90 NY2d at 652). The Husband relied on the fact that he used monies derived from separate property, the $30,000 down payment, to acquire the townhouse. But the townhouse was not 'acquired in exchange for' the $30,000 down payment (Domestic Relations Law § 236 [B] [1] [d] [3]). Instead, the husband 's $30,000 separate property contribution covered only a fraction of the purchase price. While the down payment facilitated the acquisition, the use of a 'separate property' down payment does not, in and of itself, establish the property's character as separate property. The remaining $100,000 of the purchase price was paid through two mortgages and, despite the husband 's claim that he made mortgage payments solely from rental proceeds, he failed to substantiate that allegation. The husband testified that he commingled marital assets in the partnership bank account from which mortgage payments were made. Specifically, he acknowledged that he would sometimes deposit his paychecks, which were marital property, into the account. Funds from other sources of marital income were also placed into the account, such as the husband 's earnings from his tax preparation and video businesses and wife's paychecks. The fact that the husband would later transfer funds or give cash to the Wife does not alter the commingled nature of the funds. Finally, both the husband and the Wife paid rent to the partnership using income from their outside endeavors, which was a partial source of the mortgage payments. The Court found that the therefore failed to establish that the mortgages, which were used to pay the majority of the townhouse's purchase price, were paid using monies derived exclusively from separate property, much less that all of the expenses associated with the property were covered by segregated funds. Judge Graffeo noted that there is no single template that directs how courts are to distribute a marital asset that was acquired, in part or in whole, with separate property funds. In these situations, courts have usually given the spouse who made the separate property contribution a credit for such payment before determining how to equitably distribute the remaining value of the asset. In distributing any appreciation in value, courts may consider any of the factors listed in Domestic Relations Law §236 (B) (5) (d) or any other relevant considerations, including the respective contributions of each spouse and the effect of market forces. In this case, the courts below properly considered the spectrum and quantity of contributions made by each spouse to the management and maintenance of the townhouse and the extent to which market factors enhanced the value of the property. Under these circumstances, the Court declined to disturb the determination below that the husband failed to rebut the statutory presumption that his interest in the townhouse is marital property subject to equitable distribution and that the Wife was entitled to 35 percent of the husband 's interest in that asset. In reaching this conclusion, the Court emphasized that the husband purchased the townhouse eight years into the 35-year marriage and that the family maintained their living arrangement since 1978. It is not for the courts to dictate what type of lifestyle a 'normal' marriage should reflect or how married couples should structure their marital relationships. That the husband and the Wife in this case maintained separate apartments in the building did not change the character of the property from marital to separate, especially since they both made economic and noneconomic contributions to their marriage and the upbringing of their son. Many married couples sleep in different bedrooms for a variety of reasons and such arrangements do not affect the 'marital property' status of their homes if they divorce. The fact that the husband took title to his one-half interest in the townhouse in his name alone is irrelevant under the statute's express language, nor does the fact that the husband acquired title with his mother interfere with the marital character of his interest in the property. That portions of the townhouse were used as an income-generating business does not transform the building into separate property. The Wife's lack of an initial monetary investment and involvement in the management activities pertaining to the townhouse do not preclude a holding that the husband 's interest in the building is marital property. These were factors properly considered by the trial court in determining the extent of wife's distributive award (see Domestic Relations Law §236 [B] [5] [d]). Judge Graffeo pointed out that the dissent failed to recognize the statutory presumption that property acquired during a marriage is marital property; instead, the dissent begins with the assumption that the building was separate property at the time of its acquisition. The majority did not view the husband 's interest in the townhouse as property 'acquired in exchange for' his separate property contribution toward the down payment. Under the dissent's analysis, any time a married couple purchases a marital residence using 'separate' funds contributed by one spouse towards the down payment, the entirety of the marital home would be classified as separate property. This approach is not consistent with relevant precedent, does not heed Domestic Relations Law's statutory presumption in favor of marital property and is contrary to the very purpose underlying the statute in recognition of an 'economic partnership.' The husband also claimed that his one-half interest in the partnership bank account was separate property because the account was created solely to manage funds relating to the townhouse. But, he commingled marital assets in the partnership bank account and he could not sufficiently delineate any of the funds in the account as separate property . Thus, the husband's interest in the partnership bank account was marital property that should be allocated between the parties. The husband also challenged the trial court's distribution of the marital property, arguing that the court abused its discretion by awarding the Wife 35 percent of the value of the marital assets. The Court of Appeals disagreed. In recognizing marriage as an economic partnership, Domestic Relations Law §236 mandates that the equitable distribution of marital assets be based on the circumstances of the particular case and directs the courts to consider a number of statutory factors. (Domestic Relations Law 236 [B] [5] [d]). Absent an abuse of discretion, this Court may not disturb the trial court's distributive award. Here, Supreme Court issued a comprehensive decision addressing all relevant factors, including that the husband and the Wife were married for 35 years; that both maintained employment and made economic and noneconomic contributions to the marriage, their son and the townhouse; that they had equal parenting responsibilities; that the Wife did not invest in the purchase of the townhouse; and that the couple maintained separate units in the building for approximately 28 years. In light of these considerations, particularly the length of the marriage, the age of the parties and wife's contributions to the marriage, the Court could not conclude that Supreme Court abused its discretion in awarding the Wife 35 percent of the value of the husband 's half interest in the townhouse and other marital assets. Judge Smith dissented in an opinion in which Judge Read concurred.

June 1, 2010

US Supreme Court Holds “Ne Exeat Right” Granted by Chilean Law Was a "Right of Custody," under Hague Convention

In Abbott v Abbott, --- S.Ct. ----, 2010 WL 1946730 (U.S.) the U.S. Supreme Court, in an opinion by Justice Kennedy, held that father's ne exeat right granted by Chilean law was a "right of custody," under the Hague Convention, abrogating Croll v. Croll, 229 F.3d 133, Fawcett v. McRoberts, 326 F.3d 491, and Gonzalez v. Gutierrez, 311 F.3d 942.

Timothy Abbott and Jacquelyn Abbott married in England in 1992. He was a British citizen, and she was a citizen of the United States. Their son A.J. A. was born in 1995. The Abbotts moved to La Serena, Chile, in 2002. There was marital discord, and the parents separated in March 2003. The Chilean courts granted the mother daily care and control of the child, while awarding the father "direct and regular" visitation rights, including visitation every other weekend and for the whole month of February each year. Chilean law conferred upon Mr. Abbott what is commonly known as a ne exeat right: a right to consent before Ms. Abbott could take A.J. A. out of Chile. See Minors Law 16,618, art. 49 (Chile), (granting a ne exeat right to any parent with visitation rights). Justice Kennedy noted that in effect a ne exeat right imposes a duty on one parent that is a right in the other. After Mr. Abbott obtained a British passport for A.J. A., Ms. Abbott grew concerned that Mr. Abbott would take the boy to Britain. She sought and obtained a "ne exeat of the minor" order from the Chilean family court, prohibiting the boy from being taken out of Chile. In August 2005, while proceedings before the Chilean court were pending, the mother removed the boy from Chile without permission from either the father or the court. A private investigator located the mother and the child in Texas. In May 2006, Mr. Abbott filed an action in the United States District Court seeking an order requiring his son's return to Chile pursuant to the Convention and enforcement provisions of the ICARA.

In July 2007, after holding a bench trial during which only Mr. Abbott testified, the District Court denied relief. The court held that the father's ne exeat right did not constitute a right of custody under the Convention and, as a result, that the return remedy was not authorized. (495 F.Supp.2d 635, 640.)

The United States Court of Appeals for the Fifth Circuit affirmed on the same rationale. The court held the father possessed no rights of custody under the Convention because his ne exeat right was only "a veto right over his son's departure from Chile.". The court expressed substantial agreement with the Court of Appeals for the Second Circuit in Croll v. Croll, 229 F.3d 133 (2000). Relying on American dictionary definitions of "custody" and noting that ne exeat rights cannot be " 'actually exercised' " within the meaning of the Convention, Croll held that ne exeat rights are not rights of custody. A dissenting opinion in Croll was filed by then-Judge Sotomayor. The dissent maintained that a ne exeat right is a right of custody because it "provides a parent with decision making authority regarding a child's international relocation." The Courts of Appeals for the Fourth and Ninth Circuits adopted the conclusion of the Croll majority. See Fawcett v. McRoberts, 326 F.3d 491, 500 (C.A.4 2003); Gonzalez v. Gutierrez, 311 F.3d 942, 949 (C.A.9 2002). The Court of Appeals for the Eleventh Circuit followed the reasoning of the Croll dissent. Furnes v. Reeves, 362 F.3d 702, 720, n. 15 (2004). Certiorari was granted to resolve the conflict. 557 U.S. ----, 129 S.Ct. 2859, 174 L.Ed.2d 575 (2009).

Justice Kennedy noted that the provisions of the Convention of most relevance at the outset of the discussion are as follows: "Article 3: The removal or the retention of the child is to be considered wrongful where– "a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and "b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

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"Article 5: For the purposes of this Convention– "a 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence; "b 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

He also noted that the Convention's central operating feature is the return remedy. When a child under the age of 16 has been wrongfully removed or retained, the country to which the child has been brought must "order the return of the child forthwith," unless certain exceptions apply. A removal is "wrongful" where the child was removed in violation of "rights of custody." The Convention defines "rights of custody" to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Art. 5(a). A return remedy does not alter the pre--abduction allocation of custody rights but leaves custodial decisions to the courts of the country of habitual residence. Art. 19. The Convention also recognizes "rights of access," but offers no return remedy for a breach of those rights. Arts. 5(b), 21.

The parties agreed that the Convention applied to this dispute. A.J. A. was under 16 years old; he was a habitual resident of Chile; and both Chile and the United States are contracting states. The question was whether A.J. A. was "wrongfully removed" from Chile, in other words, whether he was removed in violation of a right of custody.

The Court's inquiry was shaped by the text of the Convention; the views of the United States Department of State; decisions addressing the meaning of "rights of custody" in courts of other contracting states; and the purposes of the Convention, which were all discussed in the opinion. After considering these sources, the Court determined that Mr. Abbott's ne exeat right is a right of custody under the Convention.

The Court consulted Chilean law to determine the content of Mr. Abbott's right, while following the Convention's text and structure to decide whether the right at issue is a "righ[t] of custody." Chilean law granted Mr. Abbott a joint right to decide his child's country of residence, otherwise known as a ne exeat right. Minors Law 16,618, art. 49 (Chile), provides that "[o]nce the court has decreed" that one of the parents has visitation rights, that parent's "authorization ... shall also be required" before the child may be taken out of the country, subject to court override only where authorization "cannot be granted or is denied without good reason." Mr. Abbott had "direct and regular" visitation rights and it followed from Chilean law, that he had a shared right to determine his son's country of residence under this provision.

To support the conclusion that Mr. Abbott's right under Chilean law gave him a joint right to decide his son's country of residence, it was notable that a Chilean agency had explained that Minors Law 16,618 is a "right to authorize the minors' exit" from chile and that this provision means that neither parent can "unilaterally" "establish the [child's] place of residence." (Citing Letter from Paula Strap Camus, Director General, Corporation of Judicial Assistance of the Region Metropolitana, to National Center for Missing and Exploited Children (Jan. 17, 2006), App. to Pet. for Cert. in Villegas Duran v. Arribada Beaumont, No. 08-775, pp. 35a-37a, cert. pending.)

Justice Kennedy stated that the Convention recognizes that custody rights can be decreed jointly or alone, see Art. 3(a); and Mr. Abbott's joint right to determine his son's country of residence was best classified as a joint right of custody, as the Convention defines that term. The Convention defines "rights of custody" to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Art. 5(a), . Mr. Abbott's ne exeat right gave him both the joint "right to determine the child's place of residence" and joint "rights relating to the care of the person of the child." Mr. Abbott's joint right to decide A.J. A.'s country of residence allowed him to "determine the child's place of residence." The Convention's protection of a parent's custodial "right to determine the child's place of residence" includes a ne exeat right. Mr. Abbott's joint right to determine A.J. A.'s country of residence also gives him "rights relating to the care of the person of the child." The Court of Appeals described Mr. Abbott's right to take part in making this decision as a mere "veto," 542 F.3d, at 1087; but even by that truncated description, the father had an essential role in deciding the boy's country of residence. For example, Mr. Abbott could condition his consent to a change in country on A.J. A.'s moving to a city outside Chile where Mr. Abbott could obtain an astronomy position, thus allowing the father to have continued contact with the boy.

Justice Kennedy indicated that it was “is beside the point” whether a ne exeat right does not fit within traditional notions of physical custody The Convention defines "rights of custody," and it is that definition that a court must consult. This uniform, text-based approach ensures international consistency in interpreting the Convention. It forecloses courts from relying on definitions of custody confined by local law usage, definitions that may undermine recognition of custodial arrangements in other countries or in different legal traditions, including the civil-law tradition. The Court of Appeals' conclusion that a breach of a ne exeat right does not give rise to a return remedy would render the Convention meaningless in many cases where it is most needed. Any suggestion that a ne exeat right is a "righ[t] of access" is illogical and atextual.

Ms. Abbott contended that the Chilean court's ne exeat order contained no parental consent provision and so awarded the father no rights, custodial or otherwise). Justice Kennedy responded that even a ne exeat order issued to protect a court's jurisdiction pending issuance of further decrees is consistent with allowing a parent to object to the child's removal from the country. The Court did not decide the status of ne exeat orders lacking parental consent provisions, however; for here the father relied on his rights under Minors Law 16,618. Mr. Abbott's rights derived not from the order but from Minors Law 16,618. That law requires the father's consent before the mother can remove the boy from Chile, subject only to the equitable power family courts retain to override any joint custodial arrangements in times of disagreement. Minors Law 16,618; The consent provision in Minors Law 16,618 confers upon the father the joint right to determine his child's country of residence. This is a right of custody under the Convention.

Justice Kennedy noted that the “Perez-Vera Report”, was cited by the parties and by Courts of Appeals that have considered this issue. (See 1980 Conference de La Haye de droit international prive, Enl & egrave; vement d'enfants, E. Perez-Vera, Explanatory Report (Perez-Vera Report or Report), in 3 Actes et Documents de la Quatorzi & egrave;me session, pp. 425- 473 (1982). Justice Kennedy stated that the Court need not decide whether this Report should be given greater weight than a scholarly commentary. He pointed out that the Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10503-10506 (1986) identifying the Report as the "official history" of the Convention and "a source of background on the meaning of the provisions of the Convention", indicates that the Report had not been approved by the Conference, and it is possible that, despite the Rapporter's [sic] efforts to remain objective, certain passages reflect a viewpoint which is in part subjective".

Justice Kennedy pointed out that while a parent possessing a ne exeat right has a right of custody and may seek a return remedy, a return order is not automatic. Return is not required if the abducting parent can establish that a Convention exception applies. One exception states return of the child is not required when "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Art. 13(b). If, for example, Ms. Abbott could demonstrate that returning to Chile would put her own safety at grave risk, the court could consider whether this is sufficient to show that the child too would suffer "psychological harm" or be placed "in an intolerable situation." The Convention also allows courts to decline to order removal if the child objects, if the child has reached a sufficient "age and degree of maturity at which it is appropriate to take account of its views." Art. 13(b). The proper interpretation and application of these and other exceptions are not before the Court. It stated that these matters may be addressed on remand. The judgment of the Court of Appeals was reversed, and the case was remanded for further proceedings consistent with the opinion.

Chief Judge Roberts and Justices Scalia, Ginsburg, Alito, and Sotomayor joined. Justice Stevens, with whom Justice Thomas and Justice Breyer joined, dissented in a separate opinion.

First Department Holds Prenuptial Agreement May Contain Enforceable Waiver of Interest in Retirement Assets.

In Strong v Dubin,--- N.Y.S.2d ----, 2010 WL 1905004 (N.Y.A.D. 1 Dept.) the First Department found, in an opinion by Justice Andrias, that the parties' prenuptial agreement contained an enforceable waiver of defendant wife's interest in the marital portion of plaintiff husband's retirement assets. In analyzing this issue it revisited its determination in Richards v. Richards (232 AD2d 303, 303 [1996]), where the court had found that under the Employee Retirement Income Security Act 'only a spouse can waive spousal rights to employee plan benefits, that a fiancee is not a spouse, and that such rights, therefore, cannot be effectively waived in a prenuptial agreement.'

After entering into a prenuptial agreement, the parties were married on April 6, 1992. In 2005, plaintiff commenced this matrimonial action and defendant moved to have the prenuptial agreement set aside. The trial court denied defendant's motion. Defendant appealed and the Appellate Division affirmed (48 AD3d 232, 233 [2008]), finding, among other things, that '[d] efendant admitted that she read the agreement before signing it, and while she did not understand the 'legalese' (i.e., statutory references), she did understand that the parties' properties would remain separate.

While the prior appeal was pending, defendant moved for a declaratory judgment, or alternatively, discovery and a hearing, on her entitlement to certain assets, including plaintiff's retirement assets and the marital apartment. The motion court, relying on Richards v. Richards (232 AD2d 303 [1995], supra), found that there was no enforceable waiver of defendant's interest in the retirement assets and granted defendant's motion to the extent of ordering discovery and, if necessary, a hearing to determine (a) the value of the marital-property portion of plaintiff's retirement funds, to be divided among the parties by the percentages laid out in the prenuptial agreement; and (b) whether marital assets were used to purchase the apartment, rendering it marital property. The Appellate Division modified finding that contrary to the motion court's holding, the prenuptial agreement contained a valid waiver of defendant's interest in the marital portion of plaintiff's retirement assets.

Judge Andrias pointed out that Prenuptial agreements addressing the ownership, division or distribution of property must be read in conjunction with Domestic Relations Law 236(B), which provides that, unless the parties agree otherwise in a validly executed prenuptial agreement pursuant to section 236(B)(3), upon dissolution of the marriage, marital property must be distributed equitably between the parties, while separate property shall remain separate (see Domestic Relations Law 236[B] [5][a]-[c]).

He also pointed out that as with all contracts, prenuptial agreements are construed in accord with the parties' intent, which is generally gleaned from what is expressed in their writing. The intent to override the rules of equitable distribution, whether by express waiver, or by specifically designating as separate property assets that would otherwise be considered marital property under New York law, must be clearly evidenced by the writing. When interpreting a prenuptial agreement 'the court should arrive at a construction that will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized. 'Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. A contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect.

The court found that the parties' prenuptial agreement, read as a whole and giving effect to all provisions, expressed an intent to opt out of the statutory scheme governing equitable distribution, which encompassed plaintiff's retirement funds, pointing to the recitals to the prenuptial agreement and the various provisions of the agreement, which indicated their intention that the property owned by each of them shall remain separate. The Court noted that the agreement reflected an intent to opt out of equitable distribution 'with respect to the division of all marital and separate property either now in existence or which is hereafter acquired ' which encompassed the retirement funds at issue. To hold otherwise would render the reference to property that is 'hereafter acquired' meaningless, leaving that provision without force or effect.

Justice Andrias wrote that insofar as the Court's determination in Richards v. Richards (232 AD2d 303 [1996]) would preclude the waiver of pension rights in the event of divorce in a prenuptial agreement, it should not be followed in that it failed to recognize the distinction between waivers of survivor benefits and other pension benefits. For purposes of equitable distribution, a waiver of any interest in a pension as marital property by an otherwise valid prenuptial agreement is not prohibited by The Employee Retirement Income Security Act of 1974 (ERISA) (29 USC 1001 et seq. ), as amended by the Retirement Equity Act of 1984 (REA) (citing Moor-Jankowski, 222 AD2d at 423; Edmonds v. Edmonds, 184 Misc 2d 928 [Sup Ct, Onondaga County 2000]).

May 18, 2010

Court of Appeals Reaffirms Alison D, and Rejects Parenthood by Equitable Estoppel But Recognizes Partner As Parent By Giving Full Faith and Credit to Vermont Civil Union

In Debra H v Janice R, \_\_\_NY3d\_\_\_, 2010 WL 1752168 (N.Y.) the Court of Appeals reaffirmed it holding in Alison D v. Virginia M. (77 N.Y.2d 651 [1991] ), that only a child's biological or adoptive parent has standing to seek visitation against the wishes of a fit custodial parent. It rejected the argument that Matter of Shondel J. v. Mark D. (7 N.Y.3d 320 [2006] ) endorsed a nonbiological or nonadoptive parent's right to invoke equitable estoppel to secure visitation or custody notwithstanding Alison D and held that Alison D., in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in the wake of domestic breakups. However, because Debra H. and Janice R. entered into a civil union in Vermont before M.R.'s birth, it reversed the Appellate Division's for reasons of comity, holding that Debra H. was M.R.'s parent under Vermont law and, as a matter of comity she was his parent under New York law as well, thereby conferring standing for her to seek visitation and custody in a best-interest hearing. The Court limited its ruling, which did not resolve whether New York extends comity to the civil union for other purposes. It decided only that New York will recognize parentage created by a civil union in Vermont.

Respondent Janice R. was the biological mother of M.R., a six-year old boy conceived through artificial insemination and born in December 2003. Janice R. and petitioner Debra H. met in 2002 and entered into a civil union in the State of Vermont in November 2003, the month before M.R.'s birth. Janice R. repeatedly rebuffed Debra H.'s requests to become M.R.'s second parent by means of adoption. After the relationship between Janice R. and Debra H. soured and they separated in the spring of 2006, Janice R. allowed Debra H. to have supervised visits with M.R. each week. After a while Janice R. began scaling back the visits and then cut off all communication between Debra H. and M.R. Debra H. brought a proceeding against Janice R. in Supreme Court for joint legal and physical custody of M.R., restoration of access and decisionmaking authority with respect to his upbringing, and appointment of an attorney for the child. At the hearing Debra H. acknowledged the decision in Matter of Alison D. v. Virginia M. (77 N.Y.2d 651 [1991] ), which held that only a child's biological or adoptive parent has standing to seek visitation against the wishes of a fit custodial parent, but contended that Matter of Shondel J. v. Mark D. (7 N.Y.3d 320 [2006] ) endorsed a nonbiological or nonadoptive parent's right to invoke equitable estoppel to secure visitation or custody notwithstanding Alison D. In support of thisinterpretation of our precedents, Debra H. emphasized that Shondel J. cited Jean Maby H. v. Joseph H. (246 A.D.2d 282, 676 N.Y.S.2d 677 [2d Dept 1998] ), a divorce proceeding in which the husband successfully invoked equitable estoppel to seek custody and visitation with a child born to the wife prior to the marriage, whom he neither fathered nor adopted. Debra H. also urged Supreme Court to consider the effect of the parties' civil union, and alluded to the Vermont Supreme Court's decision in Miller-Jenkins v. Miller-Jenkins (180 Vt. 441, 912 A.2d 951 [2006], cert denied 550 U.S. 918 [2007] ). Janice R. stressed that she had always spurned Debra H.'s entreaties to permit a second-parent adoption. She argued, among other things, that Alison D., which interpreted Domestic Relations Law 70, was not eroded or overruled by Shondel J.

Supreme Court ruled in Debra H.'s favor. The judge reasoned that "it [was] inconsistent to estop a nonbiological father from disclaiming paternity in order to avoid support obligations, but preclude a nonbiological parent from invoking [equitable estoppel] against the biological parent in order to maintain an established relationship with the child" since, in either event, "the court's primary concern should be furthering the best interests of the child". Supreme Court concluded that the facts alleged by Debra H., if true, "establish[ed] a prima facie basis for invoking the doctrine of equitable estoppel." In this regard, the judge considered the parties' civil union to be "a significant, though not necessarily a determinative, factor in [Debra H.'s] estoppel argument" because, under Vermont law, "parties to a civil union are given the same benefits, protections and responsibilities . . . as are granted to those in a marriage," which "includes the assumption that the birth of a child during a couple's legal union is 'extremely persuasive evidence of joint parentage' " ( quoting Miller-Jenkins, 180 Vt. at 466, 912 A.2d at 971). Because of the many contested facts, however, Supreme Court ordered another hearing to resolve whether Debra H. stood in loco parentis to M.R., as she asserted, and therefore possessed standing to seek visitation and custody.

Janice R. appealed, and obtained a stay of the equitable-estoppel hearing ordered by Supreme Court, pending disposition of the appeal. On April 9, 2009, the Appellate Division unanimously reversed on the law, vacated Supreme Court's order, denied the petition, and dismissed the proceeding. The court acknowledged that while the "record indicate[d] that [Debra H.] served as a loving and caring parental figure during the first 2 ½ years of [M.R.'s] life, she never legally adopted [him]" and, in accordance with Alison D ., "a party who is neither the biological nor the adoptive parent of a child lacks standing to seek custody or visitation rights under Domestic Relations Law 70" (61 AD3d 460, 461 [1st Dept 2009] ). The Appellate Division commented that, to the extent that denial of any right to equitable estoppel in this case might be considered inconsistent with Shondel J. and Jean Maby H., its own "reading of precedent was such that the doctrine of equitable estoppel may not be invoked where a party lacks standing to assert at least a right to visitation".

The Court of Appeals, in an opinion by Judge Read, reaffirmed its holding in Alison D., but reversed the Appellate Division's order in this case for reasons of comity in light of Debra H.'s status as M.R.'s parent under Vermont law. She pointed out that in Alison D., the court decided that DRL section 70 does not confer standing on a biological stranger to seek visitation with a child in the custody of a fit parent. Domestic Relations Law § 70(a) provides, in part, that "[w]here a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order.

The Court rejected Debra H.’s argument that the court should exercise what she characterized as longstanding common law and equitable powers to recognize the parentage of a nonbiological, nonadoptive individual on a theory of equitable estoppel and in the child's best interest. She asked the court to revisit and either distinguish or overrule Alison D., a case that closely resembled this one factually.

Judge Read explained that in that case Alison D., the former romantic partner of Virginia M., petitioned for visitation with Virginia M.'s child under Domestic Relations Law s 70. According to Alison D., she and Virginia M. established a relationship, began living together, and decided to have a child whom Virginia M. would conceive through artificial insemination. They agreed to share all parenting responsibilities, and continued to do so for the first two years of the child's life. When the child was about 2 ½ years old, however, the parties ended their relationship and Alison D. moved out of the family home. The parties adhered to a visitation schedule for a time, but Virginia M. at first restricted and eventually stopped Alison D.'s contact with the child. In that case the Court rejected Alison D.'s argument that she "acted as a 'de facto' parent or that she should be viewed as a parent 'by estoppel ' " (Alison D., 77 N.Y.2d at 656, 569 N.Y.S.2d 586, 572 N.E.2d 27). The rationale of the Court in Alison D was that "[t]raditionally, in this State it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child, even in situations where the nonparent has exercised some control over the child with the parents' consent ... To allow the courts to award visitation--a limited form of custody--to a third person would necessarily impair the parents' right to custody and control" (id. at 656-657, 569 N.Y.S.2d 586, 572 N.E.2d 27). Because Alison D. conceded that Virginia M. was a fit parent, she had no right to petition the court to displace the choice made by the fit parent in deciding what is in the child's best interests. The Court emphasized that where the Legislature deemed it appropriate, it gave other categories of persons standing to seek visitation and it gave the courts the power to determine whether an award of visitation would be in the child's best interests" . Thus, it refused to read the term parent in section 70 to include categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child. Judge Read noted that the in its decision in Alison D., the Court cited Matter of Bennett v. Jeffreys (40 N.Y.2d 543 [1976] ) and Matter of Ronald FF. v. Cindy GG. (70 N.Y.2d 141 [1987] ), cases which set forth bedrock principles of family law. In Bennett, the Court held that the State "may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances". Where extraordinary circumstances are present, the court determines custody based on the child's best interest. Concomitantly, in Ronald FF., it held that "[v]isitation rights may not be granted on the authority of the ... Bennett ... extraordinary circumstances rule, to a biological stranger where the child, born out of wedlock, is properly in the custody of his mother"; and further noted that the mother possessed a fundamental right "to choose those with whom her child associates," which the State may not "interfere with ... unless it shows some compelling State purpose which furthers the child's best interests".

Judge Read rejected Debra H.’s argument that the Court implicitly departed from Alison D. in Shondel J., where there were affirmed findings of fact that Mark D. had held himself out as the child's biological father, and had treated her as his daughter for the first 4 ½ years of her life. When Shondel J. sought orders of filiation and support, Mark D. requested DNA testing. The Family Court hearing examiner ordered genetic marker tests, which revealed that Mark D. was not the child's biological father. Shondel J. was an unusual case because "the process was inverted": "The procedure contemplated by sections 418(a) and 532(a) of the Family Court Act is that Family Court should consider paternity by estoppel before it decides whether to test for biological paternity". The Court held in Shondel J. that "a man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the child's detriment". The Court premised its decision on "our precedents, the affirmed findings of fact and the legislative recognition of paternity by estoppel". On the latter point, it highlighted that although paternity by estoppel for purposes of child support "originated in case law," it was "now secured by statute in New York"; namely, sections 418(a) and 532(a) of the Family Court Act.

Judge Read pointed out that the Court did not mention Alison D. in Shondel J. Nor did it intend to signal disaffection with Alison D. by citing Jean Maby H., one of a handful of lower court decisions applying equitable estoppel to custody and visitation proceedings despite Alison D., where it considered and explicitly rejected this approach. The holding in Shondel J. was limited to the context in which that case arose--the procedure for determining the paternity of an "alleged father." The Court saw no inconsistency in applying equitable estoppel to determine filiation for purposes of support, but not to create standing when visitation and custody are sought. The Legislature has drawn the distinction in sections 418(a) and 532(a) of the Family Court Act which direct the courts to take equitable estoppel into account before ordering paternity testing, while section 70 of the Domestic Relations Law does not even mention equitable estoppel.

The Court rejected Debra H’s request to replace the bright-line rule in Alison D. with a complicated and non-objective test for determining so-called functional or de facto parentage. The Court stated that the flexible type of rule championed by Debra H. threatens to trap single biological and adoptive parents and their children in a limbo of doubt. These parents could not possibly know for sure when another adult's level of involvement in family life might reach the tipping point and jeopardize their right to bring up their children without the unwanted participation of a third party. It found significant that the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by" the United States Supreme Court (citing Troxel v. Granville, 530 U.S. 57, 65 [2000] ). Courts must be sensible of "the traditional presumption that a fit parent will act in the best interest of his or her child" and protect the parent's "fundamental constitutional right to make decisions concerning the rearing of" that child. In the Courts view, this fundamental right entitled biological and adoptive parents to refuse to allow a second-parent adoption, as Janice R. did, even if they have permitted or encouraged another adult to become a virtual parent of the child, as Debra H. insisted was the case here.

The Court of Appeals agreed with Janice R. that any change in the meaning of "parent" under our law should come by way of legislative enactment rather than judicial revamping of precedent. Whether to expand the standing to seek visitation and/or custody beyond what sections 70, 71 and 72 of the Domestic Relations Law currently encompass remains a subject for the Legislature's consideration.

The Courts reaffirmation of Alison D. did not dispose of this case, because Debra H. and Janice R. entered into a civil union in Vermont before M.R.'s birth. This circumstance presented two issues: (1) whether Debra H. was M.R.'s parent under Vermont law and, (2) in the event that she is, whether as a matter of comity she is his parent under New York law as well, thereby conferring standing for her to seek visitation and custody in a best-interest hearing.

Judge Read explained that Vermont's civil union statute provides that parties to a civil union shall have "all the same benefits, protections and responsibilities under law ... as are granted to spouses in a marriage" (Vt Stat Ann tit 15, 1204[a] ); and that they shall enjoy the same rights "with respect to a child of whom either becomes the natural parent during the term of the civil union," as "those of a married couple" (Vt Stat Ann tit 15, 1204[f] ). In Miller-Jenkins, the Vermont Supreme Court relied upon these provisions to hold that a child born by artificial insemination to one partner of a civil union should be deemed the other partner's child under Vermont law for purposes of determining custodial rights following the civil union's dissolution (Miller-Jenkins, 180 Vt. at 464-465, 912 A.2d at 969-970). The court concluded that in the context of marriage, a child born by artificial insemination was deemed the child of the husband even absent a biological connection. In light of section 1204 and by parity of reasoning, the court decided that the same result pertained to the partner in the civil union with no biological connection to the child.

Judge Read noted that the potential legal ramifications in New York of entering into a civil union in Vermont were uncertain in 2003, and remain unsettled except to the extent the Court resolves the specific issue--i.e., parentage--presented by this case. Whatever her motivation or expectation, Janice R. chose to travel to Vermont to enter into a civil union with Debra H. In light of the Miller-Jenkins decision, the Court concluded that Debra H. was M.R.'s parentunder Vermont law as a result of that choice.

The next question was whether New York courts should accord comity to Vermont and recognize Debra H. as M.R.'s parent under New York law as well. Judge Read explained that the doctrine of comity "does not of its own force compel a particular course of action. Rather, it is an expression of one State's entirely voluntary decision to defer to the policy of another. Such a decision may be perceived as promoting uniformity of decision, as encouraging harmony among participants in a system of co-operative federalism, or as merely an expression of hope for reciprocal advantage in some future case in which the interests of the forum are more critical" (citing Ehrlich-Bober & Co. v. University of Houston, 49 N.Y.2d 574, 580 [1980]). New York's "determination of whether effect is to be given foreign legislation is made by comparing it to our own public policy; and our policy prevails in case of conflict". The court locates the public policy of the state in "the law as expressed in statute and judicial decision" and also considers "the prevailing attitudes of the community". Even in the case of a conflict, however, New York's public policy may yield "in the face of a strong assertion of interest by the other jurisdiction" . The Court noted that New York will accord comity to recognize parentage created by an adoption in a foreign nation (citing see L.M.B. v. E.R.J., 2010 N.Y. Slip Op 01345, \*4-5 [2010] [comity may be extended to a Cambodian adoption certificate so that an individual who is a child's father under Cambodian law is also his father under New York law] ). It saw no reason to withhold equivalent recognition where someone is a parent under a sister state's law. Janice R., as was her right as M .R.'s biological parent, did not agree to let Debra H. adopt M.R. But the availability of second-parent adoption to New Yorkers of the same sex negates any suggestion that recognition of parentage based on a Vermont civil union would conflict with our State's public policy. Nor would comity undermine the certainty that Alison D. promises biological and adoptive parents and their children: whether there has been a civil union in Vermont is as determinable as whether there has been a second-parent adoption. And both civil union and adoption require the biological or adoptive parent's legal consent, as opposed to the indeterminate implied consent featured in the various tests proposed to establish de facto or functional parentage. The Court commented that the decision does not lead to protracted litigation over standing and is consistent with New York's public policy by affording predictability to parents and children alike. The Court limited its ruling, which did not resolve whether New York extends comity to the civil union for other purposes. It decided only that New York will recognize parentage created by a civil union in Vermont. The determination that Debra H. was M.R.'s parent allowed her to seek visitation and custody at a best-interest hearing. There, she will have to establish facts demonstrating a relationship with M.R. that warrants an award in her favor.

The order of the Appellate Division was reversed, and the case remitted to Supreme Court for a best-interest hearing in accordance with this opinion.

Judge Graffeo concurred with Judge Read's analysis as well as the result she reached in a separate concurring opinion in which Judge Jones concurred. She wrote separately to explain why she believed the decision in Matter of Alison D. v. Virgina M. (77 N.Y.2d 651 [1991] ) must be reaffirmed. Judge Ciparick, concurred in the result in an opinion in which Chief Judge Lippman concurred. She agreed with the majority that principles of comity require the recognition of Debra H.'s parentage of M.R. because of the Vermont civil union between the parties, but wrote separately to set forth her view that Matter of Alison D. v. Virginia M. (77 N.Y.2d 651 [1991] should be overruled as outmoded and unworkable. Judge Smith concurred in the result in an opinion.

Court of Appeals Holds Equitable Estoppel May Be Used by Biological Father to Prevent Child's Mother from Asserting Biological Paternity, When Mother Has Acquiesced in the Development of a Close Relationship Between the Child and Another Father Figure, and it Would Be Detrimental to the Child's Interests to Disrupt That Relationship.

In Matter of Juanita A, v Kenneth Mark N., \_\_\_NY3d\_\_\_, 2010 WL 1752194 (N.Y.) the Court of Appeals, in an opinion by Judge Pigott, held that under the circumstances of this case, where another father-figure is present in the child's life, a biological father may assert an equitable estoppel defense in paternity and child support proceedings. The doctrine of equitable estoppel may be used by a purported biological father to prevent a child's mother from asserting biological paternity, when the mother has acquiesced in the development of a close relationship between the child and another father figure, and it would be detrimental to the child's interests to disrupt that relationship.

On June 25, 1994, the child, A., was born. At the time, mother was unmarried, but living with Raymond S., who was listed as A.'s father on her birth certificate. The Mother and Raymond had a previous child together and, after the birth of A., had another child. When A. was seven years old, during a family dispute, she became aware that Raymond may not be her biological father. At that time, the mother called Kenneth at his home in Florida and had him speak with A. The conversation lasted less than ten minutes, during which time A. asked questions concerning his physical characteristics. Kenneth's attempt to speak with A. a second time was rebuffed by Raymond, who warned Kenneth not to speak to A. again. Kenneth had no further contact with A. In 2006, when A. was approximately twelve years old, the mother filed a petition against Kenneth, seeking an order of filiation and child support. Kenneth appeared before Family Court for the first time by way of telephone. Kenneth agreed to the ordered genetic marker testing, which indicated a 99.99% probability that Kenneth was A.'s biological father. When the issue of equitable estoppel was raised by Kenneth, the Magistrate, lacking the authority to hear that issue, transferred the case to a Judge of the Family Court. That court, determining the issue on motion papers and oral argument, held that Kenneth was the father of A. and entered an order of filiation.

The Appellate Division affirmed, holding that the doctrine of equitable estoppel is applicable in paternity proceedings only where it is invoked to further the best interests of the child, and "generally is not available to a party seeking to disavow the allegation of parenthood for the purpose of avoiding child support" (63 AD3d 1662 [4th Dept 2009] ). Judge Pigott pointed out that in Shondel J. v. Mark D. (7 N.Y.3d 320 [2006] ), the Court set forth the law applicable to equitable estoppel in paternity and child support proceedings. The Court noted there that the "purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position." It concluded that the "paramount" concern in such cases "has been and continues to be the best interests of the child".

Judge Pigott stated that equitable estoppel has been used, as it was in Shondel J., to prevent a man from avoiding child support by claiming that he is not the child's biological father. In such a case, the man has represented himself to be the child's father and the child's best interests are served by a declaration of fatherhood. The doctrine in this way protects the status interests of a child in an already recognized and operative parent-child relationship. Here, Kenneth sought to invoke the doctrine against mother, who led Kenneth to form the reasonable belief that he was not a father and that Raymond was A .'s father. He argued that it was not in A.'s best interest to have her current, child-father relationship with Raymond interrupted.

At the time the petition was brought, A. was 12 years old and had lived in an intact family with Raymond and her mother. His name appeared on her birth certificate and he was the biological father of her older and younger siblings. For most of A.'s life, she referred to Raymond as father. Thus, Kenneth appropriately raised an issue as to whether it was in A.'s best interest to have someone besides Raymond declared her father this late in her childhood.

The Court concluded it was proper for him to assert a claim of estoppel to, among other things, protect the status of that parent-child relationship.

The Court disagreed with the Law Guardian's position that a person who has already been determined to be a child's biological father cannot raise an equitable estoppel argument. The doctrine has been used to prevent a biological father from asserting paternity rights when it would be detrimental to the child's interests to disrupt the child's close relationship with another father figure. The same best-interests considerations that justify estopping a biological father from asserting his paternity may justify preventing a mother from asserting it. Whether it is being used in the offensive posture to enforce rights or the defensive posture to prevent rights from being enforced, equitable estoppel is only to be used to protect the best interests of the child. Therefore, the Court held that the doctrine of equitable estoppel may be used by a purported biological father to prevent a child's mother from asserting biological paternity, when the mother has acquiesced in the development of a close relationship between the child and another father figure, and it would be detrimental to the child's interests to disrupt that relationship.

The Court concluded that a hearing was needed to decide the merits of Kenneth's claim. At that hearing, Raymond had to be joined as a necessary party, so that Family Court may consider the nature of his relationship with the child and make a proper determination of A.'s best interests. It remitted the matter to Family Court for such a hearing and determination.

In a footnote Judge Pigott pointed out that Family Court should have addressed the equitable estoppel issue prior to directing that Kenneth undergo genetic marker tests. The fact that testing was conducted, however, does not bar the court from thereafter deciding the estoppel issue, as Shondel itself held.

Court of Appeals Holds Family Court Has Subject Matter Jurisdiction to Adjudicate Support Petition Brought Pursuant to "UIFSA" by Biological Parent Seeking Child Support from Former Same-sex Partner.

In the Matter of H.M. v. E.T. \_\_\_NY3d\_\_\_, 48 opn 10 (2010) the Court of Appeals, in an opinion by Judge Ciparek, held that the Family Court has subject matter jurisdiction to adjudicate a support petition brought pursuant to the Uniform Interstate Family Support Act ("UIFSA") (Family Ct Act art 5-B) by a biological parent seeking child support from her former same-sex partner. The Court concluded that because H.M. asserted that E.T. was the child's parent, and was chargeable with the child's support, the case was within the Family Court's Article 4 jurisdiction. It did not decide whether it was also, as the Support Magistrate and the Appellate Division dissent concluded, within that Court's Article 5 jurisdiction. Nor did it decide the merits of H.M.'s support claim.

H.M. sought child support from E.T. According to H.M.'s allegations, which the court took as true for present purposes, the parties were involved in a romantic relationship in New York from 1989 through 1995, and cohabited during much, if not all, of that period. During the first year of their relationship, they planned to conceive and raise a child together, discussing available methods of conception, child-rearing practices, and whether the child would be raised as a sibling of E.T.'s children from a prior relationship. In 1993, after many failed attempts, H.M. became pregnant by artificial insemination. E.T. performed the procedure by which H.M. was inseminated.

H.M. gave birth to a son in September 1994. E.T. was present at the delivery and cut the umbilical cord, and the parties shared the expenses associated with the conception and birth of the child. After the child's birth, both parties participated in his care. However, four months after the child was born, E.T. ended the relationship. H.M., a Canadian citizen, moved into her parents' residence in Montreal with the child. An attempted reconciliation in 1997 failed, although E.T. continued to provide H.M. with gifts for the child and monetary contributions for the child's care at unspecified times after the parties' separation.

In 2006, H.M. filed an application in Ontario, Canada, seeking a declaration of parentage and an order of child support establishing monthly payments retroactive to the child's birth. Pursuant to the Uniform Interstate Family Support Act (UIFSA), H.M.'s application was transferred to Family Court, Rockland County.

At an appearance before a Family Court Support Magistrate, E.T. moved to dismiss the petition on jurisdictional grounds. The Support Magistrate dismissed the petition, agreeing with E.T. that no legal basis for jurisdiction existed. H.M. filed written objections to the Support Magistrate's order, and Family Court subsequently reversed the order of dismissal and ordered a hearing to determine whether E.T. should be equitably estopped from denying parentage and support obligations.

E.T. appealed. The Appellate Division, with two Justices dissenting, reversed and reinstated the Support Magistrate's order dismissing the petition for lack of subject matter jurisdiction (see Matter of H.M. v E.T., 65 AD3d 119 [1st Dept 2009]).

H.M. appealed as of right pursuant to CPLR 5601 (a) from the Appellate Division order reinstating the Support Magistrate's order of dismissal, and the Court of Appeals reversed.

Judge Ciparek pointed out that in 1996, the United States Congress required each state to enact the Uniform Interstate Family Support Act (UIFSA), to ensure uniformity in interstate actions for the establishment, enforcement, and modification of spousal and child support orders (see 42 USC § 666 [f]; Matter of Spencer v Spencer, 10 NY3d 60, 65 [2008]). New York adopted UIFSA in 1997, designating Family Court as our UIFSA "tribunal" (see Family Ct Act § 580-102 ["The family court is the tribunal of this state."]). With respect to the law to be applied by Family Court, UIFSA states that "Except as otherwise provided by this article, a responding tribunal of this state: (1) shall apply the procedural and substantive law, including the rules on choice of law, generally applicable to similar proceedings originating in this state and may exercise all powers and provide all remedies available in those proceedings; and (2) shall determine the duty of support and the amount payable in accordance with the law and support guidelines of this state"(Family Court Act § 580-303).

Article VI of the state Constitution establishes "[t]he family court of the state of New York" (NY Const., art VI, § 13 [a]). Family Court is a court of limited jurisdiction, constrained to exercise only those powers granted to it by the state Constitution or by statute (see Matter of Johna M.S. v Russell E.S., 10 NY3d 364, 366 [2008]). Thus, in addition to establishing Family Court, the Constitution enumerates the powers thereof. Among the "classes of actions and proceedings" over which the Constitution grants Family Court jurisdiction are proceedings to determine "the support of dependents except for support incidental to actions and proceedings in this state for marital separation, divorce, annulment of marriage or dissolution of marriage" (NY Const., art VI, § 13 [b] [4]).

Article 4 of the Family Court Act more specifically defines Family Court's role with respect to support. Family Court Act § 413 [1] [a] provides, among other things, that "the parents of a child under the age of twenty-one years are chargeable with the support of such child and, if possessed of sufficient means or able to earn such means, shall be required to pay for child support a fair and reasonable sum as the court may determine".

Judge Ciparek held that Family Court indisputably has jurisdiction to determine whether an individual parent, regardless of gender, is responsible for the support of a child (see Family Court Act § 413 [1] [a]). Moreover, statutory jurisdiction, as Family Court has, carries with it such ancillary jurisdiction as is necessary to fulfill the court's core function. Thus, because Family Court unquestionably has the subject matter jurisdiction to ascertain the support obligations of a female parent, Family Court also has the inherent authority to ascertain in certain cases whether a female respondent is, in fact, a child's parent. Article 4 of the Family Court Act establishes the public policy of the State in favor of obligating individuals, regardless of gender, to provide support for their children.

The dissent argued that such relief can be afforded only in Supreme Court, a court of original trial jurisdiction. However, family Court and Supreme Court have co-extensive authority, concurrent jurisdiction, in relation to child support matters. The Domestic Relations Law and the Family Court Act are identical in the establishment of statewide child support guidelines applicable to all child support proceedings, whether brought initially in Family Court or brought in Supreme Court as ancillary to a matrimonial action or custody proceeding. Moreover, under the guidelines adopted in New York as the Child Support Standards Act (L 1989, ch 567), both parents have an obligation to contribute to the economic well-being of their children. The relevant co-extensive statutes, Family Court Act § 413 and Domestic Relations Law § 240, are capable of being enforced in a fashion that does not disadvantage a litigant in Family Court.

The Court concluded that because H.M. asserted that E.T. was the child's parent, and was chargeable with the child's support, this case was within the Family Court's Article 4 jurisdiction. It did not decide whether it was also, as the Support Magistrate and the Appellate Division dissent concluded, within that Court's Article 5 jurisdiction. Nor did it decide the merits of H.M.'s support claim.

Chief Judge Lippman and Judges Smith and Pigott concurred, Judge Smith in a separate concurring opinion. Judge Jones dissented and voted to affirm in an opinion in which Judges Graffeo and Read concurred.

May 3, 2010

Court of Appeals Holds Egregious Misconduct Must Be an Exceptional Situation, Due to Outrageous or Conscience-shocking Conduct. Absent Those Circumstances, Liberal Discovery on Issues of Marital Fault, Should Not Ordinarily Be Permitted.

In Howard S v Lillian S, \_\_\_NY3d \_\_\_, No. 71 (2010) the plaintiff husband and defendant wife were married in May 1997. Defendant had one child from a previous relationship, who was later adopted by plaintiff. Three other children were born during the marriage The youngest child, born in 2004, was the product of an extramarital affair between defendant and an unidentified man. Plaintiff, unaware of his wife's infidelity until the child was over three years old, raised that child as his own. Plaintiff alleged that, although defendant knew or should have known that the child was not plaintiff's, she withheld that information from him. In 2007, defendant allegedly commenced another extramarital affair with an individual who was initially named as a co-respondent in this action. Plaintiff confronted defendant with his suspicions of her infidelity, but she denied that she was unfaithful. Defendant maintained that there were no grounds for divorce and the parties entered into the collaborative law process at her suggestion. Several months later, plaintiff obtained the results of a DNA marker test revealing that he was not the biological father of the youngest child. Soon thereafter, plaintiff commenced an action for divorce, based on cruel and inhuman treatment and adultery, and he interposed a cause of action for fraud. The fraud allegations stated that defendant represented that she had been faithful to plaintiff and that he continued to participate in the marriage in reliance upon those representations to his financial detriment. He sought to recover damages under the fraud claim based upon costs he incurred due to defendant's failure to disclose her adultery. Plaintiff sought equitable distribution of the marital property, alleging that the bulk of the property should be awarded to him due to defendant's egregious fault. Defendant moved to dismiss or sever the fraud cause of action and plaintiff cross-moved for liberal discovery relating to his fraud claim and to the issue of defendant's egregious fault for purposes of equitable distribution. Supreme Court denied defendant's motion to dismiss and found that the complaint stated a cause of action for fraud, but limited plaintiff's available damages to his pecuniary loss in the form of collaborative law process fees. The court also denied plaintiff's cross motion for liberal discovery, finding that defendant's actions did not rise to the level of egregious fault. A majority of the Appellate Division affirmed, agreeing that defendant's behavior did not constitute egregious fault such that it could be considered for purposes of equitable distribution (62 AD3d 187 [1st Dept 2009]). The Court further found that plaintiff could only pursue his claims of actual pecuniary loss under the fraud cause of action and rejected the claims for lost profits, child support and punitive damages.

The Court of Appeals, in an opinion by Judge Lippman, affirmed noting that Domestic Relations Law § 236 (B) (5) (d) sets forth the factors a court must consider when making an equitable distribution award. The statute does not specifically provide for consideration of marital fault, but does contain a catch-all provision that allows a court to consider "any other factor which the court shall expressly find to be just and proper" (Domestic Relations Law § 236 [B][5][d][14]). He explained that in O'Brien v O'Brien, 66 NY2d 576, 589-590 [1985] the Court had previously rejected the notion that marital fault is a "just and proper" factor for consideration, except in egregious cases which shock the conscience of the court, This rule is based, in part, upon the recognition that marriage is, among other things, an economic partnership and that the marital estate should be divided accordingly. In O’Brien the Court also observed that "fault will usually be difficult to assign and that introduction of the issue may involve the courts in time-consuming procedural maneuvers relating to collateral issues. Judge Lippman observed that although the Court of Appeals had not had occasion to further define egregious conduct, courts have agreed that adultery, on its own, does not ordinarily suffice. This makes sense because adultery is a ground for divorce, a basis for ending the marital relationship, not for altering the nature of the economic partnership.

The Court of Appeals held that, at a minimum, in order to have any significance at all, egregious conduct must consist of behavior that falls well outside the bounds of the basis for an ordinary divorce action. This is not to say that there can never be a situation where grounds for divorce and egregious conduct will overlap. However, it should be only a truly exceptional situation, due to outrageous or conscience-shocking conduct on the part of one spouse, that will require the court to consider whether to adjust the equitable distribution of the assets. The Court cited, as examples, a case involving the attempted bribery of the trial judge and a case involving a vicious assault of spouse in presence of the children. Absent these types of extreme circumstances, courts are not in the business of regulating how spouses treat one another. In a footnote the Court pointed out that to the extent that the Appellate Division opinion can be read to limit egregious conduct to behavior involving extreme violence, the definition should not be so restrictive.

The majority opinion appears to have adopted the rule of the First and Second Departments that a party is not entitled to discovery on the issue of fault. Judge Lippman pointed out that although CPLR 3101 provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action," Domestic Relations Law § 236 (B)(5)(d) is the specific statutory provision that governs equitable distribution in marital actions. He explained despite the general policy in favor of liberal discovery, the Court has interpreted the more specific section of the Domestic Relations Law to allow for consideration of marital fault in only a limited set of circumstances involving egregious conduct. In the absence of those circumstances, liberal discovery on issues of marital fault, at variance with O'Brien, should not ordinarily be permitted, though there may be exceptions in rare circumstances. The rationale behind this conclusion was that despite the availability of protective orders, if courts were to consider these matters on a case by case basis, there remains significant potential for abuse and harassment as a result of such discovery, as well as the possibility that parties will be induced to enter into disadvantageous settlements rather than litigate these types of intensely personal issues.

Judge Pigott dissented in an opinion. In his view it was premature to rule that wife's behavior did not, as a matter of law, constitute egregious misconduct for purpose of equitable distribution under the Domestic Relations Law. Therefore, the husband was entitled to discovery on his claim. He commented that the majority had implicitly accepted the view of the First and Second Departments that a party is required to make a motion for discovery on the issue of fault, and that he (citing Ginsberg v Ginsberg, 104 AD2d 482 [2d Dept 1984] and McMahan v McMahan, 100 AD2d 826 [1st Dept 1984] disagreed with this approach. He took the view of the Third and Fourth Departments which have no general prohibition of pretrial discovery on fault, relying on a liberal discovery rule (citing Nigro v Nigro, 121 AD2d 833 [3d Dept 1986] and Lemke v Lemke, 100 AD2d 735 [4th Dept 1984]). Under that rule, the husband would be entitled to discovery on the issue of fault, with the court overseeing and preventing abuses by asserting its protective power in CPLR 3101 authorizing the court to issue a protective order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

Physician's Office Records, Supported by the Statutory Foundations Set Forth in Cplr 4518(a), Are Admissible in Evidence as Business Records

In Matter of Fortunato v Murray, --- N.Y.S.2d ----, 2010 WL 1498628 (N.Y.A.D. 2 Dept.), the mother filed a petition claiming that the father was willfully in arrears of child support and the father filed a petition for a downward modification. At a hearing before a Support Magistrate, the father sought to admit certified medical records in support of his contention that he was medically disabled and could not work. The Support Magistrate refused to admit any medical records on the ground that such documents were hearsay. Thereafter the Support Magistrate dismissed the petition with prejudice. The Family Court denied his objection, stating "[the father] objects to the Support Magistrate's order on the grounds that the doctor's records dated July 8, 2008, which the Support Magistrate did not allow into evidence should have been admitted into evidence. The Support Magistrate denied petitioner's request based on the fact that the records are hearsay as they deprive respondent of the right to confront the witness. This Court agrees. The [father] refers to CPLR 4518(a). This section refers to business records, not doctors office records or notes." The Appellate Divison held that contrary to the Family Court's general statement of the applicable law, "[a] physician's office records, supported by the statutory foundations set forth in CPLR 4518(a), are admissible in evidence as business records. However, medical reports, as opposed to day-to-day business entries of a treating physician, are not admissible as business records where they contain the doctor's opinion or expert proof" (Matter of Bronstein-Becher v. Becher, 25 AD3d 796, 797 [internal quotation marks and citations omitted]; see Batts v. Rutrick, 298 A.D.2d 417; Napolitano v. Branks, 141 A.D.2d 705, 705-706). Moreover, a physician's office records "may be received as evidence despite the fact that a physician is available to testify as to the substance and contents of the records" (Napolitano v. Branks, 141 A.D.2d at 705-706; see Clarke v. New York City Tr. Auth., 174 A.D.2d 268). It remitted the matter to the Family Court, for a review by the Support Magistrate of the subject medical documents in light of and pursuant to the aforementioned standard as to admissibility.

April 16, 2010

Third Department Distinguishes Bush and Finds Exception to Rule That Absent Stipulation No Pendente Lite Counsel Fee Award Without A Hearing

In Lang v Lang, --- N.Y.S.2d ----, 2010 WL 1375285 (N.Y.A.D. 3 Dept.) the parties were married in 1991 and had two minor children. Plaintiff commenced a divorce action in 2003. In 2004 and 2007, plaintiff was awarded interim counsel fees from defendant in the total amount of $50,000. In May 2008, plaintiff moved, in part, seeking an upward modification of pendente lite maintenance and support and also sought an additional award of interim counsel fees in the amount of $50,000. Without conducting a hearing, Supreme Court denied all relief sought, but granted plaintiff interim counsel fees in the amount of $25,000. The Appellate Division affirmed. It noted that in support of her application, plaintiff argued that additional counsel fees were required as a result of defendant's lack of cooperation in providing discovery, and the additional amount would be sufficient to take the case through the trial of this action. Plaintiff provided Supreme Court with counsel's billing history. Defendant took issue with certain fees charged by plaintiff's counsel, and disagreed with the assertion that he failed to provide discovery. He asserted that plaintiff, who was college-educated, chose to remain underemployed. The Appellate Division found that in granting plaintiff an award of interim counsel fees of $25,000, without a hearing, Supreme Court was familiar with this "highly contentious action for divorce" since 2004, and the court had a sufficient evidentiary basis to assess plaintiff's application. The court distinguished this case from Bush v. Bush, 46 A.D.3d 1140, 1141 [2007], noting that the proof submitted concerning the financial circumstances of the parties was limited to written submissions by respective counsel. The record contained information regarding the assets and liabilities of each party, including affidavits from each party and their statements of net worth. In addition to the procedural posture of the case, Supreme Court acknowledged and took into consideration the disparity of income and financial circumstances of the parties--plaintiff's annual income was approximately $77,000 ($59,280 of which was child and spousal support) and defendant's annual income was $286,000. Supreme Court noted that plaintiff had expended more than $100,000 on counsel fees from an advance on her equitable distribution and from borrowed funds and, at the time of her application, owed her attorneys $19,000 in legal fees. The court also noted that defendant's net worth increased from $5 million when the action commenced to approximately $8 million in 2008. It held that while it is true that a final award of counsel fees cannot be made "without a hearing in the absence of a stipulation consenting to a determination upon written submissions" (citing Redgrave v. Redgrave, 304 A.D.2d 1062, 1066 [2003] ), the court pointed out that it had previously permitted interim counsel fee awards without a full evidentiary hearing (citing Dane v. Dane, 260 A.D.2d 817, 819 [1999] ). It found that the Third Department cases cited by defendant were inapposite since, procedurally, those cases did not contemplate any further proceedings to address claimed inequities with the interim award (citing Bush v. Bush, 46 A.D.3d at 1141, 848 N.Y.S.2d 721; Yarinsky v. Yarinsky, 2 A.D.3d 1108, 1110 [2003]; Redgrave v. Redgrave, 304 A.D.2d at 1066). Significantly, it indicated that in this case ”the ultimate amount of counsel fees awarded plaintiff, and if needed, any adjustment, can be resolved at the trial of the underlying divorce action (see Coons v. Coons, 161 A.D.2d 924, 924 [1990] )”. In keeping with the legislative intent of Domestic Relations Law 237(a) it concluded that, in this case, Supreme Court did not err in awarding interim counsel fees without first conducting an evidentiary hearing.

Child Support Order Improper Where Pro Se Respondent Does Not Receive Copy Child Support Standards Chart

In Matter of Grey v Whitford, --- N.Y.S.2d ----, 2010 WL 1173063 (N.Y.Fam.Ct.) Whitford objected to the child support determination of the support magistrate on the grounds that, among other things he did not, as a pro se litigant, receive a copy of the Child Support Standards Act chart prior to the entry of the child support order, pursuant to FCA 413[1][i]. The Family Court found that the record did not reveal that a copy of the child support standards chart was provided to Whitford. Family Court Act 413[1][i] provides that "[w]here either or both parties are unrepresented, the court shall not enter an order or judgment other than a temporary order pursuant to section two hundred thirty-seven of this article, that includes a provision for child support unless the unrepresented party or parties have received a copy of the child support standards chart promulgated by the commissioner of social services pursuant to subdivision two of section one hundred eleven-i of the social services law.” Notwithstanding that the application of FCA 413(1)(i) to the facts here creates an absurd result, because "Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute, the court was court constrained to grant the objection, by the clear language of the statute, even though the substance of the chart was reviewed on the record and no deviation therefrom was made. The order of support dated February 9, 2009 was converted to temporary order, and the matter was remanded to the support magistrate for a de novo support hearing.

Fourth Department Affirms Child Support Award Based Upon Mother’s Current Salary

In Eberhardt - Davis v Davis, --- N.Y.S.2d ----, 2010 WL 988486 (N.Y.A.D. 4 Dept.), the Appellate Division affirmed a judgment of divorce that directed the father to pay child support to the mother of $100 per week. It held that contrary to the contention of the father, Supreme Court properly determined that the parties had a shared custody arrangement and that he was the noncustodial parent. It pointed out that where "the parents' custodial arrangement splits the child's physical custody so that neither can be said to have physical custody of the child for a majority of the time, the parent having the greater pro rata share of the child support obligation should be identified as the noncustodial parent for the purpose of child support regardless of the labels employed by the parties. In light of the parties' agreement to maintain shared, equal custody of the child, the father failed to establish that he would maintain physical custody of the child for a majority of the time. The Appellate Division held that the court properly calculated the amount of child support and the parties' respective shares thereof. In calculating the parties' income for child support purposes, "a court is not required to use reported income but, rather, may base its determination on [the parties'] actual income and ability to support the child [ ]" (Stanley v. Hain, 38 A.D.3d 1205, 1206, 833 N.Y.S.2d 344). Inasmuch as the mother was receiving a higher salary at the time of the hearing than she had received the previous year, the court was not required to determine her income based on her federal tax return for the previous year.

April 1, 2010

Fourth Department Holds that In Calculating Income For Child Support Purposes Court is not required to use reported income but, rather, may base its determination on parties actual income and ability to support the child

In Eberhardt - Davis v Davis, --- N.Y.S.2d ----, 2010 WL 988486 (N.Y.A.D. 4 Dept.), the Appellate Division affirmed a judgment of divorce that directed the father to pay child support to the mother of $100 per week. It held that contrary to the contention of the father, Supreme Court properly determined that the parties had a shared custody arrangement and that he was the noncustodial parent. It pointed out that where "the parents' custodial arrangement splits the child's physical custody so that neither can be said to have physical custody of the child for a majority of the time, the parent having the greater pro rata share of the child support obligation should be identified as the noncustodial parent for the purpose of child support regardless of the labels employed by the parties. In light of the parties' agreement to maintain shared, equal custody of the child, the father failed to establish that he would maintain physical custody of the child for a majority of the time. The Appellate Division held that the court properly calculated the amount of child support and the parties' respective shares thereof. In calculating the parties' income for child support purposes, a court is not required to use reported income but, rather, may base its determination on the parties] actual income and ability to support the child (Stanley v. Hain, 38 A.D.3d 1205, 1206, 833 N.Y.S.2d 344). Inasmuch as the mother was receiving a higher salary at the time of the hearing than she had received the previous year, the court was not required to determine her income based on her federal tax return for the previous year.

Court Applies Rule of Johnson v Chapin and Reimburses Defendant for Excess Temporary Maintenance Payments from Sums Awarded to the Plaintiff in Equitable Distribution

In Poberesky v Poberesky, --- N.Y.S.2d ----, 2010 WL 910466 (N.Y.A.D. 1 Dept.) the Appellate Division increased the maintenance awarded from $3,700 per month to $4200 a month, and affirmed the direction that defendant be credited for pendente lite maintenance overpayments. It found that in concluding that "[t]here is no life style that must be maintained here," the Special Referee focused disproportionately on the parties' standard of living during the first eight years following their immigration to this country from the Soviet Union and failed to give due consideration to their standard of living during the seven years before the commencement of this action. It agreed with Supreme Court that the defendant should be reimbursed for any excess temporary maintenance payments from the sums awarded to the plaintiff in equitable distribution (citing Johnson v.. Chapin, 49 AD3d 348, 350 [2008] ["equity requires that the husband be awarded a distributive credit for ... the amount that his pendente lite support payments exceeded what he would have been required to pay consistent with the final maintenance award"] ). In determining defendant's maintenance obligations, the Special Referee properly considered his primary salary only, crediting defendant's testimony that he had worked overtime and taken on additional jobs to enable his daughter to graduate from private college without debt and thereafter continued to support her for a time, that he had planned to reduce his workload but was under financial pressure supporting two families, and that he was 60 years old. However, it found the monthly maintenance award of $3,700 inadequate and increase the award as indicated. It also held that Plaintiff, who was now eligible for Medicare, failed to identify any special medical needs requiring an additional award for medical expenses or health insurance coverage.

Not A Family Offense Where Child's Caretaker Uses Reasonable Physical Force for the Purpose of Discipline

In the Matter of Anthony J. v David K. 70 A.D.3d 1220, 895 N.Y.S.2d 245 (3 Dept 2010) Petitioner, who was incarcerated, was the biological father of two of the three children in this proceeding (born 1999 and 2001). Respondent Denise K. ( mother) was the mother of all three children and married to respondent David K. (stepfather), who was the biological father of the third child (born in 2006). Petitioner filed a family offense petition alleging that the stepfather had choked and assaulted one of petitioner's children (child). After a fact-finding hearing, Family Court found that the stepfather had acted "in a harassing manner" and that a family offense had occurred. The court issued an enabling order and an order of protection directing the stepfather to refrain from using corporal punishment directed toward petitioner's children. The stepfather, supported by the mother, appealed both orders. The Appellate Division reversed. It found that the stepfather and the mother testified without contradiction that, after being sent to his room, the child became upset and swore at the stepfather. In response, the stepfather "grabbed" or "squeezed" the child's shoulder and told him to stay in his room. The mother and stepfather testified that the child was not bruised or otherwise injured. The incident was investigated by local police, who filed no charges, and by the local Department of Social Services DSS), which concluded that there was no credible evidence of abuse or neglect Family Court made a factual finding that, after the child "got a little bit out of control [and] used some very inappropriate language," the stepfather "sought to try and get him under control by grabbing his shoulder." A respondent's conduct forms the basis for a family offense predicated on harassment in the second degree when "with intent to harass, annoy or alarm another person ... [he or she] strikes, shoves, kicks or otherwise subjects such other person to physical contact" (Penal Law 240.26[1]; see Family Ct. Act 812[1] ). The court found the proof of intent insufficient and, thus, petitioner did not meet his burden of establishing by a fair preponderance of the evidence that the stepfather's conduct constituted this offense (Family Ct. Act 832). The Court pointed out that a child's caretaker may use reasonable physical force for the purpose of discipline (see Penal Law 35.10[1]; see generally Matter of Collin H., 28 A.D.3d 806, 809, 812 N.Y.S.2d 702 [2006] ). The proof did not establish that the stepfather used unreasonable force or that his conduct was undertaken for any purpose other than discipline. In the absence of proof revealing the requisite intent, no family offense was established, and the order of protection was improperly issued.

Distributive Award Is Not a Money Judgement. Claim to Enforce it Is Governed by Six Year Statute of Limitations

In Woronoff v Woronoff, 70 A.D.3d 933, 894 N.Y.S.2d 529 (2 Dept 2010) the parties 1988 judgment provided that the plaintiff would pay the defendant $87,500 for her share of his businesses. In 1990 the parties entered into an agreement which modified this portion of the judgment so as to set forth a different payment schedule for the distributive award. This agreement was not reduced to a court order. The defendant never entered her distributive award as a money judgment nor sought to enforce collection thereof until 2007, when she obtained a clerk's judgment against the plaintiff. The plaintiff successfully moved to vacate the clerk's judgment and then commenced this action to recover damages for wrongful procurement of the clerk's judgment including the counsel fees he expended in moving to vacate the clerk's judgment. The defendant's first counterclaim asserted that the plaintiff had failed pay her the full amount of her distributive award for her share of his business, and alleged damages resulting therefrom in excess of $150,000. The Supreme Court granted the plaintiff's motion to dismiss this counterclaim as time-barred. The Appellate Division affirmed. It held that contrary to the defendant's contention, the distributive award made in the divorce judgment for her share of the plaintiff's business was not a "money judgment" subject to a 20-year statute of limitations. Instead, her claim to enforce this award was governed by the six-year statute of limitations set forth in CPLR 213(1) and (2). Since the defendant did not seek to enforce her distributive award nor reduce it to a money judgment until well beyond six years after the divorce judgment was entered, and even well beyond six years after the parties entered into their modification agreement, the Supreme Court properly dismissed this counterclaim as time-barred.

March 16, 2010

Third Department Declines to Follow its Previous Decisions Which Required Showing of Actual Prejudice as Part of the Ineffective Assistance of Counsel Analysis

In Matter of Hurlburt v Behr, --- N.Y.S.2d ----, 2010 WL 653028 (N.Y.A.D. 3 Dept.) after a hearing Family Court continued joint custody of the parties' child (born in 2005), but changed primary physical custody from respondent (mother) to petitioner (father). On appeal the mother contended that she received ineffective assistance of counsel. The Appellate Division stated that to establish this claim, the mother must demonstrate that she was deprived of meaningful representation as a result of her lawyer's deficiencies (see Matter of Hudson v. Hudson, 279 A.D.2d 659, 661-662 [2001]; Matter of Thompson v. Jones, 253 A.D.2d 989, 990 [1998] ). The Court first held that to the extent that previous decisions of the Court required a showing of actual prejudice as part of the ineffective assistance of counsel analysis under the N.Y. Constitution, it declined to follow them (citing e.g. People v. Roberts, 63 AD3d 1294, 1295 [2009]; Matter of Chaquill R., 55 AD3d 975, 977 [2008], lv denied 11 NY3d 715 [2009]; Matter of Matthew C., 227 A.D.2d 679 [1996]; People v. Frascatore, 200 A.D.2d 860, 861 [1994] ). The Court held that her allegations that her attorney should have objected to the amendment of the father's petition to seek custody, that he was unprepared to proceed with a hearing on custody, and that he should have called her and other witnesses on her behalf fail to meet that standard. In response to the amendment of the father's petition, the mother's attorney acknowledged that he was not surprised, and the record did not suggest that more time was needed to prepare for the hearing. Nor was it necessary for him to call the mother as a witness because the father had called her to testify and her attorney fully explored the relevant issues during cross-examination. In addition, on appeal, the mother conceded that her attorney's cross-examination of the father was well done and merely speculated that other evidence would have supplemented the case against a change in custody. As for the fact that the mother's attorney did not call the child's maternal grandmother or the caseworker who conducted home studies of the parties' residences, the mother failed to show that those omissions were the result of any neglect on counsel's part. While the child's grandmother likely could have provided relevant evidence, she had left the jurisdiction and was not available to testify. In any event, it was mere speculation that the grandmother's testimony would have been more helpful than harmful to the mother. Since the home study report found the mother's home to be in poor condition with half of it uninhabitable, a leaky roof, an unguarded wood stove and holes in its foundation, the court could not say that her attorney's decision not to call the caseworker to testify about the report was anything other than a legitimate trial strategy. The Court affirmed Family Court's decision to change physical custody of the child. The mother's neglect of this four-year-old child's dental health, which resulted in severe tooth decay requiring root canal procedures and caps, and the mother's absence from the child's home for roughly seven months prior to the hearing amounted to a substantial change in circumstances warranting Family Court to consider the child's best interests. The evidence established that the mother had neglected the child's dental health, was cavalier about the child's risk of being burned by an unguarded wood stove, and had allowed the child to be dirty and suffer from a burn, lice infestation and urinary tract infections. The mother had regularly entrusted the care of the child to her boyfriend and the grandmother, with the grandmother unilaterally denying the father visitation on some occasions. The mother was overwhelmed and could not properly care for all three of her children at the same time, and she had no viable plan to support them. There was evidence that the mother and her boyfriend spent significant amounts of money on cigarettes even though she was only occasionally employed and their household was on the brink of financial disaster. By contrast, the evidence showed that the father had a stable and suitable home and an adequate income, and he engaged in positive educational and social activities with the child.

Proper Vehicle to Challenge Child Support Agreement Provision is Plenary Action or Motion in Enforcement Proceeding.

In Barany v Barany, --- N.Y.S.2d ----, 2010 WL 733133 (N.Y.A.D. 2 Dept.) following almost seven years of marriage, the plaintiff and the defendant were divorced by judgment entered May 5, 2003, which incorporated, but did not merge with, the parties' separation agreement, whereby, among other things, the plaintiff retained custody of the parties' daughter, and the defendant was directed to pay child support in the sum of $250 per week. As a result of the defendant's allegedly sporadic payments of child support, the plaintiff moved to hold the defendant in contempt of court pursuant to Domestic Relations Law 245 and Judiciary Law 753, for his contumacious failure to pay child support, thus accumulating arrears of $52,155. Although the defendant failed to bring a cross motion or plenary action to vacate or set aside the separation agreement, he nonetheless asserted in his opposition papers that the separation agreement's child support provisions were invalid and unenforceable for failure to comply with the recitation requirements of the Child Support Standards Act. The Supreme Court denied the plaintiff's contempt motion and sua sponte vacated the child support provisions as unenforceable, setting the matter of child support, childcare expenses, and health care expenses down for a de novo hearing. The plaintiff unsuccessfully moved for reargument and renewal of that order. These appeals ensued from the resulting orders. The Appellate Division held that under the circumstances, the Supreme Court erred in sua sponte vacating the child support provisions of the parties' separation agreement. The proper vehicle for challenging the propriety of child support provisions contained in a separation agreement or stipulation of settlement incorporated, but not merged, into a divorce judgment is by either commencing a separate plenary "action in which such relief is sought in a cause of action" or by motion within the context of an enforcement proceeding. Here, the defendant neither interposed a cross motion, nor commenced a separateplenary action, seeking to vacate or set aside the purportedly unenforceable child support provisions. Thus, the Supreme Court erred in sua sponte vacating the child support provisions in the separation agreement and denying the plaintiff's contempt motion. The matter was remitted to the Supreme Court, for a determination of the plaintiff's motion on the merits.

Where Plaintiff Chose Not to Realize Profits from His Business That Were Earned Years Before the Commencement of Action, Deferred Fees Constituted Marital Property

In Wyser-Pratte v Wyser-Pratte, 68 A.D.3d 624, 892 N.Y.S.2d 334 (1 Dept, 2009) the Appellate Division found that the proportional division of the assets of plaintiff's brokerage and investment management companies was based on the lower court's assessment that when plaintiff married, he already possessed substantial business assets, as well as the skills that allowed him to earn the "extraordinary" income the parties enjoyed during the marriage. While defendant contributed to the further development of the business by, among other things, decorating and renovating the parties' residences to create impressive surroundings in which to entertain plaintiff's clients and potential investors, the 35% allocation was reasonable under all the circumstances. Supreme Court properly treated the couple's trading accounts with plaintiff's brokerage business as business assets. The accounts were managed solely by plaintiff, who invested the funds in a manner intended to improve his companies' returns. As such, the accounts were an integral part of the business. However, it disagreed with Supreme Court's treatment of the deferred incentive fees owed to the investment management company as business assets subject to the 65%/35% division, and modified accordingly to equalize each party's share of this item at 50%. Although these fees, which totaled $31,020,400, were earned by plaintiff's company for managing a hedge fund during 1996 through 2000, plaintiff caused the company to defer receipt of payment from the fund, and they remained unpaid. Upon their payment to the company, which was a Subchapter S corporation, the fees would be taxable to plaintiff as income, and as plaintiff acknowledged, he deferred their receipt to postpone paying personal income tax. Plaintiff also claimed that the deferral was intended to benefit the fund's performance by increasing the amount available for investment. However, under the circumstances, where plaintiff chose not to realize profits from his business that were earned years before the commencement of this action, the deferred fees constituted marital property to be divided equally. The Supreme Court correctly recognized that defendant's share of the deferred fees had to be reduced by 48.77%, which the parties stipulated would be the applicable tax rate for the fees. These incentive fees were not intangible assets whose valuation depended on the occurrence of a contingent event; rather, they constitute earned income in a definite amount whose receipt will lead to certain tax liability. Accordingly, in connection with the deferred fees, defendant was awarded 50% of their post-tax value of $15,896,135, which equals $7,948,067, or an increase of $2,384,420 from the lower court's award of $5,563,647. The Supreme Court rejected defendant's claim that a $1 million note on the couple's Bedford property was a fiction after weighing the credibility of conflicting testimony, and accordingly reduced the in-kind distribution to plaintiff by the amount of the note. It was also reasonable for the court to take into account that defendant's father prepared the note, yet she did not call him to testify. The Supreme Court appropriately concluded that defendant had only presented evidence that plaintiff had used $74,000 of marital property to satisfy premarital tax liens, and so denied her claim that he had used greater sums. While plaintiff had deposited sale proceeds of separately owned properties into the couple's brokerage accounts, from which other marital assets were purchased, the court appropriately credited him for the purchase price (but not the increased sale value) of these separate properties (see Domestic Relations Law s 236[B][5][d][13]). The Appellate Division found that it was reasonable for Supreme Court to find that the value of certain artwork would be shared equally. While the Supreme Court rejected plaintiff's testimony that this art belonged to a third party, there was no credible evidence that plaintiff had acted improperly so as to justify an unequal award. Moreover, defendant offered no proof of her claim that the artwork was worth more than the court's valuation. It was reasonable for Supreme Court to deny defendant's request for counsel fees since the equitable distribution would provide her with adequate funds to pay her attorney. The court's denial of prejudgment interest under CPLR 5001 recognized that plaintiff had been paying pendente lite maintenance totaling more than $3 million, and was within its discretion. While interest from the decision to the entry of final judgment is mandatory (CPLR 5002), the court continued the pendente lite award in lieu of interest. Since defendant conceded that the judgment awarded her $17,645 more than the court intended, it reduced the increased judgment to her by that amount.

Court Properly Imputed Income Based on Evidence Husbands Businesses Paid for Virtually All Personal Expenses

In Beroza v Hendler, --- N.Y.S.2d ----, 2010 WL 733036 (N.Y.A.D. 2 Dept.) at the time of the parties' marriage on April 21, 1990, the plaintiff was a licensed veterinarian who specialized in the treatment of horses, and the defendant was a licensed anesthesiologist at the Long Island Jewish Medical Center. Throughout the marriage, the defendant worked full-time and the plaintiff operated his private veterinary practice and a related business which boarded horses and held polo matches on a five-acre property in Huntington Station. The plaintiff purchased this property before the marriage. At the beginning of their marriage, the parties agreed that they would save the defendant's income for a down payment on a home, and rely on the plaintiff's income to pay their expenses through one or both of his businesses. In 1993 the defendant and her mother purchased a home in Laurel Hollow in which the parties lived for the duration of the marriage. The defendant and her mother held title as joint tenants with the right of survivorship, for the ostensible purpose of shielding the home from the husband's potential creditors. The defendant and her mother assumed a $300,000 mortgage to purchase the home, which the defendant paid throughout the marriage, and satisfied during the pendency of the action with a final payment of $30,248. At the time the plaintiff commenced this action for divorce on October 12, 2001, the parties had a son who was approximately 4 ½ years old, and twins who were approximately 18 months old. After trial, the parties were divorced by judgment dated August 13, 2008, which, inter alia, directed the plaintiff to pay monthly child support of $4,833.33; awarded the plaintiff one half of the defendant's one half-interest in the marital residence after crediting the defendant with certain sums and one half of $440,000, which the defendant transferred to the children's custodial accounts without the plaintiff's permission, awarded the defendant 25% of the appreciated value of the plaintiff's veterinary practice and the related business, declined to award the plaintiff a percentage of the defendant's increased earnings, and declined to award the plaintiff a 50% credit for unaccounted-for funds in the joint accounts the defendant held with her mother at Chase Bank, deposited from October 14, 1997, to October 12, 2001. For purposes of its child support award, the Supreme Court imputed income to the plaintiff in the sum of $259,100. The Appellate Division held that the plaintiff’s challenges to this imputation was without merit. In determining a party's child support obligation, a court need not rely upon the party's ... account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential. The Supreme Court properly imputed an annual income to the plaintiff based, inter alia, on undisputed evidence that his businesses paid for virtually all of his personal expenses, so that his actual earnings greatly exceeded the amount of income which he reported on his tax returns. However, in determining the amount of child support, the Supreme Court failed to set forth the parties' pro rata shares of child support, and to adequately explain the application of the "precisely articulated, three-step method for determining child support" pursuant to the Child Support Standards Act, so it remitted the matter to the Supreme Court, for a recalculation of the plaintiff's child support obligation. The Appellate Division held that Supreme Court properly determined that the plaintiff was entitled to one half of the defendant's half-interest in the marital residence, which was marital property and subject to equitable distribution. However, the Supreme Court erred in deducting the amount of the outstanding mortgage from the stipulated gross value of the home to determine the available amount for equitable distribution since the mortgage was already satisfied at the time of distribution, and the Supreme Court additionally credited the defendant for one half the amount of the $30,248 payment. The Supreme Court also erred in determining the amount of marital funds which was subject to equitable distribution with respect to transfers the defendant made from her personal bank account into the children's custodial accounts without the plaintiff's permission. The evidence conclusively established that the defendant transferred the sum of $605,848 in marital funds.

March 1, 2010

Agreement Is Not Unconscionable Merely Because, in Retrospect, Some of its Provisions Were Improvident or One-sided

In Label v Label--- N.Y.S.2d ----, 2010 WL 552606 (N.Y.A.D. 2 Dept.) in 2004, the plaintiff wife commenced an action for a divorce and she retained an expert evaluator to value the husband's business. On January 12, 2007, the expert issued a "preliminary appraisal" estimating the value of the business as of 2004 to be $1,042,890. The expert acknowledged that since discovery was incomplete, he had not been able to evaluate the "intangible value or goodwill" of the business. In August 2007, the parties entered into an oral stipulation of settlement on the record, which, inter alia, settled the custody and visitation issues between the parties, awarded the wife the marital residence, durational maintenance, child support, and a cash distributive award of $120,000, and provided that the wife waived equitable distribution of the husband's ownership interest in his business. In April 2008, after the wife surreptitiously discovered a 2007 offer by the husband's business partner to purchase the husband's share of the business for the sum of $1,820,000, the expert completed a second appraisal of the business at the wife's request, whereupon he assigned a value of $3,640,000 to the business as of 2004. Based on this new information, the wife moved to vacate so much of the stipulation of settlement as provided that she waived equitable distribution of the husband's ownership interest in the business as having been induced by fraud.The Supreme Court granted the motion. The Appellate Division reversed. It held that an agreement between spouses which is fair on its face will be enforced according to its terms unless there is proof of fraud, duress, overreaching, or unconscionability (Christian v. Christian, 42 N.Y.2d 63, 73). However, an agreement is not unconscionable merely because, in retrospect, some of its provisions were improvident or one-sided. Supreme Court erred in partially vacating the stipulation of settlement. The wife was represented by independent counsel and received meaningful and bargained-for benefits under the agreement, including generous maintenance and equitable distribution, based on the financial information made available to the wife's independent accountant and legal counsel, who negotiated on her behalf over the course of several months. Although the husband retained business property which was apparently now substantially more valuable than it was appraised for at the time of the agreement, courts will not set aside an agreement on the ground of unconscionability simply because it might have been improvident' " or one-sided. The wife failed to demonstrate that the agreement, which was fair on its face, was the result of fraud. She was fully aware of the parties' assets, cognizant that the expert evaluation of the business was preliminary and had not assessed goodwill, and she waived further discovery upon entering into a stipulation of settlement without a final independent evaluation. Under these circumstances, the husband's failure to disclose the 2007 offer did not render the stipulation of settlement so patently unfair as to require its vacatur. Accordingly, the court should have denied the wife's motion to vacate so much of the stipulation of settlement as provided that she waived equitable distribution of the husband's ownership interest in his business.

Husbands Manner of Engaging in Sexual Relations Deemed Cruel and Inhuman Treatment

In Kung v Kung, 69 A.D.3d 1295, 893 N.Y.S.2d 391 (3 Dept, 2010) the parties were married in May 1991 and had two children. In September 2007, plaintiff commenced this action for divorce. The evidence adduced at trial established that during the five years prior to the commencement of this action, defendant would normally come home after 1:00 A.M., many times intoxicated, from the restaurant he managed and wake up plaintiff insisting that they have sexual relations against her wishes. According to plaintiff, if she refused, defendant would begin yelling and would go "ahead with it anyway." Defendant's conduct continued despite plaintiff resorting to sleeping on the couch for over a year. Plaintiff testified that defendant's conduct, as well as the overall demeaning manner in which he treated her, made her feel scared, disrespected and nervous. She also claimed to suffer from sleeplessness and headaches. Furthermore, plaintiff testified that defendant came home on June 21, 2006 smelling of alcohol and again insisted on having sexual relations. According to plaintiff, when she refused, defendant became upset. When he continued to persist, plaintiff bit him in order to get away. She indicated that he then pushed her causing her to hit her head on the coffee table. Plaintiff then called the police. Although defendant denied some of plaintiff's allegations, he does not deny the manner in which he routinely engaged in sexual relations with plaintiff, explaining that plaintiff never said "no," either in English or their native language. Rather, she would cross her arms and put a pillow over her head while he continued to have sexual relations with her. The Appellate Division concluded that there was sufficient basis for Supreme Court's determination that defendant engaged in a course of conduct that endangered plaintiff's mental well-being rendering it improper for her to cohabit with him. Furthermore, a finding of cruel and inhuman treatment is not negated by plaintiff's continued residence in the marital home, given her inability to speak English, the presence of her daughters at the house and her total reliance on defendant for financial assistance. Nor did the lack of medical proof require dismissal under the particular facts of this case.

Where There Is Inconsistency Between Specific Provision and General Provision of a Contract, Specific Provision Controls

In Andersen v Andersen, 69 A.D.3d 773, 892 N.Y.S.2d 553 (2 Dept, 2010) plaintiff former husband and the defendant former wife divorced after 30 years of marriage. To settle their matrimonial action, they signed a stipulation of settlement, section 14 thereof providing for the equitable distribution of marital property. Section 14(a) of the stipulation provided that "[a]ll of the personalty in the possession of the Husband, including bank accounts, Bonds, and/or Individual Retirement Accounts, Annuity contracts, any pension rights he may have, now or in the future, his personal effects and clothing, shall be deemed the Husband's property, pursuant to a distribution of marital property and/or designation of separate property". However, section 14(f) thereof provided that "[a]ll pension rights that the husband has acquired with the Port Washington School District, including any defined benefit plan, 457K, or separate annuity, during the marriage are to be divided equally by a Qualified Domestic Relations Order, to be prepared by the wife's attorney, pursuant to the 'Maj[a]uskas' formula." The plaintiff brought an action, inter alia, to declare section 14(f) null and void, arguing that it was in conflict with section 14(a) and that he did not intend for his pension to be considered in the division of marital property. After a hearing, the Supreme Court found that section 14(f) of the agreement should remain in full force and effect. The judgment appealed from declared that section 14(f) of the stipulation of settlement remains in full force and effect as an accurate reflection of the parties' intent. The Appellate Division affirmed. It held that a stipulation of settlement which is incorporated but not merged into a judgment of divorce retains the character of an independent contract and survives as a basis for suit. As such, it is a subject to general principles of contract construction. Where there is an inconsistency between a specific provision and a general provision of a contract, the specific provision controls. Here, the Supreme Court properly found that section 14(a) of the stipulation was a general provision, while section 14(f) was a specific provision, which accurately reflected the parties' intent, and therefore, remained in full force and effect.

Judgment Which Is Paid and Satisfied of Record Ceases to Have Any Existence

In Samuel v Samuel, 69 A.D.3d 835, 893 N.Y.S.2d 250, (2 Dept 2010) the Appellate Division pointed out that a judgment which is paid and satisfied of record ceases to have any existence since a defendant, by paying the amount due, extinguishes the judgment and the obligation thereunder. Here, after extensive negotiations between the parties, the defendant signed a stipulation of settlement, which stated, in relevant part: "The parties acknowledge that the [defendant] owes the [plaintiff] temporary support and maintenance arrears pursuant to the pendente lite Order ...Upon the execution of the Stipulation of Settlement, the [defendant] shall pay the [plaintiff] the sum of SEVENTY-FIVE HUNDRED ($7,500) DOLLARS in full satisfaction of any and all arrears owed to [the plaintiff] pursuant to the ... pendente lite Order." On February 13, 2008, the defendant signed an affidavit stating that he had read the stipulation of settlement, fully understood its contents, and agreed to it after "mature and careful deliberation" and, on that same date, wrote a check to the plaintiff for the agreed upon amount of $7,500. Thereafter, on May 20, 2008, the plaintiff, as required by CPLR 5020, filed a satisfaction of the relevant judgment, which had been entered on November 7, 2007 (see CPLR 5020[a], [c] ). Since the stipulation of settlement and the satisfaction of judgment extinguished the defendant's obligations under that judgment, his appeal therefrom was rendered academic. Accordingly, by reason of the stipulation of settlement and the satisfaction of judgment, the Supreme Court correctly denied defendant's motion which was to vacate the judgment.

In Limine Determination Does Not Preclude Trial Evidence of Efforts Affecting Value

In Morton v Morton, 69 A.D.3d 693, 892 N.Y.S.2d 518 (2d Dept, 2010) at issue on this appeal was the proper valuation date for marital assets consisting of multiple business entities which own commercial real estate properties and act as the landlord for industrial and manufacturing tenants, many of which are located in the Detroit, Michigan, area. The Appellate Division noted that defendant proffered evidence that a decrease in the value of these assets since the date of commencement of this action was attributable to market forces and, thus, was passive in nature. There was no evidence that a decline in the value of these assets during this period of time was due to dissipation or wasteful conduct on the part of the defendant. Thus, the Supreme Court improvidently exercised its discretion in valuing these assets as of the date of commencement of the action rather than as of the date of trial. (see McSparron v. McSparron, 87 N.Y.2d 275, 287-288) The court pointed out that his determination did not preclude either party from presenting evidence at trial for the purposes of equitable distribution of any efforts which he or she alleges affected the value of the subject assets.

Inappropriate for the Plaintiff to Continue as a Joint Owner with the Defendant of Their Closely-held Corporation

In Bricker v Bricker, 69 A.D.3d 546, 893 N.Y.S.2d 128, (2d Dept 2010) the Appellate Division held there is no uniform rule for fixing the value of a going business and the valuation of a business for equitable distribution purposes is an exercise properly with the fact-finding power of the trial court, guided by expert testimony. The factfinder's determination of the value of a business, if it is within the range of the expert testimony presented, is entitled to deference on appeal where the valuation rests primarily on the credibility of the expert witnesses and their valuation techniques. Similarly, the court did not err in valuing the marital residence based upon the appraisal thereof that was admitted into evidence, rather than upon the testimony of the defendant's neighbor that he was willing to purchase it for considerably more than the appraised value, which the trial court expressly found lacked credibility. However, it was error for the court to award 100% of JCB Holdings to the plaintiff, and it modified the judgment by awarding each party a 50% share of that marital asset. It declined to disturb the trial court's award to the plaintiff of a 60% interest in Bricker's, Inc. However, it agreed with the defendant that it was inappropriate for the plaintiff to continue as a joint owner with the defendant of this closely-held corporation, and that, instead, a distributive award should be made to the plaintiff for her share. Based on the evidence that Bricker's, Inc., was the owner and lessor of the real property where the auto repair shop which the defendant operated was located, that the appraised value of that real property of $535,000, and the trial court's determination that the plaintiff was entitled to a 60% share of this marital asset, it modified the judgment so as to award the plaintiff a distributive award of $321,000 for her share of Bricker's, Inc. In view of the defendant's lack of liquid assets, it directed that he pay the plaintiff her distributive award for this asset over a period of 14 years, in annual installments of $24,000 per year for 13 years, and a final installment of $9,000 in the 14th year, with the proviso that, if he should sell the real property owned by Bricker's, Inc., within that time period, he shall pay any remaining balance due on the award to the plaintiff upon that sale.

February 16, 2010

Where Tenancy by Entirety Not Altered by Judicial Decree, or by a Written Instrument Satisfying Gol 3-309 upon Wife's Death, Husband Became Seized of the Whole Property.

In Beudert-Richard v Richard, --- N.Y.S.2d ----, 2010 WL 157221 (N.Y.A.D. 1 Dept.) Pamela and Adam purchased the cooperative apartment in 1978, while they were married. They took title to the co-op shares as joint tenants with rights of survivorship rather than as tenants by the entirety. [Prior to the amendment of EPTL 6-2.1 and 6-2.2 on January 1, 1996 (L 1995, ch 480), co-op shares were treated as personalty rather than realty, and a married couple's ownership interest in such shares could be as joint tenants or as tenants in common, but could not be as tenants by the entirety (see EPTL 6- 2.1; Stewart v. Stewart, 118 A.D.2d 455, 457 [1986] )]. On April 12, 1989, Pamela and Adam entered into a separation agreement which provided for distribution of the marital property. The paragraph of the separation agreement concerning the apartment erroneously stated that the couple owned the apartment "as tenants by the entirety," and gave Pamela exclusive possession during their child's minority, after which the apartment was to be sold and the net proceeds split. Their December 1989 divorce judgment, which incorporated but did not merge their separation agreement, stated that the marital property was to be distributed pursuant to the separation agreement. Adam thereafter married plaintiff Michele. Adam died on September 23, 1999, and his will bequeathed to Michele his ownership interest in the apartment. At the time of Adam's death, the obligation to sell the apartment under the separation agreement had not yet been triggered because his child with Pamela was then 16 years old. After Adam and Pamela's son completed college and became emancipated, Michele and Pamela entered into an agreement dated November 21, 2007, which provided that Pamela was the owner of a one-half interest in the apartment and Michele was the beneficiary of Adam's one-half interest in the apartment, and both agreed to sell the apartment and split the net proceeds. In January 2008, Michele and Pamela, as sellers, entered into a contract to sell the apartment for $1,385,000. However, in February, 2008, the managing agent of the cooperative insisted that the contract be amended to omit Michele's name from the contract. Pamela then filed an application seeking a determination that the estate did not have a legal right or interest in the apartment or the proceeds of its sale, while Michele commenced this action seeking enforcement of the separation agreement and the November 2007 contract. The Supreme Court granted Pamela's motion, directing that Michele was not entitled to share in any portion of the proceeds of the sale of the apartment, rescinding the 2007 agreement and dismissing the complaint. Relying on Matter of Violi (65 N.Y.2d 392 [1985] ), the motion court reasoned that at the time of Adam's death the relevant provision of the separation agreement was merely an executory contract to divide the proceeds when a sale occurred that did not alter the form of its ownership, and since Adam's contract right to the sale of the co-op was not enforceable at the time of his death, his estate could not claim it (citing Brower v. Brower, 226 A.D.2d 92 [1997] ). The First Department, in an opinion by Justice Saxe, reversed. He noted that Matter of Violi involved a situation where spouses who owned their residence as tenants by the entirety entered into a separation agreement pursuant to which they agreed to sell their residence within four years and split the net proceeds, but the wife died a year later, before the parties were divorced, with the residence still unsold. Since the parties had not altered their tenancy by the entirety either by a judicial decree such as a divorce judgment, or by a written instrument satisfying General Obligations Law 3- 309 by clearly expressing an intent to convert the form of tenancy in which the property was held, the tenancy had continued to be held by the entirety; so, upon the wife's death, the husband became seized of the whole property. Had the parties in Violi actually gotten the divorce before the wife's death, the property would have automatically been held as a joint tenancy and the wife's estate would have been entitled to her share. In Brower v. Brower (226 A.D.2d 92 [1997], supra ), a small but important difference in the facts led to a different result from that in Violi. Like Violi, the parties held the marital residence by the entirety, and, like Violi, they entered into a separation agreement providing for its sale, but one party died before either the sale or the divorce. However, unlike Violi, in Brower, "[t]he date prescribed in the agreement for defendant [wife] to vacate the property so that it could be sold preceded decedent's death," and therefore the husband in Brower had a viable breach of contract claim against the surviving wife at the time of his death, which viable right entitled his estate to seek specific performance of the agreement after his death. Justice Saxe stated that in the present case, unlike either Violi or Brower, the parties actually obtained a final judgment of divorce, incorporating the separation agreement in which they expressed their mutual belief that they held the co-op shares by the entirety and the concomitant, if implicit, expectation that upon the divorce their tenancy would be automatically converted into a tenancy in common. While a married couple's tenancy by the entirety automatically converts into a tenancy in common upon entry of a divorce judgment, the same does not hold true for a married couple's joint tenancy. However, General Obligations Law 3-309 allows a married couple to freely "convey or transfer real or personal property directly, the one to the other, without the intervention of a third person." Therefore, as the court observed in Matter of Violi, a married couple may convert the form of tenancy in which they hold property by expressing in a writing an intent to do so. While Adam and Pamela did not specifically state in their separation agreement an intent to convert their ownership of the co-op from joint tenancy to a tenancy by the entirety, as they had a right to do, their failure to do so appeared to be based on their (albeit incorrect) understanding that their ownership already took that form. There was little doubt from the language of their separation agreement that Adam and Pamela intended, and assumed, that upon entry of their divorce judgment they would automatically become tenants in common without any right of survivorship. Not only was there no indication that Adam intended to waive his (or his estate's) property interest in the co-op, or that Pamela thought he had done so, but the record contained numerous indications to the contrary. The spouses' mutual expectation that entry of the divorce judgment would result in a tenancy in common was apparent from the language of their separation agreement. That Pamela and Adam both proceeded in the belief that the divorce would convert their ownership of the apartment into a tenancy in common was established by Pamela's entry into the 2007 agreement to sell the apartment, which stated "Michele is the Executrix of the Estate of Adam Richard who died owning the other one-half ( ½ ) interest in said apartment." Pamela did not claim the sole right of survivorship until after the managing agent of the cooperative insisted that the contract of sale be amended to provide that Michele's name be omitted from the contract. Moreover, Adam's will, where he stated, "I give, devise and bequeath to my wife, Michele F. Beudert, my entire ownership interest in [the apartment], to be hers outright," reflected his understanding that upon his divorce from Pamela the form of their ownership of the co-op would leave them each with an ownership interest in the event of his death. There was substantial evidence that the parties intended that following the divorce, their ownership of the co-op would automatically become a tenancy in common. At a minimum, the record evidence raised issues of fact as to whether the language of the separation agreement demonstrated an understanding that the ownership of the apartment was intended to be altered upon their divorce so as to eliminate any existing right of survivorship. This issue alone precluded the entry of final judgment declaring that Adam's estate was not entitled to share in any portion of the proceeds of the sale of the apartment. The order and judgment which rescinded the 2007 agreement to sell the cooperative apartment and share equally in the proceeds and dismissed the complaint seeking to enforce that agreement, was reversed on the law, the rescission of the agreement vacated, the complaint reinstated, and the matter remanded for further proceedings. Justice Moskowitz dissented.

Ritz v. Ritz Does Not Shift Burden to Party Asserting That the Property Is Separate to Show the Effect of Market Forces.

In Karas-Abraham v Abraham, --- N.Y.S.2d ----, 2010 WL 27034 (N.Y.A.D. 1 Dept.), the Appellate Division held that the award of four years' maintenance and the amount of child support were properly premised on the imputation of income to defendant based on the report of the neutral forensic accountants and the referee's credibility findings. It was clear that defendant was the monied spouse who had been hiding income through his family's companies, his own business in which he was the sole shareholder, and illusory undocumented loans that he used to support a standard of living that would have been impossible to maintain on the income he claimed in the divorce proceeding and on his personal income tax returns. The referee properly considered plaintiff's ability to be self-supporting and the parties' standard of living in determining the duration and amount of maintenance, which was further justified by defendant's lack of candor with respect to his income. The amount of support was also properly based on the parties' life style, the custodial parent's financial resources and the needs of the children. Plaintiff was properly awarded half the proceeds from the sale of the cooperative apartment upstairs from the marital residence, which amounted to more than $600,000, rather than solely her contribution of about $43,000 to its purchase. However, the Appellate Division held that plaintiff was not absolved of her responsibility for capital gains taxes on her share of the proceeds merely because the stipulation with respect to the sale proceeds did not provide for the allocation between the parties of capital gains taxes and the court had declined to direct her to pay such taxes pendente lite, especially since defendant was held responsible for all of the other expenses paid out of the escrowed proceeds. Notably, plaintiff's objection was based only on these procedural grounds, not on any claim of substantive fairness because of the disparate economic status of the parties. Plaintiff was properly awarded expenses for the New Jersey residence to which she and the children had moved. The only reasons that the court had denied her earlier request to have defendant pay these housing costs were that the trial was imminent and that plaintiff had failed to document her claim that her mother had paid for the house with the understanding that plaintiff would pay the carrying charges until she was able to buy it. Neither of these reasons remained viable after plaintiff documented her claim at trial. Defendant had been previously obligated to pay carrying charges on the marital residence, and the New Jersey home was functioning as the marital residence. It rejected defendant's procedural claim that, by including the New Jersey housing costs in the judgment, the referee improperly modified her decision since it did not mention such costs; procedure is more flexible in nonjury matters. The court held that the counsel fee award was proper. Defendant failed to object to any specific charge, and, in any event, it found the amount appropriate under the circumstances. However, the referee should not have awarded plaintiff all of the appreciation of the marital residence, since she failed to carry her burden to demonstrate the amount of the increase in value that was the result of her contributions to the renovations and not of market forces. Contrary to plaintiff's contention, Ritz v. Ritz (21 AD3d 267 [2005] ) does not shift the burden to the party asserting that the property is separate to show the effect of market forces.

Constructive Abandonment Divorce to Husband Does Not Bar Him from Attempt to Establish Paternity of Child Conceived During Period of Constructive Abandonment

In Andrew T v Yana T, --- N.Y.S.2d ----, 2009 WL 5226917 (N.Y.Sup.) the Supreme Court pointed out that the lack of a true no-fault basis for granting a divorce poses significant problems. Not only does it often force the person obtaining the divorce to swear to things that everybody knows are untrue, but it forces judges and special referees who preside over these cases to in effect turn a blind eye, or at least a myopic one, to what is technically perjury. In this case, plaintiff-husband was granted an uncontested divorce from defendant-wife on the ground of constructive abandonment. . As part of pleading his claim of sexual abandonment, plaintiff had to swear to the fact that he and defendant did not have sexual relations for over a year. Defendant sought to that statement to prevent plaintiff from seeking to establish that a child born during the course of the marriage, but conceived well after the date on which the parties allegedly stopped having sex, was actually his son. Plaintiff contended that irrespective of what he stated in the divorce pleadings, the child in question, a baby boy named Ethan, was his child. He moved for an order directing that genetic marker testing be done so as to conclusively determine paternity, and upon such determination, plaintiff sought a declaration of paternity and the amendment of the divorce judgment to reflect that Ethan was the child of the marriage. Defendant opposed plaintiff's motion pointing out that in his verified complaint for divorce, he alleged that from August 1, 2006, onward she refused to have sexual relations with him. Thus, based on plaintiff's own sworn statements, defendant contends that the child, who was not born until March 19, 2008, could not possibly be his. Defendant further submitted that if plaintiff was taking the position that Ethan was his child, this meant that the sworn statements in his verified complaint concerning the lack of sexual relations must be untrue. As a result, defendant cross-moved for an order finding that plaintiff violated Penal Law section 210.10, perjury in the second degree. The Supreme Court took the view that although perjury of any kind is not to be condoned, the context in which it arises must be taken into consideration. The sad truth is that New York's insistence on fault-based divorce ends up promoting a disregard for the truth by fostering and encouraging the embellishment of a spouse's wrongdoing as to grounds, often with immeasurable effects upon a divorcing household. Here, the divorcing household included an infant boy who, according to his birth certificate, was essentially fatherless. Under the circumstances, the question of whether plaintiff embellished the truth or even told outright lies in order to obtain the parties' uncontested divorce was far less important than resolving the issue of Ethan's parentage, something that was in his best interests. An additional factor to be considered was the role defendant played in the divorce proceeding. While defendant was quick to claim that "plaintiff's perjury to the court is blatant, obvious and must be punished," she failed to address her own complicity and lack of truthfulness in the matter. It appeared that at no time during the pendency of the divorce action did defendant ever inform plaintiff or the court that she was pregnant or had given birth. Moreover, defendant expressly consented to plaintiff obtaining the divorce based on the allegation that she had refused to have sex with him. Thus, the granting of the divorce was facilitated by defendant's acquiescing in what plaintiff alleged. If plaintiff's sworn statement that he and the defendant did not have sexual relations after August 2006 was a lie, then defendant joined in that lie and benefitted from it when the divorce was granted. Being in pari delicto, defendant did not come before this court with "clean hands," and she was scarcely in the position to seek to have plaintiff punished as a perjurer or even to have his words used against him. In this case, the presumption of legitimacy, the child's best interests and plaintiff's request for paternity testing went hand-in-hand. Plaintiff was already presumed to be Ethan's father by virtue of having been married to Ethan's mother when the child was born. See David L. v. Cindy L., 208 A.D.2d 502, 503 (2d Dept 1994). Ethan's best interests lie in having his parentage confirmed, his father's name listed on his birth certificate, and his rights and status attendant to the father-son relationship fully established, so the court granted the motion. However, it denied Defendant's Cross-Motion for an order finding that plaintiff has violated Penal Law section 210.10, which makes it a crime to make a false statement under oath that is material to the proceeding involved. This offense, perjury in the second degree, is a class E felony punishable by up to four years in prison. It found the application without merit as the examination of witnesses to ascertain whether a basis exists for prosecution is the province of the District Attorney's Office and the Grand Jury, not a civil trial court and referring the matter to the District Attorney for investigation or prosecution would serve no purpose.

February 1, 2010

22 NYCRR 202.5(d)(1) Specifies Limited Circumstances under Which Court Clerks Can Reject Papers.

Section 202.5(d)(1) was added to the Uniform Civil Rules for Supreme and County Courts to specify the limited circumstances under which court clerks can reject papers. They may reject papers that do not have an index number, documents commencing or concluding a lawsuit that do not list the names of all parties, filings offered in the wrong county, or documents not signed as required by court rules authorizing sanctions for frivolous contentions. 22 NYCRR 202.5(d)(1) also requires clerks to date-stamp papers they reject and to write the reason for the rejection on the papers themselves. In addition, the rule tracks the provisions of CPLR 2102(c). CPLR 2102(c) which was added effective January 1, 2008 (See Laws of 2007, Ch 125, §4), provides that a clerk shall not refuse to accept for filing any paper presented for that purpose except where specifically directed to do so by statute or rules promulgated by the chief administrator of the courts, or order of the court. The 2008 amendment to CPLR 2102(c) was intended to make it clear that the clerk of the court is not authorized to make a determination as to the legal sufficiency of any legal filings, and that such a determination was the province of the court, rather than the clerk.

Filing Child Support Petition constitutes Valid Withdrawal from Invalid Child Support Agreement

In Matter of Savini v. Burgaleta, --- N.Y.S.2d ----, 2010 WL 114546 (N.Y.A.D. 2 Dept.) the Appellate Division held that as the child support provisions in the parties' judgment of divorce dated August 22, 1997, were vacated by an order of the Supreme Court, which was affirmed, (Burgaleta v. Burgaleta, 51 AD3d 842), so much of the mother's petition as sought to enforce the child support provisions in the parties' judgment of divorce had to be dismissed. In a handwritten agreement dated April 19, 1997, the parties agreed, that starting with the January 28, 1998, payment the mother would accept $200 per week as child support. The agreement provided that the mother would not "file suit for any monies that would make up the difference between the child support percentage of 29% of [the father's] weekly income and the two hundred dollar weekly payment." The Appellate Division held that this agreement was a valid waiver by the mother of her right to file suit to recover child support above the sum of $200 per week while the waiver was in effect. Since the father complied with the agreement, no arrears accrued while it was in effect. The Appellate Division held that the mother validly withdrew from the agreement by filing her child support petition dated August 11, 2004.

Attorneys Fee Request Must Be Sufficiently Supported

In Filiaci v Filiaci,--- N.Y.S.2d ----, 2009 WL 5128542 (N.Y.A.D. 4 Dept.) the Appellate Division agreed with plaintiff that the court erred in directing him to pay defendant's attorney's fees and expenses in its interim orders and in the supplemental judgment. The court issued an interim order on May 15, 2007 that, inter alia, directed plaintiff to pay the Law Guardian a retainer of $1,000 and defendant's attorney $4,000 from an escrow fund. The court issued a second order on October 24, 2007 that, inter alia, directed plaintiff to pay defendant's attorney $6,972.53 and to pay the court reporter deposition fees $1,451.60 from the escrow fund. The court issued a third order on November 30, 2007 that directed plaintiff to pay an additional $2,800 to the Law Guardian from the escrow fund. The supplemental judgment directed plaintiff to pay defendant's attorney $8,203.05 from the escrow fund, as well as an additional sum of $13,206.05. The three orders and supplemental judgment were not supported by affidavits from which the court could determine the nature, quality and reasonableness of the services rendered. Although defendant's attorney submitted an affidavit in support of defendant's order to show cause seeking, inter alia, the attorney's fees awarded in the May 15, 2007 interim order, that affidavit merely alleged in a conclusory manner the total numbers of hours that the attorney had expended to date, and defendant failed to submit any other affidavits concerning attorney's fees. It remitted the matter to Supreme Court for a hearing to determine the reasonable amount of fees and expenses to be awarded to defendant's attorney, the Law Guardian and the court reporter.

Proper to Deny Wife Maintenance Because of Lack of Proof

In Wanker v Samitz, 67 A.D.3d 1135, 889 N.Y.S.2d 705 (3 Dept, 2009) the parties married in July 1998 and had one child (born in 1999). Plaintiff commenced the divorce action in March 2006. Following a bench trial in April 2008, Supreme Court granted plaintiff a divorce on the grounds of cruel and inhuman treatment and abandonment and denied defendant's request for maintenance. The Appellate Division held that Supreme Court properly granted plaintiff a divorce based on cruel and inhuman treatment. The record established that throughout the marriage, defendant used heroin and other drugs, despite multiple incidents of overdose, at least one of which occurred in the presence of the parties' son, and she was admitted to several rehabilitation programs. Defendant was verbally and physically aggressive toward plaintiff whenever he attempted to confront her about her addiction or whenever he attempted to take the heroin away from her. Plaintiff became depressed over the situation, often crying and feeling physically sick, and sought counseling with a number of therapists. Even assuming this to be a marriage of long duration necessitating a high degree of proof, defendant engaged in a course of conduct that endangered plaintiff's mental well-being such that it was improper for plaintiff to cohabit with defendant. Supreme Court erred, however, in granting plaintiff a divorce on the basis of abandonment because, at the time the complaint was filed, defendant had not been absent from the home for a period of one year or more, nor was there any evidence presented at trial that could establish constructive abandonment. It held that Supreme Court did not err in denying the wife’s request for maintenance. While there was some general testimony at trial regarding plaintiff's financial situation, defendant did not present evidence of her own income, assets or her ability to be self-supporting. There was a similar lack of proof with respect to the other statutory factors, which precluded the Appellate Division from exercising its factual review power to determine the maintenance issue.

Failure to Comply with Diligent Efforts Requirement Renders Petition Jurisdictionally Defective

In Re Jahad R., 890 N.Y.S.2d 44 (1 Dept 2009) the Appellate Division reversed on the law an order that adjudicated appellant a person in need of supervision and placed him in the custody of the Commissioner of Social Services for 12 months, and the petition was dismissed. In its report accompanying the petition to have appellant adjudicated to be a person in need of supervision, the Administration for Children's Services stated that "diligent efforts" have been made, that services have been "exhausted," that appellant is "resistant to services," and that there is "no substantial likelihood that the family will benefit from diversion services." However, ACS failed to clearly document any diligent attempts it made to provide appropriate services to appellant and his family before it was determined that it was substantially unlikely they would benefit from further attempts, as required by Family Court Act 735. The report did not identify the services that allegedly were offered. The failure to comply with this statutory requirement rendered the petition jurisdictionally defective (Matter of Leslie H. v. Carol M.D., 47 A.D.3d 716, 849 N.Y.S.2d 612 [2008] ).

Equitable Does Not Mean Equal

In Kelly v Kelly, --- N.Y.S.2d ----, 2010 WL 28203 (N.Y.A.D. 2 Dept.) an action for a divorce Supreme Court awarded the plaintiff a divorce, awarded the plaintiff an equitable share of 60% of the marital assets, and directed the defendant to pay 60% of the plaintiff's reasonable medical and dental insurance benefit costs, to the extent that such insurance benefits were not available to her through her anticipated future employment, until Medicare becomes effective, and denied the wife’s requests for lifetime maintenance and an award of an attorney's fee, and awarded her maintenance only until December 31, 2008. The Appellate Division affirmed. It held that the court providently exercised its discretion in awarding the plaintiff 60% of the marital assets. When both spouses equally contribute to a marriage of long duration, the division of marital property should be as equal as possible. However, there is no requirement that the distribution of marital property be made on an equal basis. In making the division of property in this case, the court took into account, among other things, the property held by each party at the commencement of the action, the length of the marriage, the limited award of maintenance to the wife, and the husband's more recent work experience and greater earning potential. Contrary to the plaintiff's contention, the Supreme Court providently exercised its discretion in denying her request for lifetime maintenance. However, in light of the award of limited maintenance, the court should have determined that the defendant's obligation to pay the plaintiff's reasonable medical and dental insurance benefit costs also should end on December 31, 2008. Considering the parties' relative circumstances and all of the relevant factors, including the pendente lite award of attorney's fees to the plaintiff in the amount of $7,500, the Supreme Court did not improvidently exercise its discretion in denying the plaintiff's request for an award of an attorney's fee.

January 18, 2010

Hearing Need Not Follow Any Particular Form, but must Consist of Adducement of Proof Coupled with Opportunity to Rebut

In Matter of Nuesi v Gago, --- N.Y.S.2d ----, 2009 WL 4985551 (N.Y.A.D. 2 Dept.) the Appellate Division found that father's contention that the Support Magistrate failed to conduct a proper hearing on the issue of emancipation was without merit. The father and mother were sworn and examined, and findings of fact were made regarding emancipation. A hearing need not follow any particular form, but any meaningful hearing must, at least, consist of an adducement of proof coupled with an opportunity to rebut it (Waby v. Waby, 143 A.D.2d 506; see Matter of Thompson v. Thompson, 59 AD3d 1104). The father was given an opportunity to provide the court with proof as to the child's emancipation, but failed to do so. However, the Support Magistrate erred in failing to permit the father to submit evidence regarding his current financial situation. The father was not given an opportunity to provide proof that he was unable to pay the current amount of child support. The matter was remitted to the Family Court for a new hearing on the issue of the father's ability to pay support, followed by a new determination of the petition for a downward modification.

Boden Does Not Apply to Application to Modify Child Support Where, Judgment of Divorce and Stipulation of Settlement Are Silent as to the Costs of Private Secondary Education

In Matter of Durso v Durso, --- N.Y.S.2d ----, 2009 WL 4985467 (N.Y.A.D. 2 Dept.) petitioner ( mother), and respondent (father), were divorced by judgment in 2002. In 2007, the mother commenced a proceeding to modify the father's child support obligation by requiring him to pay a share of the tuition for the parties' daughter Concetta for the parochial high school she was attending. After a hearing, the Support Magistrate determined that the father was required to pay for 50% of Concetta's tuition. The Family Court vacated the order. The Appellate Division held that contrary to the Family Court's conclusion, the mother was not required to demonstrate "an unanticipated and unreasonable change in circumstances" (Matter of Boden v. Boden, 42 N.Y.2d 210, 213) to support her application to modify the father's child support obligation. Where, as here, the parties' judgment of divorce and stipulation of settlement are silent as to the costs of private secondary education, the appropriate standard for determining the mother's application is found in the Child Support Standards Act, pursuant to which a court may award educational expenses if it determines that a private school education is appropriate for the child, "having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires" (DRL 240[1-b][c][7]). Under this standard, a court may, in its discretion, direct a parent to pay the educational expenses of a child, even in the absence of special circumstances or a voluntary agreement. The evidence presented at the hearing established that the father had ample financial resources, far exceeding those of the mother, enabling him to contribute to the cost of Concetta's parochial high school tuition without impairing his ability to support himself and maintain his own household. The fact that Concetta enrolled in the parochial high school as a freshman, with the father's approval and with initial financial support from him, and performed well at that school, warrants a finding that it was in her best interests to remain at that school, rather than having her academic and social life disrupted by a transfer to a different high school. Thus, the Support Magistrate properly determined that the father should be directed to pay 50% of Concetta's private secondary school tuition, and the father's objection to that determination should have been denied.

Improper to Impute Income Without Factual and Legal Basis

In Mongelli v Mongelli, --- N.Y.S.2d ----, 2009 WL 4985685 (N.Y.A.D. 2 Dept.) Supreme Court awarded the defendant 50% of the appreciation of the marital residence from the date of the marriage, awarded him a separate property credit of $48,000 for the marital residence, imputed income to him of $100,000, directed him to pay child support of $1,924 per month for the parties' two minor children until the emancipation of the older of those children and, upon emancipation of the older minor child, to pay child support in the sum of $1,308 per month until the emancipation of the younger of those children, and awarded the defendant an attorney's fee in the sum of $15,000. The Appellate Division held that Supreme Court erred in determining the plaintiff's child support obligation, and otherwise affirmed. While a court may depart from a party's reported income and impute income based on the party's past income or demonstrated earning potential the court failed to properly consider that the plaintiff's opportunities to earn overtime compensation at his job had lessened in recent years, and that the home improvement jobs that he performed on the side were for family and friends, with no showing that he profited therefrom. Thus, the plaintiff's child support obligation, as determined by the Supreme Court based upon income imputed to the plaintiff, had to be modified. It recalculated the plaintiff's child support obligation based on his total annual income of $70,254, on his 2007 federal tax return and defendant's relevant annual income which was $32,322 after the FICA deduction. The plaintiff's pro rata share was 67%. Applying the statutory percentage of 25% to the entire $97,201.57 in combined parental income, resulted in a basic child support obligation of $24,300.50. Therefore, the plaintiff's child support obligation was 67% of that amount, or $1,356.77 monthly. The Appellate Division held that the court properly determined that the defendant was entitled to an equitable share of the appreciation in the value of the marital residence over the course of the marriage, notwithstanding that the residence was the separate property of the plaintiff until 1999, when the property was transferred into the names of the plaintiff and the defendant as tenants by the entirety. The increase in the value of separate property remains separate property "except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse", at which point the increase in value becomes marital property, in accordance with the rule that the definition of marital property is to be broadly construed, given the principle that a marriage is an economic partnership. The record established that the appreciation in the value of the marital residence was attributable to the joint efforts of the parties. Thus, the defendant was entitled to share equitably in that increased value. In addition, the court's award of a separate property credit to the plaintiff in the sum of $48,000 for the value of the marital residence at the time the parties were married was proper.

Where Parties Maintained Separate Finances, and Filed Separate Tax Returns, Not Error to Direct Husband Bear Responsibility for Paying Income Taxes, Interest, and Penalties.

In Frey v Frey, --- N.Y.S.2d ----, 2009 WL 4986166 (N.Y.A.D. 2 Dept.) the Appellate Division held that under the circumstances of this case, where the parties, for the most part, maintained separate finances, and determined from the start of the marriage to file separate tax returns, the trial court providently exercised its discretion in directing that the defendant, who failed to file tax returns throughout the duration of the marriage, bear the responsibility for paying income taxes, interest, and penalties. The plaintiff had no role whatsoever in the operation of the defendant's business, and she did not learn that he failed to file tax returns until after she commenced the action. The husband's conduct constituted economic fault, justifying the trial court's determination. It also held that Supreme Court providently exercised its discretion, after examining the circumstances of the case and the pertinent statutory factors, in distributing the value of the marital home, the plaintiff's pension, and the plaintiff's investments, equally between the parties. However, Supreme Court erred in awarding the plaintiff $8,800 representing her 20% share of the value of the defendant's business. Under the circumstances of this case, in order that the parties' property be equitably distributed to achieve the ultimate goal of fairness, the award to the plaintiff of 20% of the value of the defendant's business, which was separate property, was not warranted.

January 1, 2010

Court May Not Substitute by Reformation Agreement Which it Thinks Is Proper but to Which the Parties Had Never Assented

In Walker v Walker, 67 A.D.3d 1373, 888 N.Y.S.2d 823, 2009 N.Y. Slip Op. 08301 the Appellate Division noted that when the case was previously before it ( Walker v. Walker, 42 A.D.3d 928) defendant moved for an order that, inter alia, directed plaintiff to comply with an oral stipulation of the parties made in open court concerning the division of a parcel of real property. The stipulation was incorporated but not merged in the parties' judgment of divorce. On the prior appeal, the Appellate Division concluded that Supreme Court erred in ordering the parcel to be divided in accordance with a survey map procured by plaintiff inasmuch as the stipulation was ambiguous, and it therefore reversed the order and remitted the matter to Supreme Court for a hearing to determine the intent of the parties at the time of the stipulation with respect to the division of the parcel in question. On remittal, the court determined, inter alia, that the oral stipulation did not express the true intent of the parties, and the court "again implement[ed]" the order that was the subject of the prior appeal. The Appellate Division rejected defendant's contention that the oral stipulation was clear on its face. To the contrary, the court properly determined that there was no meeting of the minds, inasmuch as the parties introduced conflicting evidence with respect to their intended division of the property at the time they entered into the stipulation and thereby established that there was a mutual mistake. It agreed with defendant that the court abused its discretion in dividing the parcel in accordance with the survey map procured by plaintiff. The court, in effect, reformed the parties' oral stipulation by adopting plaintiff's interpretation of the stipulation based

on the survey map, despite the fact that defendant rejected that interpretation. It held that it is well established that in order to reform a written agreement, it must be demonstrated that the parties came to an understanding but, in reducing it to

writing, through mutual mistake or through mistake on one side and fraud on the other, omitted some provision agreed upon or inserted one not agreed upon. Reformation is not a mechanism to interject into the writings terms or provisions not agreed upon or suggested by one party but rejected by the other, and a court may not substitute by reformation an agreement which it thinks is proper but to which the parties had never assented. Where, as here, the parties lack the requisite meeting of the minds when they enter into an oral stipulation, the appropriate relief is rescission of the stipulation and restoration of the parties to their pre-stipulation positions. In the absence of a valid agreement concerning the division of the parcel in question, such division must be based upon the equitable consideration and application of the factors enumerated in Domestic Relations Law 236(B)(5)(d). It therefore reversed the order and remitted the matter to Supreme Court for equitable distribution of the parcel in accordance with Domestic Relations Law 236(B)(5)(d).

Adverse Inference for Missing Witness Not Appropriate Where Testimony Cumulative

In Matter of Spiegel v Spiegel, --- N.Y.S.2d ----, 2009 WL 4679182, 2009 N.Y. Slip Op. 09236 (NYAD 2 Dept) the Appellate Division held that the Support Magistrate properly declined to draw an adverse inference against the mother for her failure to produce her current child care worker to testify, as testimony from that witness would have been cumulative. (see e.g. Austin v. Carstens-Elliot, 39 A.D.3d 443, 831 N.Y.S.2d 734; Clements v. Lindsey, 237 A.D.2d 557, 655 N.Y.S.2d 987).

Taking Child to Philippines Is Not “Unjustifiable Conduct” Where There Is No Custody Order Preventing it

In Sanjuan v Sanjuan, --- N.Y.S.2d ----, 2009 WL 4981840 (N.Y.A.D. 2 Dept.) the plaintiff mother and the defendant father were married in the Philippines, and their daughter was born there. They emigrated to the United States and lived together from August 2005 until late June 2007, when the father took the child back to the Philippines. On July 24, 2008, the father filed a petition in the Philippines Regional Trial Court to annul the marriage and for custody of the child. The next day, the mother filed a summons with notice in the Supreme Court for a divorce and ancillary relief, seeking custody of the child. The father moved to dismiss, for lack of subject matter jurisdiction, so much of the complaint as sought custody of the child, and the court granted the motion. The Appellate Division held that Supreme Court correctly adhered to the original determination upon granting reargument. At the time the proceeding was commenced in the Philippines, the child's "home state" was the Philippines, as she had been living there with the father for a period of approximately 13 months (DRL 75-a[7], 76[1][a] ). By taking the child to the Philippines, the father did not engage in "unjustifiable conduct" such that the Philippines should have declined jurisdiction (DRL 76-g[1] ). There was no custody order that prevented the father from taking the child to the Philippines. While the mother initially indicated to the Supreme Court that she had no knowledge of their whereabouts, she later stated that several days after the father left with the child, she learned that they were in the Philippines, and the mother's family visited with the child there on several occasions. Since the mother knew of the child's whereabouts, and there was no existing custody order in place preventing the father from taking the child to the Philippines, the father's conduct was not unjustifiable. Even if the father's conduct had been unjustifiable, the mother acquiesced to the jurisdiction of the Philippines (DRL 76-g[1][a] ). According to the mother, she filed a summons with notice about a month after the father left for the Philippines, but that action "expired" because she was unsuccessful in effecting service. The mother did not recommence her action until almost one year later. By waiting, the mother acquiesced to the jurisdiction of the Philippines.

No Requirement That Movant Identify Specific Statute or Rule in Notice of Motion. Must Be Pattern of Wilful Failure to Justify Preclusion

In Matter of Blauman-Spindler v Bauman,--- N.Y.S.2d ----, 2009 WL 4985472 (N.Y.A.D. 2 Dept.) the Appellate Division held that contrary to the father's contention, there is no requirement that a movant identify a specific statute or rule in the notice of motion, only that the notice "specify ... the relief demanded and the grounds therefor" (CPLR 2214 [a] ). Even though the mother's notice of motion and supporting affirmation did not formally and specifically request relief pursuant to CPLR 3126, where, as here, there is no misunderstanding or prejudice, "a court may grant relief that is warranted by the

facts plainly appearing on the papers on both sides". Here, the mother's notice of motion clearly sought the relief of preclusion based upon the father's alleged willful failure to respond to her discovery demands. Accordingly, because the father was adequately apprised of the relief sought and the grounds therefor, there was no prejudice, and the Support Magistrate did not err in treating the motion as one made pursuant to CPLR 3126. Nevertheless, the Support Magistrate improvidently exercised her discretion in granting that branch of the mother's motion which was to preclude evidence of the father's finances. While the nature and degree of the penalty to be imposed pursuant to CPLR 3126 is a matter within the discretion of the court in order "[t]o invoke the drastic remedy" of preclusion for failure to disclose pursuant to CPLR 3126(2), the court "must determine that the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious". The father served responses and objections to the mother's discovery demands. While the mother was clearly dissatisfied with the objections and responses to her demands, there was no showing of a pattern of willful failure to respond to discovery demands or comply with disclosure orders, so as to justify an order of preclusion. Moreover, the mother's motion was unsupported by an affirmation of a good faith effort to resolve the purported discovery dispute as required by 22 NYCRR 202.7(a)(2) .

December 16, 2009

His or Her Driver's License

In Circe v Circe, --- N.Y.S.2d ----, 2009 WL 4348396 (N.Y.A.D. 3 Dept.) after the father failed to make court-ordered support payments for a period of five months, the County Support Collection Unit notified him that his driver's license would be suspended based upon his failure to make support payments. The father filed petitions against the mother for modification of support and a violation petition naming both the mother and SCU as respondents, alleging that SCU intended to wrongfully suspend his driver's license. Following a hearing, a Support Magistrate dismissed all petitions but, in light of the father's recent support payment, recommended that SCU refrain from suspending his driver's license as long as he continued making payments. The father commenced a proceeding, alleging that SCU was garnishing more of his income than directed under the current order of support, and requesting a refund. Upon consent of the father and the mother, the Support Magistrate issued an amended order of support, modifying the amount to be paid by the father toward arrears, which totaled approximately $82,000. Although the record contained no request for such relief in connection with the proceeding on appeal the Support Magistrate directed that SCU was not to impose any administrative orders or any driver's license suspension, and that any suspension in effect must be vacated. The Department of Social Services filed objections which Family Court denied. The Appellate Division agreed with DSS that Family Court erred in terminating the suspension of the father's driver's license because the father failed to exhaust his administrative remedies. It held that subject to certain exceptions not relevant here, SCU has the authority to enforce child support orders by suspension of a support obligor's driver's license when, among other things, the obligor has accumulated at least four months of arrears ( Social Services Law 111-b [12]; 18 NYCRR 346.12). There was no dispute that the father received the required notice that his continued refusal to pay support would result in suspension of his driver's license or that he thereafter failed to follow any of the alternative procedures set forth in the regulation or statute for administratively challenging SCU's determination or avoiding suspension of his license. It concluded that the statutory scheme requires a support obligor to exhaust administrative remedies prior to seeking court review of SCU's determination to suspend his or her driver's license. Family Court's power to review ... SCU's determination in this regard is limited by statute. While the court may, in its discretion, rescind a court-imposed driver's license suspension after payment of arrears (Family Ct Act 458-a [a] ), review of objections to an SCU determination to suspend an obligor's driving privileges must follow an administrative challenge, is limited to "the record and submissions of the support obligor and SCU, and must be denied unless SCU's determination is based upon a clearly erroneous determination of fact or error of law (Family Ct Act 454[5]). As petitioner failed to exhaust his administrative remedies or make any administrative record upon which SCU's determination could be reviewed, Family Court lacked the authority to revoke SCU's suspension of his driver's license or to direct that SCU impose no further administrative orders absent court order. (Family Ct Act 458-a [a], [d] ).

FFCCSOA and UIFSA Does Not Apply to Original Support Petition Brought by Child Against Mother Where Sister State Support Order in Existence

In Matter of Clarke v Clarke,--- N.Y.S.2d ----, 2009 WL 4348948 (N.Y.A.D. 3 Dept.) a 1997 a support order issued by Superior Court in California directed respondent Michael Clark (father) to pay child support to respondent Connie Clark (mother) for their three children, including petitioner, their 17-year-old daughter, until each reached the age of majority or became emancipated. The mother and her children, including petitioner, moved to New York while the father remained in California. In 2008, petitioner commenced a proceeding seeking an order directing both of her parents to pay directly to her any moneys that were tendered for her support. The father and the mother both moved to dismiss the petition, with the father specifically alleging that Family Court lacked personal jurisdiction over him. After the Support Magistrate ordered that the petition be dismissed, petitioner filed objections, claiming that the Support Magistrate erred by dismissing the petition against the mother, essentially conceding that the court lacked personal and subject matter jurisdiction over the father. Family Court disagreed with petitioner, and affirmed the decision of the Support

Support Obligor must Exhaust Administrative Remedies Prior to Seeking Court Review of Scu's Determination to Suspend Magistrate dismissing the petition as to both respondents. The Appellate Division reversed in part. It pointed out that Family Court concluded, among other things, that it lacked subject matter jurisdiction to grant the relief sought by the petition because FFCCSOA and UIFSA vest the issuing state with "continuing, exclusive jurisdiction over its child support orders so long as an individual contestant continues to reside in the issuing state. (42 USC 1738B [d]; 42 USC 654; Family Ct Act 580- 205). Here, the father remained a resident of California and, therefore, California retained exclusive jurisdiction over the child support order that obligated the father to pay child support. However, the Appellate Division agreed with petitioner that, with respect to the mother, the provisions of the FFCCSOA and UIFSA did not apply to this proceeding because her petition against the mother was not an attempt to modify the California support order but, rather, an original petition that, for the first time, sought an award of child support from her mother. A tribunal of this state may not modify any aspect of a child support order that may not be modified under the law of the issuing state (Family Ct Act 580-611[c] ), and a modification is defined as "a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supercedes, or otherwise is made subsequent to the child support order" (28 USC 1738B [b] [B] ). However, the Court did not view the petition against the mother and a resulting order against her as one that would result in a modification of any aspect of the California order or would otherwise disturb the continuing, exclusive jurisdiction that the California Superior Court had over its order directing the father to pay child support for his children to the mother. Rather, an order imposed in New York against the mother would, for the first time, establish the parameters of her obligation to support her children. The California order contained no direction with respect to an obligation on the part of the mother to pay child support. As such, the petition, as it had been filed against the mother, was a de novo application for child support and not directly or indirectly a modification of a prior, out-of-state order. The Appellate Division disagreed with Family Court that it lacked subject matter jurisdiction to hear an application of petitioner, who resided in New York, to seek an order obligating her mother, who was also a resident of this state, to provide for her support, where no order had been previously issued establishing the existence of such an obligation. The order was modified, on the law, by reversing so much thereof as granted respondent Connie Clarke's motion to dismiss the petition against her.

Support Obligation of a Parent of a Child Receiving Public Assistance Is Measured by Child's Needs and Parent's Means

In Matter of Gregory v Gregory, --- N.Y.S.2d ----, 2009 WL 4447898 (N.Y.A.D. 2 Dept) the parents physically separated and the mother retained custody of the children. At some unspecified time, the parents agreed that the father would have primary custody of their two sons, and the mother would have primary custody of their daughter. Although there was no written agreement or court order concerning child support, the father claimed that he and the mother agreed that each parent would support the child or children in her or his custody, respectively. Thereafter, the mother applied for and was awarded public assistance. The mother received public assistance from August 1, 2004, until May 31, 2007, of $26,830.67, of which $13,415.44 was attributable to the support of the parties' daughter, who was the child in her custody. In May 2007 the mother commenced a proceeding seeking child support for the parties' daughter. The Department of Social Services (DSS) intervened in the proceeding, seeking payment of child support from the father, which sum included the money it had paid to the mother on behalf of the parties' daughter. After a hearing, the Support Magistrate calculated the father's support obligation for his daughter for the period to be $26,006.26, and directed him to pay that amount to the DSS. The Appellate Division held that Family Court's directive that the father pay the DSS the sum of $26,006.26 was proper. Since the support obligation of a parent of a child receiving public assistance is measured by the child's needs and the parent's means, not by the amount of public assistance paid on behalf of the child, the Family Court acted properly in declining to limit the amount required to be paid by the father to the DSS to the child's share of the public assistance grant (Matter of Commissioner of Social Servs. v. Segarra, 78 N.Y.2d 220). Contrary to the father's contention, he was not entitled to offset alleged unpaid child support from the mother against the amount he owed to the DSS. During the relevant time period, there was no support obligation imposed upon the mother for the children who were in the custody of the father.

Statement of Intention in Antenupual Agreement Does Not Create Enforceable Right

In Smith v Smith, 66 A.D.3d 584, 888 N.Y.S.2d 14 (1 Dept 2009) the Appellate Division reversed on the law an order of the Supreme Court which awarded plaintiff a sum equal to 50% of the value of the apartment owned by defendant prior to the marriage upon a finding that defendant breached the terms of an antenuptial agreement. At issue was the meaning of a provision in an antenuptial agreement providing that defendant "shall cause the cooperative or condominium which he intends to purchase, with his funds, as the primary residence of the parties to be held in joint names of the parties with right of survivorship." The court determined that it was unable to give effect to this provision as written, and that it required extrinsic evidence of the parties' intentions on this issue. After holding a non-jury trial, the court found that the provision imposed an affirmative duty on defendant's part to fulfill his stated intention of buying a new apartment in the parties' joint names, that defendant had breached that duty, and, as a remedy for the breach, the court awarded plaintiff a sum equal to 50% of the value of the apartment owned by defendant prior to the marriage. The Appellate Division disagreed with the trial court's conclusion that the provision was ambiguous. A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (Breed v. Insurance Co. of N. Am., 46 N.Y.2d 351, 355 [1978] ). Here, the intent to purchase clause did not create an enforceable obligation, as a mere statement of an intention, even if expressed unconditionally and unequivocally does not, on its own, give rise to a binding contract. This reading of the provision was consistent with other terms of the agreement, specifically D(ii) of Article 8, which provided that if no jointly owned marital residence was held at the termination of the parties' marriage, defendant was required to pay to plaintiff $500,000, if such termination occurs within the first five years of the marriage and $1,000,000 if such termination occurs after the fifth anniversary of the marriage. There was no basis to deviate from the agreement as written. Given this bargained for payment, as well as the other financial provisions included in the agreement for the benefit of plaintiff in the event the marriage terminated, there was no basis for the court's conclusion that plaintiff's waiver of spousal support or maintenance must have been premised on a guarantee of a

joint share in a marital residence. Nor did plaintiff provide any other basis for a contractual right to half the equity in defendant's pre-marital apartment.

Provision for Counsel Fees for Services Rendered does not Bar Future Counsel Fee Application

In McMahan v McMahan, 66 A.D.3d 969, 888 N.Y.S.2d 133 (2 Dept 2009) the Appellate Division held that since the provision of the parties stipulation of settlement providing that each party was responsible for his or her own counsel fees was drafted in the past tense, referring to fees for "services rendered," such provision did not bar her request for an award of interim counsel fees for litigation between the parties which post-dated the agreement.

December 1, 2009

Second Department Holds Cause of Action for Social Abandonment Does Not State a Cause of Action

In Davis v Davis, \_\_\_AD3d \_\_\_,11/23/2009 NYLJ 17, (col. 3) (2d Dept 2009) the Second Department, in an opinion by Justice Dillon, held that the 'social abandonment' of a spouse may not qualify as 'abandonment' and provide a ground for the dissolution of marriage under Domestic Relations Law 170(2). The plaintiff, Novel Davis, commenced this action for a divorce against her husband. Shepherd Davis, by the filing of an amended summons with notice and a verified complaint alleging two causes of action, one asserting constructive abandonment under Domestic Relations Law s170(2). The complaint alleged that the husband refused to engage in social interaction with the wife by refusing to celebrate with her or acknowledge Valentine's Day, Christmas, Thanksgiving, and the wife's birthday, by refusing to eat meals together, by refusing to attend family functions or accompany the wife to movies, shopping, restaurants, and church services, by leaving her once at a hospital emergency room, by removing the wife's belongings from the marital bedroom, and by otherwise ignoring her. The parties had been married for 41 years and resided at the same address. The husband filed a pre-answer motion pursuant to CPLR 3211(a) (7) to dismiss the constructive abandonment cause of action. The husband argued that the wife's factual allegations of 'social abandonment failed to state a cause of action for a divorce based on 'constructive abandonment. Supreme Court granted the husband's motion pursuant to CPLR 3211(a)(7) to dismiss the second cause of action for a divorce on the ground of social abandonment. The Appellate Division affirmed. Justice Dillon noted that Domestic Relations Law 170 sets forth six statutory grounds on which a spouse may seek to divorce another. The abandonment ground for divorce, set forth in Domestic Relations Law 170(2), provides that an action for a divorce may be maintained based upon '[t]he abandonment of the plaintiff by the defendant for a period of one or more years.' Abandonment was recognized as a statutory ground for divorce in the Domestic Relations Law in 1966 but had also been recognized in earlier statutes, CPA 1147 and 1156. The essence of abandonment is the refusal of one spouse to fulfill 'basic obligations springing from the marriage contract' (Schine v. Schine, 31 NY2d 113, 119; see Mirizio v. Mirizio, 242 NY 74, 81). A viable cause of action under Domestic Relations Law s170(2) has been recognized in three different factual forms. The first, not applicable here, involves a defendant spouse's actual physical departure from the marital residence that is unjustified, voluntary, without consent of the plaintiff spouse, and with the intention of the departing spouse not to return. The second, also not applicable here, exists when the defendant spouse locks the plaintiff spouse out of the marital residence, absent justification or consent. The third is based on 'constructive abandonment,' which has been routinely defined as the refusal by a defendant spouse to engage in sexual relations with the plaintiff spouse for one or more years prior to the commencement of the action, when such refusal is unjustified, willful, and continual, and despite repeated requests for the resumption of sexual relations. The earliest interpretation by the Court of Appeals that arguably extended the notion of 'abandonment' beyond its plain dictionary meaning arose in the 1926 case of Mirizio v. Mirizio (242 NY 74). Mirizio involved a wife's refusal to consummate a civil marriage with her husband pending the conduct of a religious ceremony in which the husband refused to partake. The Court of Appeals held in Mirizio that a spouse's refusal to consummate a marriage constitutes a breach of the marriage contract, permitting the dissolution of the marriage itself. The 1960 case of Diemer v. Diemer (8 NY2d 206) involved a refusal by one spouse to continue sexual relations with the other spouse as a result of newly discovered religious concerns. The Court of Appeals noted that marriage 'involves something far more fundamental than mere physical propinquity and, as a consequence, abandonment is not limited to mere technical physical separation'. The criterion for abandonment, the Court continued, is how fundamentally the denial of a marital right strikes at the institution of marriage (id. at 210). The Court of Appeals concluded in Diemer that a refusal of one spouse to engage in sexual relations with the other spouse undermines the central structure of marriage, and qualifies as an abandonment that is constructive, rather than actual, in nature. Constructive abandonment, therefore, was cognizable when a plaintiff spouse could prove that the abandoning spouse unjustifiably and continually refused to fulfill this basic obligation arising from their marriage contract for a period of at least one year. The wife argued, nonetheless, that her complaint stated a cause of action for a divorce on the ground of constructive abandonment based upon the authority of C.P. v. G.P. (6 Misc 3d 1034[A]). and Michaelessi v. Michaelessi (10 Misc 3d 1067[A]). The amended complaint in C.P. v. G.P. alleged a cause of action for constructive abandonment based upon allegations that the defendant husband continually refused to engage in sexual relations, despite demands, and without justification, for the requisite year. An additional cause of action, denominated as one for cruel and inhuman treatment, contained allegations remarkably similar to those at issue here; namely, that the husband refused to celebrate various family events and holidays with his wife, refused to eat meals with her, refused to attend social events with her, and maintained a separate bedroom. The Supreme Court held, in C.P. v. G.P., that while the second cause of action did not adequately state grounds for cruel and inhuman treatment,

the same allegations did state a cause of action for a divorce on the ground of constructive abandonment based upon the absence of conjugal relations. The court also noted that a defendant spouse who has refused to engage in any family

interaction with his plaintiff spouse for more than one year, without cause or condonation, has failed to fulfill a basic obligation of the marriage contract, no less so than the obligation of engaging in sexual relations. The Supreme Court

thus recognized social abandonment allegations as sufficient to withstand the husband's dismissal motion brought under CPLR 3211 and Domestic Relations Law 170 (2). Similarly, Michaelessi v. Michaelessi involved allegations by the plaintiff wife

that she was socially abandoned by the defendant husband as a result of his refusal for several years to attend any social, recreational, or family functions as a couple, by the maintenance of a separate bedroom, and by the separate purchases and preparation of their daily meals. The parties disputed whether the husband had refused to engage in sexual relations. After a trial on grounds that included sharp questions of fact and an assessment of the parties' credibility, the court found that the plaintiff wife established a constructive abandonment 'under any reasonable construction of the term, suggesting, without necessarily stating, a sexual and/or social abandonment.

The Appellate Division found, that there is no cognizable cause of action for 'social abandonment' in New York, and that, consequently, the plaintiff's second cause of action was properly dismissed. The determination was based upon five factors, any one of which supported the conclusion that 'social abandonment' is not a recognized ground for divorce in this State. First, our State Legislature has chosen to include in Domestic Relations Law 170 (2) mere reference to 'abandonment' which, in addition to its plain dictionary meaning regarding physical departure, has been expanded by the Court of Appeals only so far as its current constructive form. The plaintiff's allegations of social abandonment may appropriately be viewed as merely another way of claiming 'irreconcilable differences' between spouses, that do not constitute a cognizable ground for divorce, or of claiming the existence of a 'dead marriage.' which also is not a cognizable ground. The second reason it did not recognize social abandonment as a cognizable ground for divorce involved the longevity of the current definitional understanding of constructive abandonment. Since 1960, every constructive abandonment case reported from appellate courts, without apparent exception, has applied the concept of constructive abandonment solely to the denial of sexual relations. The third reason, related to the second, was that a judicial recognition of social abandonment, where none is supported in the statute, would constitute a judicial usurpation of legislative authority. Fourth, the court did not accept the argument that a social abandonment of one spouse by another is a provision of the marriage contract that necessarily equates with a spouse's refusal to engage in sexual relations. Fifth, there were practical difficulties associated with trying to define a social abandonment cause of action. 'Social abandonment' eludes clear or easy definition..

Greater Economic Contributions to Marriage Doesn’t Mean Entitlement to Greater Percentage of Marital Property.

In Wasserman v Wasserman, --- N.Y.S.2d ----, 2009 WL 3380654 (N.Y.A.D. 2 Dept.), the plaintiff and the defendant were married on July 6, 1979. The plaintiff was 65 years old and the defendant is 57 years old. During the course of their marriage, the parties had two children, who were emancipated. In 1979, shortly before the birth of their first child, the plaintiff became the sole source of financial support for the family. The defendant was a stay-at-home mother prior to the commencement of this divorce action. In 2002 the defendant graduated from SUNY Purchase with a BA degree. In November 2003 she became a licensed real estate broker. The parties were divorced by judgment dated May 22, 2008. The defendant was awarded, inter alia, 50% of the value of the plaintiff's businesses and 50% of the value of the marital premises, and maintenance in the sum of $10,000 per month for the two years immediately following the judgment of divorce, the sum of $7,500 per month for the next three years, and the sum of $5,000 per month for three years after that. The Appellate Division held that Supreme Court properly relied upon the opinion of the defendant's expert regarding the value of the plaintiff's business interests. In a nonjury trial, evaluating the credibility of the respective witnesses and determining which of the proffered items of evidence are most credible are matters committed to the trial court's sound discretion. There is no uniform rule for fixing the value of a business for the purpose of equitable distribution. Valuation is an exercise properly within the fact-finding power of the trial court, guided by expert testimony. The determination of the fact finder as to the value of a business, if within the range of the testimony presented, will be accorded deference on appeal if it rests primarily on the credibility of expert witnesses and their valuation techniques. The record supported the Supreme Court's determination as to the value of the plaintiff's business. Considering the circumstances of the case, the Supreme Court providently exercised its discretion in awarding the defendant 50% of the value of the plaintiff's businesses. The fact that the plaintiff may have made greater economic contributions to the marriage than the defendant did not necessarily mean that he was entitled to a greater percentage of the marital property. The plaintiff's financial statements indicated that he could not pay the distributive award in only three installments, six months apart, without liquidating his assets. Therefore, it modified to direct that he make six equal installment payments to the defendant, each six months apart, with interest at the rate of 9% from the date of the judgment until the balance is paid. The Supreme Court providently exercised its discretion in determining an appropriate maintenance award. In determining the appropriate amount and duration of maintenance, the court is required to consider, among other factors, the standard of living of the parties during the marriage and the present and future earning capacity of both parties. While the Supreme Court properly found that the defendant was capable of earning a living, "the wife's ability to become self-supporting with respect to some standard of living in no way ... obviates the need for the court to consider the predivorce standard of living" (Hartog v. Hartog, 85 N.Y.2d 36, 52). The maintenance award of $10,000 per month for the two years immediately following the judgment of divorce, of $7,500 per month for the next three years, and of $5,000 per month for three years after that, would permit the defendant to maintain the pre-divorce standard of living while allowing her a reasonably sufficient time to become self-supporting. The Court held that Supreme Court properly declined to direct the plaintiff to pay her health insurance premiums, where she had been awarded a substantial distributive award and maintenance (see Atwal v. Atwal, 270 A.D.2d 799).

Appreciation Remains Separate Property If it Resulted Purely from Market Forces

In Zaretsky v Zaretsky, --- N.Y.S.2d ----, 2009 WL 3380620 (N.Y.A.D. 2 Dept.) the plaintiff husband and the defendant wife were married on May 29, 1994, and had three unemancipated children. Both parents were born deaf. For most of the marriage, the defendant was a stay-at-home mother. Throughout the marriage, the plaintiff worked for Maxi-Aids, Inc. (Maxi-Aids), a company established by his father, to which the plaintiff was gifted a one-third interest prior to his marriage. In 2004 and 2005, the plaintiff's gross income exceeded $500,000, and he received substantial additional funds from both parents. Since 1994, the plaintiff has held a one-half interest in M & H Realty, Inc., which owned the building from which Maxi-Aids operates (M & H property). Following trial, the court awarded the defendant 100% of the equity in the marital residence, as well as sole title and a cash award of $258,527. On appeal the plaintiff contended that he was entitled to a $400,000 separate property credit for the marital residence, which was purchased in 2000. That figure represented a $150,000 down payment provided by the plaintiff's father, as well as $250,000 in renovation expenses purportedly paid by the father. The Appellate Division held that while a separate property credit may be warranted when a marital asset is purchased with property that was gifted to only one spouse the record reflected that any moneys associated with the home purchase and renovations were gifts to both parties. Accordingly, the plaintiff was not entitled to a separate property credit. The Appellate Court agreed with the plaintiff's contention that the award to defendant of 100% of the equity in the marital residence was improper. The defendant was entitled to 40% of the plaintiff's one-half interest in the M & H property, as well as a 40% share of the total appreciated value of the plaintiff's one-third interest in Maxi-Aids. The defendant was not entitled to any share of the plaintiff's interest in the M & H property. The plaintiff acquired the property very shortly after the parties' May 1994 wedding. Property acquired during the marriage is presumed to be marital property and the party seeking to overcome such presumption has the burden of proving that the property in dispute is separate property. Plaintiff met his burden. The plaintiff demonstrated that the M & H property was purchased with an $80,000 down payment from the plaintiff's father and brother. The evidence revealed that, in contrast to the money given for the marital residence, the down payment was intended as a gift to the plaintiff, rather than to both parties. The defendant never had title to the property. The defendant also was not entitled to any share of the appreciated value of the M & H property. The appreciation remains separate property if it resulted purely from market forces, as opposed to the titled spouse's efforts. The record reflected that no efforts on the plaintiff's part resulted in the appreciation of value of the M & H property; rather, that property appreciated solely due to market forces. With respect to the plaintiff's one-third interest in Maxi-Aids, although the plaintiff and his father attempted to downplay the plaintiff's efforts, the record revealed that the appreciation of Maxi-Aids during the marriage was due, at least in part, to the plaintiff's active participation, which was facilitated by the defendant's indirect contributions as a homemaker. Accordingly, the defendant was entitled to a share of the appreciated value of that asset. The Supreme Court failed to articulate fully its basis for awarding the defendant 40% of the total appreciated value of the plaintiff's interest in Maxi-Aids, as opposed to a portion thereof. Before making the distributive award, the court should have considered the extent and significance of the plaintiff's efforts in relation to the active efforts of others and any additional passive or active factors, and determined what percentage of the total appreciation constituted marital property subject to equitable distribution. In light of the foregoing, the entire distributive award had to be reconsidered and recalculated. Therefore, the matter was remitted to Supreme Court for a new determination on the issue of equitable distribution. The plaintiff's contention that the seven-year duration of the maintenance award was excessive was without merit. In light of, inter alia, the duration of the parties' marriage, the defendant's limited education, the years she devoted to child-rearing, and the parties' standard of living, a period of seven years was entirely appropriate.

November 16, 2009

Basic Military Allowances for Housing and Subsistence, Received as a Member of the United States Army, Constitute "Income" for the Purposes of Calculating a Parent's Child Support Obligation

In Matter of Massey v Evans,--- N.Y.S.2d ----, 2009 WL 3153251 (N.Y.A.D. 4 Dept.) the father contented that Family Court erred in determining that his basic military allowances for housing and subsistence (BAH and BAS), which he received as a member of the United States Army constitute "income" for the purposes of calculating a parent's child support obligation. The Fourth Department, in an opinion by Justice Peradatto, rejected that contention and affirmed the order of the Family Court. Petitioner mother commenced a proceeding seeking a determination that respondent was the father of her then-two-year-old child and seeking an award of child support. After an order of filiation was entered, the parties stipulated that the mother earned $14,226 per year and that the father receives base pay from the military in the amount of $22,186.80 per year. The parties further stipulated that, in addition to his base pay, the father received BAH in the amount of $10,776 per year and BAS in the amount of $3,533.16 per year. BAH is a monthly sum paid to members of the military who do not reside in government-supplied housing (see 37 USC 403[a][1]; Army Regulation 37-104-4, s 12-1). The amount of BAH, which is intended to offset the cost of civilian housing, varies according to the member's pay grade, geographic location, and dependency status (see 37 USC 403[a][1]; Army Regulation 37-104-4, s 12-2). BAS is an additional monthly sum paid to active duty members to subsidize the cost of meals purchased for the benefit of the individual member on or off base (see 37 USC 402[a][1]; Army Regulation 37-104-4, s 11-3). The amount of BAS is based upon average food costs as determined by the federal government (see 37 USC 402[b] ). Justice Peradatto pointed out that the specific question of whether military allowances may be included in a parent's income for child support purposes has never been addressed by a New York court. Family Court Act 413(1)(b)(5) provides that a parent's "income" includes, but is not limited to, gross income as reported on the most recent federal income tax return and, to the extent not reflected in that amount, "income received" from eight enumerated sources such as workers' compensation, disability benefits, unemployment insurance benefits, and veterans benefits. The statute also affords courts considerable discretion to attribute or impute income from "such other resources as may be available to the parent" (Family Ct Act 413[1][b][5][iv]; see also Irene v. Irene [appeal No. 2], 41 AD3d 1179, 1180; Matter of Hurd v. Hurd, 303 A.D.2d 928; Matter of Klein v. Klein, 251 A.D.2d 733, 735). Such resources include, but are not limited to, "meals, lodging, memberships, automobiles or other perquisites that are provided as part of compensation for employment to the extent that such perquisites constitute expenditures for personal use, or which expenditures directly or indirectly confer personal economic benefits [and] ... fringe benefits provided as part of compensation for employment" ( 413[1][b][5] [iv] ). In the Courts view the allowances that the father received from the military fell within the CSSA's broad definition of income. Pursuant to the plain language of the statute, parental income "shall not be limited to " taxable income or to the specifically enumerated sources of compensation (Family Ct Act 413[1] [b][5] The legislative history of the statute further supported the conclusion that the definition of "income" should be broadly construed to include the allowances at issue. The father contended that BAH and BAS did not constitute "income" within the meaning of Family Court Act 413(1)(b)(5) because the allowances are excluded from income for federal income tax purposes (see Internal Revenue Code [26 USC] 134[a] ). The Court rejected that contention. As courts in other states have noted in rejecting similar contentions, the purposes underlying the federal tax code and child support statutes are different. The objective of the former is to calculate an individual's taxable income, while the objective of the latter is to determine the amount that a parent can afford to pay for the support of his or her child, and the CSSA does not limit a parent's income to the amount reported on the parent's income tax return (see Family Ct Act 413[b][5][i] ). To the contrary, the statute gives courts the "discretion to look beyond tax returns to determine actual expenses and income" Notably, veterans benefits are specifically included in the Family Court Act's definition of income, notwithstanding the fact that such benefits are excluded from taxable income under federal law (see 413[1][b][5][iii] [E] ).

The father contended that BAH and BAS should be excluded from income for child support purposes because a military member's "pay" does not include military allowances pursuant to 37 USC 101(21). The court found no merit to that contention. The federal statutory definition of "pay" is not relevant to the issue whether military allowances constitute income for purposes of calculating a member's child support obligation under New York law. In any event, federal law defines "regular compensation" or "regular military compensation" as "the total of the following elements that a member of a uniformed service accrues or receives, directly or indirectly, in cash or in kind every payday: basic pay, basic allowance for housing, basic allowance for subsistence; and Federal tax advantage accruing to the aforementioned allowances because they are not subject to Federal income tax" (37 USC 101[25]. Various federal regulations also supported the conclusion that BAH and BAS are part of a member's compensation for military service (see e.g. 33 CFR 55.7 ["[t]otal family income" for purposes of child development services includes "incentive and special pay for service or anything else of value, even if not taxable, that was received for providing services," e.g., BAH and BAS]; 32 CFR 54.4 [allowances for subsistence and housing are included within a member's "disposable earnings" pursuant to 42 USC 665 for purposes of calculating child support allotments] ). Federal law thus recognizes that BAH, BAS and the associated tax advantages of such allowances provide members of the military with a valuable employment benefit that is not reflected in their base pay. The father also contended that BAH and BAS are not "perquisites" within the meaning of Family Court Act 413 because the allowances are not for his "personal use" and confer no "personal economic benefits" upon him ( 413[1] [b][5][iv][B] ). In support of that contention, the father relied on federal tax regulations for the proposition that the value of meals or lodging furnished to an employee for the convenience of his or her employer is excluded from gross income (see 26 CFR 1.61-21[a][2] ). Even assuming, arguendo, that such regulations were relevant to the issue whether military allowances should be imputed as income for child support purposes under New York law, the court noted that meals and lodging furnished to an employee or his or her dependents are excluded from income only if "the meals are furnished on the business premises of the employer ... [and] the employee is required to accept such lodging on the business premises of his [or her] employer as a condition of his [or her] employment" (Internal Revenue Code [26 USC] 119[a] ). Here, the father received BAS in the form of additional cash in his paycheck, which can be used to purchase meals or groceries at establishments of his choice, and BAH is applied to the father's choice of dwellings. There was no question that the food and housing allowances "directly or indirectly confer personal economic benefits" upon the father (Family Ct Act 413[1][b][5][iv][B] ).

The Court also reject the alternative contention of the father that the higher housing allowance he received because he has a wife and a second child should be attributed to his wife and thus excluded from the calculation of his child support obligation for the child in question. The father received that allowance as additional compensation for his military service (see 37 USC 101[25] ). The fact that he receives the greater "with dependents" BAH rate ( 403[a][2] ) to accommodate the higher costs associated with housing a family does not mean that the difference between the basic rate and the "with dependents" rate is income earned by his wife rather than him. A "dependent" is defined as, inter alia, a spouse or a minor child, including an "illegitimate child" (401[a], [b][1][C] ). The Court noted that the CSSA "is based on the principle that children are entitled to share in the income and standard of living of their parents, whether or not the parents are living together". If the child who is the subject of the instant proceeding resided with the father and his new family, she would share in the benefits conferred by the higher BAH that he received as a result of his dependency status. It held that the parties' daughter should not be deprived of the benefit of that allowance simply because her parents did not live together.

Error to Require Attorney for Child to Offer Expert Testimony on Issues of Child's Capacity to Articulate Her Desires

In Matter of Krieger v Krieger, --- N.Y.S.2d ----, 2009 WL 3135655 (N.Y.A.D. 2 Dept.), the parties were awarded joint custody of their adolescent daughter, on consent, with residential custody to the father. In May 2007, the father filed a petition to modify the order so as to allow him to relocate with the child to the State of Ohio. Upon the mother's default in personally appearing on scheduled hearing dates, the Family Court granted the father's petition, and awarded sole custody of the child to the father. The attorney for the child appealed from the order asserting that a number of errors were committed by the Family Court which require reversal of the award of sole custody to the father and the grant of permission for him to relocate with the child to the State of Ohio. The Appellate Division noted that the appointment of an attorney to represent a child in Family Court proceedings, whether the appointment is required by statute or, as in this case, the appointment is made in the court's discretion, is based on the legislative determination "that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition" (Family Court Act 241). The right to counsel has been held to imply that the court will afford a respondent and his or her attorney a reasonable opportunity to appear and present evidence and arguments. An attorney appointed to represent a child in a Family Court proceeding should be accorded the same reasonable opportunity to appear and present evidence and arguments on behalf of the child as is accorded the child's mother or father, or other interested party. Under the circumstances of this case, the Family Court improvidently exercised its discretion in failing to adjourn the hearing to provide the attorney for the child with a reasonable opportunity to present additional witnesses. The rules applicable to the representation of a child in a Family Court proceeding require that the attorney adhere to the same ethical requirements applicable to all attorneys: that the attorney zealously advocate the child's position; that the attorney have a thorough knowledge of the child's circumstances; and that the attorney consult with and advise the child, consistent with the child's capacities, in ascertaining the child's position (see 22 NYCRR 7.2[b][c][d][1] ). In addition, the attorney for the child must follow the child's wishes to refrain from taking a position for or against requested relief where the child has the capacity to take such a position and is not at imminent risk of harm, regardless of whether the attorney believes that the grant or denial of the requested relief would be in the child's best interest (see 22 NYCRR 7.2[d][2] ). The Appellate Division held that Family Court erred, however, in requiring the attorney for the child to offer expert testimony on the issues of the child's capacity to articulate her desires and whether the child would be at imminent risk of harm if she moved with the father to the State of Ohio, prior to the attorney advocating a position that could be viewed as contrary to the child's wishes. The Rules of the Chief Judge do not impose such a requirement (see 22 NYCRR 7.2). The Family Court also erred in awarding sole custody of the child to the father, as the father did not request such relief in his modification petition. It remitted for a new hearing on the father's modification petition. Upon remittal, the hearing on the father's petition shall be conducted before a different judicial officer; and given the intemperate remarks made by the attorney for the child, and the attorney's confrontational approach toward the court, the Family Court may consider whether it is appropriate to appoint a new attorney for the child or continue the representation.

Testimony of Custody Expert Admissible Since Expert Opinion Primarily Based upon Direct Knowledge

In Lubit v Lubit, --- N.Y.S.2d ----, 2009 WL 3029647 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed Supreme Court's determination awarding custody to the mother with liberal visitation to the father. The evidence demonstrated that the acrimony and mistrust that marked the parties' relationship made joint custody a nonviable option. An attempt at joint custody that the parties negotiated failed when appellant unreasonably insisted that the parties share custody on such a strictly equal basis that for several months the three children, ages 2 to 8, alternated daily between their parents' residences. A detailed alternative worked out with a law guardian also failed. The parties were unable to co-parent because they were openly hostile to each other and, without drawn-out negotiations, could not reach agreement on any decisions with respect to their children, including important matters involving education, extra-curricular activities and medical care. The court properly found that the interests of the children would best be served by awarding sole custody to the mother because her style of parenting was more nurturing and conducive to the children's emotional and intellectual development, and because she was the children's primary caretaker before the litigation commenced. The father demonstrated excessive anxiety about the children's physical well-being, and was inflexible in his response to the children's needs. The Appellate Division held that the testimony of the expert was admissible since the expert opinion was primarily based upon direct knowledge derived from the expert's psychiatric interviews of the parties and their children, alone and in combination ( Balsz v. A & T Bus Co., 252 A.D.2d 458 [1998]). To the extent that the expert's report and testimony may have incorporated inadmissible hearsay, the court found that the admissible evidence in the record, including the portion of the expert's report that did not include hearsay, was sufficient to support the trial court's conclusion. Although the court should have stricken the hearsay aspects of the expert's written report, admitting it did not constitute reversible error. It also found that the court did not treat the law guardian as an unsworn witness by briefly referring to her opinion as to custody and her basis for it. The court appropriately took notice of the position that the law guardian had taken as an advocate on the children's behalf.

Courts Will Enforce “Choice-of-law”Clause Bearing Reasonable Relationship to the Parties or the Transaction

In Friedman v Roman, 65 A.D.3d 1187, 885 N.Y.S.2d 740 (2 Dept 2009) the Appellate Division held that generally, courts will enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction. (Welsbach Elec. Corp. v. MasTec N. Am., Inc., 7 N.Y.3d 624, 629, 825 N.Y.S.2d 692, 859 N.E.2d 498). Here, the Supreme Court properly determined that the New Jersey choice-of-law provision contained in the parties' marital agreement would be enforced. Accordingly, the matter had to be analyzed pursuant to New Jersey law. It held that under the circumstances of this case, the Supreme Court erred in concluding, as a matter of law, that the parties' marital agreement was an invalid and unenforceable "mid-marriage" agreement (Pacelli v. Pacelli, 319 N.J.Super. 185, 185, 725 A.2d 56). Although the agreement was executed shortly after the parties' marriage, the record revealed triable issues of fact as to whether it constituted a valid and enforceable "premarital agreement" (NJSA 37:2-38; see Harrington v. Harrington, 281 N.J.Super. 39, 656 A.2d 456). Accordingly, the matter was remitted to the Supreme Court, Suffolk County, for further proceedings on the complaint.

November 2, 2009

Former Domestic Relations Law § 240 (1-b) (c) (5), and Family Court Act § 413, subdivision 1 (c) (5), which were amended in 2009, required the court to prorate each parent's share of the reasonable health care expenses of the child, where such expenses are not covered by insurance, in the same proportion as each parent's income is to the combined parental income. They provided that the noncustodial parent's pro rata share of such health care expenses was to be paid in a manner determined by the court, including direct payment to the health care provider.  Laws of 2009, Ch 215 § 2. (See also Family Court Act 413, subdivision 1 (c) (5), Laws of 2009, Ch 215 § 1). Former Domestic Relations Law § 240 (1-b), subdivision (c) (5) was repealed and a new Domestic Relations Law §240 (1-b) (c) (5) was added. It provides, in part, that:

” The court shall determine the parties' obligation to provide health insurance benefits pursuant to this section and to pay cash medical support as provided under this subparagraph.”

"Cash medical support" means an amount ordered to be paid toward the cost of health insurance provided by a public entity or by a parent through an employer or organization, including employers or organizations which are self insured, or through other available health insurance or health care coverage plans, and/or for other health care expenses not covered by insurance.

It also provides, in part:

(v) In addition to the amounts ordered under clause (ii), (iii), or (iv), the court shall pro rate each parent's share of reasonable health care expenses not reimbursed or paid by insurance, the medical assistance program established pursuant to title eleven of article five of the social services law, or the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law, in the same proportion as each parent's income is to the combined parental income, and state the non-custodial parent's share as a percentage in the order. The non-custodial parent's pro rata share of such health care expenses determined by the court to be due and owing shall be support arrears/past due support and shall be subject to any remedies provided by law for the enforcement of support arrears/past due support. In addition, the court may direct that the non-custodial parent's pro rata share of such health care expenses be paid in one sum or in periodic sums, including direct payment to the health care provider.

(vi) Upon proof by either party that cash medical support pursuant to clause (ii), (iii), (iv), or (v) of this subparagraph would be unjust or inappropriate pursuant to paragraph (f) of this subdivision, the court shall:

(A) order the parties to pay cash medical support as the court finds just and appropriate, considering the best interests of the child; and

(B) set forth in the order the factors it considered, the amount calculated under this subparagraph, the reason or reasons the court did not order such amount, and the basis for the amount awarded.

Former Domestic Relations Law § 240(1)(d) and Family Court Act § 416(f), which provided for the proration of costs between the parties where private health insurance is ordered, were amended at the same time to provide that the cost of private health insurance, or the cost of any premium, family contribution, or health expense incurred as a result of enrollment in the State Child Health Insurance Program or Medical Assistance program shall be deemed “cash medical support.” Each parent's contribution to the cost of such coverage is to be determined under the amended provisions of and Domestic Relations Law § 240 (1-b) (c) (5) and Family Court Act § 413, subdivision 1 (c) (5). Laws of 2009, Ch 215 § 7 & 8.

Family Court Act §§ 514 and 545, respectively, were amended to provide that the necessary expenses incurred by or for the mother in connection with her pregnancy, confinement and recovery shall be deemed a cash medical support obligation and the court must determine the obligation of either or both parties to contribute to the cost pursuant to Family Court Act § 413. Laws of 2009, Ch 215, §§ 7 & 8.

CPLR 5241 was amended to provide that a Deductions to satisfy current support obligations shall have priority over deductions for the debtor's share of health insurance premiums which shall have priority over any additional deduction authorized by CPLR 5241 (g). Civil Practice Law and Rules 5241 (h) as amended by Laws of 2009, Ch 215,§ 12, effective Oct. 9, 2009.

Second Department Holds Despite Lack of Evidence. Disability Portion of Fireman Pension Can Be Determined by Pension Administrator Pursuant to QDRO. Rejects Rule That Economic Component of Personal Injury Award Is Separate Property.

In Howe v Howe, \_\_AD3d\_\_\_, 10/5/2009 NYLJ 17, (col. 3) the plaintiff became a New York City firefighter soon after the parties were married, and remained in that employment until approximately 16 months prior to the commencement of this action. He was disabled as a result of his service during the period immediately following September 11, 2001, and retired with a disability pension. The Supreme Court, reasoning that the plaintiff had failed to satisfy his burden of establishing the separate nature of the pension, found the entire pension to be a part of the marital estate and awarded the defendant 'her Majauskas' share (see Majauskas v. Majauskas, 61 NY2d 481, 490). The plaintiff argued that the lack of expert testimony or evidence in the record by which the nondisability portion of the pension can be distinguished from the disability portion was not fatal to his separate property claim, since that distinction can be made by the pension administrator in the same manner as it makes the familiar calculation of the marital pension share under Majauskas. The husband appealed from so much of the judgment as awarded the defendant her 'Majauskas' share of the plaintiff's entire New York City Fire Department pension and directed that the plaintiff pay (a) 100 percent of the unreimbursed medical expenses of the parties' children and 100 percent of the reasonable child care expenses incurred by the defendant while she is attending school until she begins receiving her equitable share of the pension, at which time the plaintiff shall pay 64 percent and the defendant 36 percent of those expenses, and (b) 100 percent of the private school tuition of the parties' middle child until the child graduates from that school. The wife cross appealed from that part of the judgement that awarded the plaintiff 100 percent of the remaining funds from his September 11th Victim Compensation Fund award. The Court noted that Pension benefits or vested rights to those benefits, except to the extent that they are earned or acquired before marriage or after the commencement of a matrimonial action, constitute marital property'. Thus, 'to the extent that the disability pension represents deferred compensation, it is subject to equitable distribution. However to the extent it represents compensation for personal injuries, that compensation is 'separate property' which is not subject to equitable distribution. The burden of distinguishing the marital property portion of a disability pension from the separate property portion has been placed on the recipient of the pension who is resisting equitable distribution. In other words, until the contrary is demonstrated, the presumption is that the entire disability pension is marital property ' (Palazzolo v. Palazzolo, 242 AD2d 688, 689). The Court pointed out that despite he clarity of the language by which it imposed this burden, its in the full and just distribution of the marital estate has tempered the harshness of its application where the evidence is weak but some other method of defining the disability portion of the pension is available. Justice Spolzino, writing the ground breaking opinion for the court, pointed out that in Palazzolo v. Palazzolo (242 AD2d at 689), the Court defined the methodology by which the disability and nondisability portions of a public employee's pension are defined by approving, as 'fundamentally sound,' the approach taken by the plaintiff's expert. That approach has three steps. First, the pensioner's hypothetical nondisability pension is determined by multiplying the pensioner's final average salary by the percentage of that salary to which the pensioner would likely have been entitled upon retirement had the disability not cut short his or her employment. Second, the coverture fraction is applied to determine the marital portion of the hypothetical nondisability pension. Third, the actual nondisability portion of the pension is determined by reducing the hypothetical nondisability pension by the percentage of the years of service that the pensioner actually served. Here, the record was insufficient for the court to make this calculation. While the factors necessary to employ the Palazzolo formula were not on the record here, however, they were necessarily known to the plan administrator when it calculated the plaintiff's disability pension. The administrator knew the terms of the plaintiff's pension plan, the plaintiff's final average salary, and the percentage of that salary by which the pension is determined. The Palazzolo calculation requires nothing more. The Court held that just as the Majauskas formula is routinely incorporated into a qualified domestic relations order to satisfy this requirement the Palazzolo formula can be incorporated as well. The Appellate Division, in an opinion by Justice Spolzino, held that despite the lack of evidence in the record by which the disability and nondisability portions of the husbands Fireman pension can be distinguished, the disability portion of the plaintiff's pension and, consequently, his separate property interest in that pension, could be determined by the appropriate pension administrator pursuant to a properly-drawn order. Therefore, it modified the judgment accordingly.

In addition to his disability pension, the plaintiff received an award from the September 11th Victim Compensation Fund as a result of injuries he suffered in the aftermath of that tragedy. The administrator of that fund specifically designated

a portion of that award, in the amount of $127,571, as compensation for economic loss. The Supreme Court held that the economic component of the award constituted 'compensation for personal injuries' within the meaning of Domestic Relations Law 236(B) (1)(d)(2) and, on that basis, treated the award as the separate property of the plaintiff. The Appellate Division agreed with that determination, because, inter alia, the legislative history of the Equitable Distribution Law compelled it. The Second Department rejected the rule in the other departments that the economic component of a personal injury award is separate property, which is derived from the holding of the Appellate Division, Third Department, in Fleitz v. Fleitz (200 AD2d 874) and the decisions of the Appellate Division, First Department and the Appellate Division, Fourth Department, that have followed it (see Gann v.Gann, 233 AD2d 188; Solomon v. Solomon, 206 AD2d 971). Justice Spolzino wrote that while the logic of the Equitable Distribution Law suggests the conclusion that the economic portion of a personal injury award should be marital property, the legislative history compelled the contrary result. He pointed out that the exclusion from marital property of 'compensation for personal injuries' was not in the original equitable distribution proposal. As Professor Henry H. Foster, who was actively involved in drafting of the equitable distribution law, explains in his treatise, the '[e]xemption (2) in Domestic Relations Law 236(B) (1)(d) was added belatedly at the request of legislative counsel, shortly before the enactment of the Equitable Distribution Law' (3 Freed, Brandes and Weidman, Law and the Family New York, 2.6, at 69-70) and 'was accepted in order to obtain additional and important backing for the new law ' (Henry H. Foster, Commentary on Equitable Distribution, 26 NY Law Sch L Rev 1 [1981]; see also Henry H. Foster, Jr., and Doris Jonas Freed, Family Law, 32 Syracuse L Rev 335, 344-345). Professor Foster bemoans this compromise as 'highly questionable both as a matter of logic and in view of the [premise] behind the new law' (Foster, Commentary on Equitable Distribution, at 9), and concludes that 'it would have been better to separate items for mental pain and anguish from other items in compensation and to treat damages for loss of income and bills incurred as marital property' (Foster, at 10). Foster's analysis, however, recognizes that the statute's purpose was to exclude from marital property both the economic and the noneconomic portion of a personal injury award. Justice Spolzino concluded that the circumstances in which the intent of the Legislature may be gleaned from a commentary that is critical of the Legislature's action are rare. This, however, is such a case. Professor Foster was the author of the original bill, and the bill jacket establishes that he was active throughout the Legislature's consideration of the bill. His commentary criticizing the exclusion clearly implied that it encompasses the economic component of a personal injury award. His explanation of the manner in which the exclusion came to be included in the legislation, published shortly after the law's enactment, is compelling proof that the proponents of the bill reluctantly acquiesced in the inclusion of the provision, despite its inconsistency with what was otherwise the intent of the legislation. Since the legislative intent must control (see People v. Santi, 3 NY3d 234, 243), the inescapable conclusion was that the Supreme Court was correct in determining that the portion of the Victim Compensation award received by the plaintiff that constitutes compensation for economic loss during the marriage is the plaintiff's separate property.

October 16, 2009

Award of Child Support on Parental Income in Excess of $80,000 Should Be Based on Child's Actual Needs and the Amount That Is Required for the Child to Live an Appropriate Lifestyle, Rather than the Wealth of One or Both Parties.

In Erin C v Peter H, --- N.Y.S.2d ----, 2009 WL 3255773 (N.Y.A.D. 1 Dept.) the Appellate Division modified an order directing respondent to pay petitioner mother basic child support of $ 3053.67 per month, plus $ 1732.75 for child care and insurance, modified, to reduce the award for basic child support to $ 2740.44 per month. Petitioner commenced a proceeding in Family Court against respondent for child support for the parties' child several months after the child's birth. The parties were both successful professionals. By order dated December 17, 2004, the Support Magistrate directed the father to pay $4,044 per month in basic child support. The Support Magistrate rejected the father's claim that the mother had failed to demonstrate the actual needs of the child and rejected the father's argument that the parties' combined income should be capped for the purpose of determining the basic award. He based the basic award on 17% of the parties' total combined income of $375,619.21. The father was also directed to pay $1,732.75 per month in mandatory add-ons. The father's total monthly child support payent under the December 17, 2004 order was $5,776.75. The Appellate Division reversed the order, vacated the support award and remanded the matter for further proceedings, including a further hearing, if necessary, to determine the father's past and prospective child support obligations (28 AD3d 251 [2006] ). It determined that the Magistrate erred in applying the 17% statutory rate to the entire portion of the parties' combined income in excess of $80,000 without considering the actual needs of the two-year-old child. While the Magistrate stated, in conclusory fashion, that the award conformed with the child's needs, in reality he appeared to have merely allocated 50% of the mother's expenses to the child without any analysis of whether that approach was appropriate. It held that in high income cases, the appropriate determination under Family Ct Act 413(1)(f) for an award of child support on parental income in excess of $80,000 should be based on the child's actual needs and the amount that is required for the child to live an appropriate lifestyle, rather than the wealth of one or both parties. It directed that on remand, “Family Court should consider the appropriate level of child support in light of the child's actual needs. As part of its analysis, the court should consider whether a cap on combined income subject to child

support is warranted".

The Appellate Division modified the award made after remand to reduce the award for basic child support to $ 2740.44 per month. It noted that the decision of the Support Magistrate only considered the child's needs to determine the child support amount, and that he did not apply the statutory formula. It held that Family Court appropriately allocated 50% of petitioner's household and car expenses to the child based on evidence that the child equally benefitted from these expenditures. In calculating a basic child support obligation in an amount equal to the child's needs, and respondent's share thereof, Family Court, inter alia, appropriately considered that petitioner was responsible for all nonmonetary contributions toward the child's care and well-being. Evidence of changes in the child's needs, based on petitioner's early-June 2007 remarriage, was properly rejected as speculative at the time of the late-June 2007 hearing, and as beyond the scope of the proceeding, which was limited to determining the actual needs of the child in accordance with the Court's April 2006 remand order. It modified Family Court's findings as to the amount of basic child support attributable to the child's clothing and toys. Although petitioner documented average monthly payments of $ 496.91 for clothing and $ 391.32 for toys, and Family Court found petitioner's testimony about her expenses to be credible, such spending exceeded the actual needs of the child (Matter of Michele M. v. Thomas F., 42 AD3d 882, 883-884 [2007]; cf. Anonymous v. Anonymous, 286 A.D.2d 585, 586 [2001], lv denied 97 N.Y.2d 611 [2002] ). It could not be said that the child needs the number of items that were purchased. For

example, respondent purchased 10 bibs, ranging in price from $ 4.49 to $ 11.99, at one store on one day. On another day, respondent purchased 18 items from an on-line toy store at a total price of $ 231.32. Accordingly, it reduced the child

support attributable to clothing to $ 375 per month and the support attributable to toys to $ 200 per month. Justice Saxe concurred in part and dissented in part, and Justices Sweeny and McGuire, JJ. dissented in part.

In Matter of Jackson v Tompkins, --- N.Y.S.2d ----, 2009 WL 2960716, 2009 N.Y. Slip Op. 06550 (2 Dept 2009) the Appellate Division reiterated the rule it enunciated in Matter of Brim v. Combs, (25 A.D.3d 691, 693, 808 N.Y.S.2d 735) that "in high income cases, the appropriate determination under Family Court Act 413(1)(f) for an award of child support on parental income in excess of $80,000 should be based on the child's actual needs and that amount that is required for the child to live an appropriate lifestyle, rather than the wealth of one or both parties". In this case, the Support Magistrate discredited most of the evidence adduced by the mother of the child concerning the child's actual expenses, and endeavored to make a fair determination of how much the child would need for his expenses to be covered and for him to live comfortably. It found no basis to disturb the Support Magistrate's determination.

Court Not Bound to Apply the Statutory Percentage in Fca 413(1)(C). It May Determine Child Support Through Application of the Percentage Set Forth in Fca 413(1)(C), Factors Delineated in Fca 413(1)(F), or a Combination of Both .

In Irkho v Irkho, --- N.Y.S.2d ----, 2009 WL 3208729 , 2009 N.Y. Slip Op. 07256 (2d Dept 2009) the Appellate Division held that Family Court properly, in effect, denied the father's objections to the order of the Support Magistrate, which departed from the numerical guidelines of the Child Support Standards Act and directed him to pay 50% of the child's regular monthly expenses. It held that a hearing court is not bound to apply the statutory percentage established in Family Court Act 413(1)(c), but may determine the child support obligation through the application of the percentage set forth in Family Court Act 413(1)(c), the factors delineated in Family Court Act s 413(1)(f), or a combination of both (see Matter of Cassano v. Cassano, 85 N.Y.2d 649, 628 N.Y.S.2d 10, 651 N.E.2d 878; Matter of Schmitt v. Berwitz, 228 A.D.2d 604, 605, 644 N.Y.S.2d 760). Family Court providently exercised its discretion in departing from the prescribed percentage.

Parents May Not, by Written Agreement, Terminate the Child Support Obligation Because of the Child's Full-time Employment, Without a Simultaneous Showing of the Economic Independence of the Child

In Thomas B v Lydia B.,--- N.Y.S.2d ----, 2009 WL 3127737 (N.Y.A.D. 1 Dept.) the First Department, in an opinion by Justice Sweeny, held that two parents may not, by written agreement, terminate the child support obligation because of the child's full-time employment, without a simultaneous showing of the economic independence of the child. Pursuant to a stipulation of settlement entered into as part of the parties' judgment of divorce, petitioner father was obligated to pay annual child support until the parties' child reached the age of 21 or was otherwise "emancipated." The stipulation defined emancipation as, inter alia, "the Child's engaging in fulltime employment; fulltime employment during a scheduled school recess or vacation period shall not, however, be deemed an emancipation event." Justice Sweeny wrote that although petitioner relied on the definition of emancipation in the separation agreement that he drafted to support his claim, the agreement purported to do exactly what is prohibited by public policy and case law. The parties cannot contract away the duty of child support. When children's rights are involved the contract yields to the welfare of the children' " (Pecora v. Cerillo, 207 A.D.2d 215, 218 [1995], quoting Maki v. Straub, 167 A.D.2d 589, 590 [1990]). The duty of a parent to support his or her child "shall not be eliminated or diminished by the terms of a separation agreement" (Pecora, at 218), nor can it be abrogated by contract (Cellamare, 36 AD3d at 906). Economic independence from the child's parents is not established by merely working a standard, full-time work week. It was clear, that although he was working 35 hours per week during the period of time in question, the child was not economically independent of his parents, and thus was not emancipated during that period of time.

Petitioner sought termination of his child support obligations on the grounds of, inter alia, the child's "emancipation. Petitioner moved for summary judgment on the issue of emancipation. He argued that under the terms of the stipulation of settlement, the child became emancipated by reason of his full-time employment at a music store from July through December 2005. Respondent opposed the motion, arguing that during the time in question, the child was living in a halfway house as part of his treatment for substance abuse. His employment at the music store was one of the conditions of that treatment. She also argued that the child was not economically independent, as he received financial support from her in addition to her payment of 100% of his unreimbursed medical expenses.

The Support Magistrate granted petitioner's motion, finding that the child's full-time employment as of July 2, 2005 was an emancipation event pursuant to the stipulation of settlement and directed a full refund of all child support.

The Appellate Division reversed. Justice Sweeney pointed out that a parent's duty to support his or her child to the age of 21 is a matter of fundamental public policy in this State and is currently embodied in statutory law. (Family Court Act 413[1][a]; see Matter of Roe v. Doe, 29 N.Y.2d 188, 192-193 [1971] ). The concept of parental financial responsibility has been expanded to include both parents and is found in 413 and Domestic Relations Law 240. Parental-child support obligations continue until the child attains the age of 21 (Family Court Act 413[1][a] ), unless the child is sooner emancipated. Emancipation of the child suspends or terminates this duty to support. He noted that McKinney’s Practice Commentaries for 413 summarize the case law defining emancipation in these terms: "Emancipation is also automatic when the child marries or enlists in the military service. A gainfully employed child who is

fully self-supporting and economically independent from the parents may also be deemed to be emancipated. Or the parties may provide for emancipation contingencies in a written agreement or stipulation" (emphasis added). Additionally, a child may self-emancipate prior to age 21 where he or she willingly abandons the parent. This implies that the child has become independent, that he or she has willfully abandoned the parent by refusing to abide by reasonable instructions or demands of the parent, and that such abandonment was not the result of actions on the part of the parent.

The Court stated that the issue of emancipation is significant because a finding of emancipation terminates the parental obligation of support. "[C]hildren are deemed emancipated if they attain economic independence through employment, entry into military service or marriage and, further, may be deemed constructively emancipated if, without cause, they withdraw from parental supervision and control" (Matter of Bogin v. Goodrich, 265 A.D.2d 779, 781 [1999] ).

In determining whether this child was emancipated, the Court noted that all of the cases that have addressed this issue use the child's "economical independence" as the test (citing Matter of Alice C. v. Bernard G.C., 193 A.D.2d 97[1993]; Matter of Fisher v. Fritzch, 35 AD3d 1146, 1148 [2006]; Matter of Reigada v. Rinker, 30 AD3d 716 [2006]; Matter of Holscher v. Holscher, 4 AD3d 629, [2004]; Matter of Bogin, 265 A.D.2d at 781). Thus, even where a child is working but still relies on a parent for significant economic support such as paying for utilities, food, car insurance, medical insurance and the like, the child cannot be considered economically independent, and thus is not emancipated. This is true even where the child is residing with neither of the parties, so long as the child is still dependent on one of the parties for a significant portion of his or her support. (Matter of Cellamare v. Lakeman (36 AD3d 906 [2007]), Moreover, the parties cannot contract away the duty of child support. The court found insufficient evidence in the record to support a finding that the child was economically independent of his parents as a result of his working 35 hours per week while living in a halfway house. The child's employment was one of the requirements of participation in the halfway house substance abuse program.

Proper to Impute Income Where Failure to Produce Documentary Evidence of Income and Expenses

In Matter of Sena v Sena, --- N.Y.S.2d ----, 2009 WL 3048370 (N.Y.A.D. 2 Dept.) the Appellate Division held that a Support Magistrate may properly impute income in calculating a support obligation where he or she finds that a party's account of his or her finances is not credible or is suspect. Here, the Family Court providently exercised its discretion in imputing income to the father for the purpose of calculating his child support and child care obligations. Although the father testified at the hearing that he earned a salary of $350 per week, he did not submit a pay stub and testified that he was paid in cash. The father also claimed that he paid various business expenses, including a "commission" to an assistant, from his gross business income. Although he submitted a copy of his 2006 federal income tax return which listed certain business expenses, he did not detail those expenses nor submit any proof of payment of those expenses. The father's 2006 federal income tax return indicated that he was an independent contractor and paid business expenses from gross business receipts of more than $28,000 for a 10-month period, which was inconsistent with his claim that he was paid a salary of $350 per week as an employee. Under these circumstances, the Family Court did not err in basing its award on the father's gross business income as reported on his 2006 federal income tax return, and sufficiently articulated a basis for the source of the imputed income.

October 1, 2009

Judges Required to Make Additional Findings Where Domestic Violence Found

Laws of 2009, Ch 476, § 2 amended Domestic Relations Law § 240 (1)(a), effective December 15, 2009 to require judges to state on the record how their findings with regard to the effect of domestic violence factored into their custody determination. Where the court finds, by a preponderance of the evidence that there is domestic violence the court has been required to consider the effect of domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to Domestic Relations Law § 240 (1)(a). The amendment requires the Court to state on the record how such findings, facts and circumstances factored into the direction for custody or visitation. If an allegation that a child is abused is supported by a preponderance of the evidence, then the court has been required to consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child, and the court may not place a child in the custody of a parent who presents a substantial risk of harm to that child. The amendment requires the court to state on the record how such findings were factored into the determination.

Attorney For Child Will be Required to Take Domestic Violence Training

Laws of 2009, Ch 476, § 1 amended Family Court Act 249-b to require the Chief Administrator of the Courts to provide for the development of training programs which include the dynamics of domestic violence and its effect on victims and on children, and the relationship between such dynamics and the issues considered by the court, including, but not limited to, custody, visitation and child support and requires that all attorneys for children, including new and veteran attorneys, receive initial and ongoing training as provided for in this section.

Additional Crimes that Constitute a Family Offense Added

Laws of 2009, Ch 476, § 3 and 4, amended Criminal Procedure Law 530.11, and Family Court Act 812 (1) to add the crimes of sexual misconduct, forcible touching, sexual abuse in the third degree, and sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law to the crimes which constitute a “family offense”. Family Court Act 821 (1) (a) was amended accordingly.

Return of Parent from Military Automatically Considered 'Substantial Change in Circumstance For Seeking Reconsideration of Custody or Visitation Order.

Laws of 2009, Ch 473, effective November 15, 2009, amended the Domestic Relations Law, the Family Court Act and the Military Law to provide that the return of a parent from activation or deployment by the military will automatically be considered a 'substantial change in circumstance' for seeking reconsideration of a custody or visitation order. The amendment changes the law enacted last year which requires that all child custody orders issued when a parent is on active military duty be deemed temporary and subject to revision when the parent returns to civilian life.

Laws of 2009, Ch 473, § 1 amended Domestic Relations Law § 75-l ( entitled Military service by parent; effect on child custody orders) to provide unless the parties have otherwise stipulated or agreed, if an order was issued under Domestic Relations Law § 75-l, the return of the parent from active military service, deployment or temporary assignment shall be considered a substantial change in circumstances. Upon the request of either parent, the court shall determine on the basis of the child's best interests whether the custody judgment or order previously in effect should be modified.

Laws of 2009, Ch 473, § 2 amended Domestic Relations Law 240, subdivision 1 to add a new paragraph (a-2) to read as follows:

(a-2) Military service by parent; effect on child custody orders.

(1) During the period of time that a parent is activated, deployed or temporarily assigned to military service, such that the parent's ability to continue as a joint caretaker or the primary caretaker of a minor child is materially affected by such military service, any orders issued pursuant to this section, based on the fact that the parent is activated, deployed or temporarily assigned to military service, which would materially affect or change a previous judgment or order regarding custody of that parent's child or children as such judgment or order existed on the date the parent was activated, deployed, or temporarily assigned to military service, shall be subject to review pursuant to subparagraph three of this paragraph. Any relevant provisions of the Service Member's Civil Relief Act shall apply to all proceedings governed by this section.

(2) During such period, the court may enter an order to modify custody if there is clear and convincing evidence that the modification is in the best interests of the child. An attorney for the child shall be appointed in all cases where a modification is sought during such military service. Such order shall be subject to review pursuant to subparagraph three of this paragraph. When entering an order pursuant to this section, the court shall consider and provide for, if feasible and if in the best interests of the child, contact between the military service member and his or her child, including, but not limited to, electronic communication by e-mail, webcam, telephone, or other available means. During the period of the parent's leave from military service, the court shall consider the best interests of the child when establishing a parenting schedule, including visiting and other contact. For such purposes, a "leave from military service" shall be a period of not more than three months.

(3) Unless the parties have otherwise stipulated or agreed, if an order is issued pursuant to this paragraph, the return of the parent from active military service, deployment or temporary assignment shall be considered a substantial change in circumstances. Upon the request of either parent, the court shall determine on the basis of the child's best interests whether the custody judgment or order previously in effect should be modified.

(4) This paragraph shall not apply to assignments to permanent duty stations or permanent changes of station.

Laws of 2009, Ch 473, § 3 amended Family Court Act § 651 to add a new subdivision (f) which reads exactly the same as Domestic Relations Law 240, subdivision 1 (a-2).

Laws of 2009, Ch 473, § 4 amended Section 253 of the military law to read as follows:

§ 253. Military service by parent; effect on child custody proceedings.

Notwithstanding any law, rule or regulation to the contrary, child custody proceedings filed in a court of competent jurisdiction in this state, involving a parent who is activated, deployed, or temporarily assigned to military service shall be governed by subdivision (f) of section six hundred fifty-one of the family court act, section seventy-five-l or paragraph (a-2) of subdivision one of section two hundred forty of the domestic relations law.

Where Both Parties Wage Earners Each Should Claim One Dependency Exemption

In Skladanek v Skladanek, --- N.Y.S.2d ----, 2009 WL 880784 (N.Y.A.D. 2 Dept.) Supreme Court directed the husband to pay the plaintiff maintenance of $690 per week for four years and $540 per week for two years thereafter, directed him to pay retroactive maintenance and child support arrears, and awarded the plaintiff $5,280, representing the appreciation of the marital portion of property held jointly by the parties with the defendant's mother, awarded the plaintiff an attorney's fee of $41,217 .83. The Appellate Division held that in light of the defendant's greater financial resources, the Supreme Court properly awarded the plaintiff an attorney's fee. However, Supreme Court erred in failing to include a provision that the award of maintenance shall terminate upon the death of either party or the plaintiff's remarriage. It held that in directing defendant to pay maintenance and child support arrears, the Supreme Court erred in failing to credit him with sums he paid for the carrying costs on the marital home during the pendency of the action. It also held that under the circumstances of this case, both parties should have shared equally in the appreciation of the marital portion of the property held jointly by them with the defendant's mother. Finally, it found that since both parties were wage earners who contributed toward the support of their two children, the defendant could claim one of the children as a dependent on his income tax returns.

September 16, 2009

Only10% of Appreciation of Corporation is Marital Property Where Contributions of Wife Minimal

In Smith v Winter, 64 A.D.3d 1218, 883 N.Y.S.2d 412 (4 Dept 2009) defendant appealed from a supplemental judgment issued in a divorce action that distributed marital assets and ordered plaintiff to pay maintenance to defendant. The parties were married in 1996 and had no children. Prior to the marriage, plaintiff was the sole shareholder, chief executive officer, and president of American Wire Tie, Inc. (American Wire), which acquired 100% of the stock in Permanban North America (PNA). The evidence adduced at trial established that, during the marriage, plaintiff was substantially responsible for the day-to-day management and operation of American Wire. He had no involvement in the day-to-day operations of PNA. With respect to American Wire, Supreme Court found that the value of the company did not change during the course of the marriage. The court further found, however, that plaintiff's American Wire 401K had appreciated in value during the marriage, and thus the court awarded defendant half of the value of that appreciation by way of a Qualified Domestic Relations Order. With respect to PNA, the court found that the value of PNA appreciated by $20 million during the course of the marriage but that the increase in value attributable to plaintiff was minimal when compared to the increase attributable to those hired by plaintiff to run the company. The court thus determined that only 10% of the appreciation in value of PNA was marital property subject to equitable distribution and that defendant was entitled to 40% of the appreciated value based on her contributions as a homemaker. The court made additional awards with respect to life insurance policies, an art collection, and bank accounts, resulting in a total distributive award to defendant of $556,611.82. The court awarded defendant $1,700 per week as maintenance for a period of approximately 17 months. The Appellate Division held that the court properly determined that only 10% of the appreciation of the value of PNA, a wholly owned subsidiary of American Wire, was marital property subject to distribution. Plaintiff was the sole shareholder of American Wire prior to the marriage, and thus American Wire remained plaintiff's separate property. PNA appreciated in value by over $20 million during the course of the marriage but that plaintiff's contributions to that appreciation were minimal. The Court pointed out that it is well settled that an increase in the value of separate property of one spouse, occurring during the marriage and prior to the commencement of matrimonial proceedings, which is due in part to the indirect contributions or efforts of the other spouse as homemaker ... should be considered marital property. "When a nontitled spouse's claim to appreciation and the other spouse's separate property is predicated solely on the nontitled spouse's indirect contributions, however, some nexus between the titled spouse's active efforts and the appreciation in the separate property is required" (Hartog v. Hartog, 85 N.Y.2d 36, 46, 623 N.Y.S.2d 537, 647 N.E.2d 749). Here, the court properly considered the "active efforts of others and any additional passive or active factors" in determining the percentage of total appreciation that constitutes marital property subject to distribution. The award of maintenance was not an abuse of discretion.

Court Equitably Distributes Homestead Exemption on Martial Residence

In Tarone v Tarone, -- N.Y.S.2d ----, 2009 WL 260949 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed a judgment of divorce, which, inter alia, directed that the wife be awarded $25,000, representing her equitable share of the $50,000 homestead exemption of the marital residence, and maintenance of $20,000 per year for three years, The husband reported earning up to $300,000 per year during the marriage, and the wife testified that she was attempting to revive her opera career, after having taken significant time off during the marriage. Under these circumstances, the court's award of maintenance in the sum of $20,000 per year for three years was a provident exercise of its discretion.

CPLR 2102 (c) Strips Clerk of Authority to Reject Copies of Papers for Filing Unless Directed by Law, Rule, or Court Order

In Gehring v Goodman, 8/31/2009 NYLJ 18, (col. 1) Sup Ct N.Y. Co (Braun, J.), an article 78 proceeding, the court granted the petitioner attorney an 'order' directing respondent the County Clerk to accept for filing copies of affidavits confessing judgement that petitioner wanted to file pursuant to CPLR 3218 (b). Respondents did not submit any papers in opposition. According to petitioner, respondent, in interpreting CPLR 3218 (b), took the position that because the statute says 'the affidavit', that means the original affidavit must be filed, and thus he would not accept a copy thereof for filing.

CPLR 3218 (b) provides in part: “ At any time within three years after the affidavit is executed, it may be filed with the clerk...” It also noted that CPLR 2101 (e) states in pertinent part: Except where otherwise specifically prescribed, copies, rather than originals, of all papers, including orders, affidavits and exhibits may be served or filed. And CPLR 2102 (c) provides: A clerk shall not refuse to accept for filing any paper presented for that purpose except where specifically directed to do so by statute or rules promulgated by the chief administrator of the courts, or order of the court. Justice Braun held that since CPLR 3218 (b) does not specify that only the original of the affidavit must be accepted for filing and does not proscribe the filing of a copy of the affidavit, a copy may be filed. There is neither a statute nor rule of the chief administrator of the courts that directs respondent to refuse to accept for filing a copy of an affidavit under CPLR 3218 (b), nor had respondent shown that there is any court order that so directs him. He noted that Professor Alexander comments that the purpose of CPLR 2102 (c) is to strip clerks of any authority to reject papers offered for filing unless the refusal is directed by law, rule, or court order (Alexander, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, Civil Practice Law and Rules 2102, 2009 Pocket Part, at 283).

No Offset Against Child Support Obligations For Overpayments of Child Support, Extracurricular Activities and College Costs

In Mairs v Mairs, --- N.Y.S.2d ----, 2009 WL 1011101 (N.Y.A.D. 3 Dept.) the parties were married in 1981 and had seven children. Plaintiff (husband) was an ophthalmologist with his own private practice while defendant (wife) was a tenured math professor. In 2002, the husband commenced the action for divorce. Supreme Court granted the husband a divorce and ordered the husband to pay the wife 15% of the value of his medical license and medical practice, finding that the value of the marital portion of the wife's Master's degree was $56,000 while the marital portion of the husband's Bachelor's degree and medical license had a total value of $1,493,000. The court then determined that each party was entitled to 15% of the value of these assets, resulting in a net award to the wife of $215,550. It also directed the husband to pay $400 per week in maintenance for seven years, child support of $1,260 per week, $18,000 of the wife's counsel's fees, 50% of the expert witness fees, and a portion of the college expenses incurred by the parties' eldest child. It required the husband, as a guarantee against his obligations under the judgment, to maintain a $200,000 life insurance policy with the wife listed as the primary beneficiary. The Appellate Division held that the wife was entitled to more than 15% of the value of the husband's license to practice medicine and his medical practice, noting that during this long-term marriage, the husband successfully completed his undergraduate studies and attended medical school, he also earned his medical degree and completed both his internship and residency, after which he was able to establish a successful medical practice. While the husband pursued his medical career, the wife gave birth to the parties' seven children, cared for them, managed the household and earned a salary that, for a time, was the principal source of the family's income. She relocated the family from Utah to Philadelphia and later to New York for the express purpose of allowing the husband to pursue his medical studies and obtain his medical license. When the husband entered private practice, the wife, in addition to her maternal obligations, continued to work, commuting on a regular basis to Philadelphia, and managed the practice, assuming the responsibility for the preparation of all invoices and the payment of all bills. The wife's contributions to her husband's medical career were both meaningful and significant and she was entitled to 25% of the value of his medical license, as well as his medical practice. While Supreme Court placed a value on the husband's educational degrees at $1,493,000, it adopted the opinion of the expert retained by the parties that the practice had a value of $12,000 and that the wife's distributive share amounted to $1,800. The expert, while acknowledging that the practice annually had gross revenues in excess of $500,000, initially placed its value at $93,000, after allowing for a full discount on the total amount alleged by the husband to be owed on a loan made to the practice by a local hospital. The expert then reduced that amount to account for the tax implications that would occur if the practice were sold. While accepting Supreme Court's determination that the tax impact generated by the sale of the practice was fairly considered in this valuation, the court did not agree that the full amount of the loan, $190,830 , should be included in determining the practice's fair market value. It noted that in the 12 years that this debt had been in existence, not one payment has been made against its principal and the promissory notes evidencing the existence of this legal obligation only amount to $104,000. As a result, while it was appropriate to consider this loan as a liability to be counted against the value of the practice, the amount used to discount its value should be that represented by the face value of the promissory notes, $104,000. Given that the expert acknowledged reducing his estimate of the practice's value by the full amount claimed to be owed on this loan, the value of the practice for distributive purposes was increased by $86,830 to $98,830, with the wife receiving a 25% distributive share. The Court found no abuse of discretion in Supreme Court's imposition of a 4.2% interest rate imposed on the amount the husband owed the wife for her share of the marital assets. The manner in which a distributive award is to be paid is discretionary and the imposition of interest on an outstanding debt as a result of equitable distribution is equally within a court's discretion. Supreme Court failed to explain its deviation from the statutory 9% interest rate imposed by CPLR 5004 and the court noted that its decision should not be read as an approval of such an omission. Supreme Court directed that the husband pay the wife $400 per week maintenance for seven years, or $20,800 annually. The husband earned, on average, $300,000 per year, was in good health and enjoyed a significant earning potential for the foreseeable future. In comparison, the wife suffered from chronic asthma, had an annual salary that, in the past, rarely exceeded $50,000 and was not likely to earn significantly more income in the future. Given the length of the marriage, the wife's age and the fact that a substantial portion of the distributive award for her share of the marital assets was deferred, it increased the maintenance obligation to $500 per week for seven years. The Court noted that in determining each party's annual gross income for child support purposes, the trial court neglected to add any income that had been deferred by the parties ( Domestic Relations Law 240[1-b][b][5][iii] ) or deduct all the payments made by them for FICA and Medicare taxes (Domestic Relations Law 240 [1-b][b][5][vii][C], [H] )and there was no indication that Supreme Court, prior to making this computation, deducted the amount that the husband was paying in maintenance from the total of his gross income ( Domestic Relations Law 240[1-b][b][5][vii][C]). In calculating child support Supreme Court used 35% as the percentage to be applied against the first $80,000 of combined income, but reduced the percentage to 25% for any income over $80,000. The husband's pro rata share of child support was 83% and the wife's pro rata share was 17%. Supreme Court found that applying the statutory percentage to all of the parties' income, including that in excess of $80,000, would result in an "unjust or inappropriate" award. Since the husband's child support obligation will be substantially reduced once his maintenance payments are deducted from his gross income and, as a result of Supreme Court's decision, he was no longer required to contribute to the payment of the children's extracurricular activities, a financial burden borne entirely by the wife, there was no justification for deviating from the statutory percentage. Therefore the 35% figure was applied against the entire combined parental income used to calculate child support. It recalculated child support finding the husband's pro rata share of the combined obligation was $71,025 annually, or $1,365 per week. This obligation was to be adjusted to take into account that period of time that the husband had custody of one child and the wife did not pay child support. Further, this amount of child support was to be adjusted upon the termination of the maintenance obligation to the wife (Domestic Relations Law 240[1-b][b][5][vii][C]). It vacated Supreme Court's determination that the husband should receive a $250 weekly credit against his child support obligations "for overpayments of child support, extracurricular activities and college expenses" The court noted that there can be no such offset and that this part of the order must be vacated. Because the husband would be required to pay additional maintenance, as well as a significant sum for the wife's distributive share of the marital assets, the Appellate Division refused to revisit Supreme Court's decision that the husband was no longer required to contribute towards the payment of the children's extracurricular activities or that he pay any more of the expert witness fees or the wife's counsel fees. Supreme Court's only required the husband to pay half of a loan taken by the wife to defray expenses incurred by their oldest daughter for her first two years in college. This finding, which also served to absolve the husband from any responsibility for any college expenses incurred by any of the remaining six children, appeared to be at odds with the court's own observation of the "high value [the parties] place upon learning and knowledge," and the "ambitions and hopes" they have for their children. Given that the evidence presented at trial focused almost exclusively on the oldest child, it found that Supreme Court did not adequately account for the needs of the other children or give appropriate consideration to expectations that appear to have existed within the family unit as to their pursuit of a higher education. Its decree that the husband had no financial responsibility for the payment of college expenses incurred on behalf of the remaining children, per the wife's request, was stricken. Supreme Court, other than acknowledging that the insurance was to secure the husband's obligation to pay maintenance and the wife's distributive share of the marital assets, failed to set forth any rationale for establishing the face value of the life insurance policy at $200,000. The Court found that given that the obligations it was intended to secure easily exceed $200,000, such a policy would not serve its intended purpose. The order was modified to the extent that the husband was required to obtain a declining term life insurance policy with an initial face value of $500,000.

September 1, 2009

CSSA Cap on Combined Parental Income Raised to $130,000 effective January 31, 2010

Laws of 2009, Chapter 343 enacted the "child support modernization act" which amended the provisions of the Child Support Standards Act to raise the cap on combined parental income to $130,000 effective January 31, 2010, and to provide for the adjustment of the $130,000 cap every two years to reflect changes in the Consumer Price Index. The child support percentages of payments that non-custodial parents are obligated to make toward child support remains the same. Domestic Relations Law § 240 (1-b) (2) and Family Court Act § 413 (1) (c) (2) were each amended to provide that the court shall multiply the combined parental income up to the amount set forth in Social Services Law 111-i, (2) (b). Social Services Law 111-i (2)(b) provides that the combined parental income amount to be reported in the child support standards chart and utilized in calculating orders of child support in accordance with Domestic Relations Law § 240 (1-b) (2) and Family Court Act § 413 (1) (c) (2) shall be one hundred thirty thousand dollars; and that beginning January 31, 2012 and every two years thereafter, the combined parental income amount shall increase by the product of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the two year period rounded to the nearest one thousand dollars. These amendments take effect on January 31, 2010.

Domestic Relations Law § 240 (1-b) (2) and Family Court Act § 413 (1) (c) (2) were each amended to read as follows:

(2) The court shall multiply the combined parental income up to the amount set forth in paragraph (b) of subdivision two of section one hundred eleven-i of the social services law by the appropriate child support percentage and such amount shall be prorated in the same proportion as each parent's income is to the combined parental income.

Social Services Law 111-i (2) was amended to read as follows:

2. (a) The commissioner shall publish a child support standards chart. The child support standards chart shall include: (i) the revised poverty income guideline for a single person as reported by the federal department of health and human services; (ii) the revised self-support reserved as defined in section two hundred forty of the domestic relations law; (iii) the dollar amounts yielded through application of the child support percentage as defined in section two hundred forty of the domestic relations law and section four hundred thirteen of the family court act; and (iv) the combined parental income amount.

(b) The combined parental income amount to be reported in the child support standards chart and utilized in calculating orders of child support in accordance with subparagraph two of paragraph (c) of subdivision one of section four hundred thirteen of the family court act and subparagraph two of paragraph (c) of subdivision one-b of section two hundred forty of the domestic relations law shall be one hundred thirty thousand dollars; provided, however, beginning January thirty-first, two thousand twelve and every two years thereafter, the combined parental income amount shall increase by the product of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the two year period rounded to the nearest one thousand dollars.

(c) The commissioner shall publish the child support standards chart on an annual basis by April first of each year and in no event later than forty-five days following publication of the annual poverty income guideline for a single person as reported by the federal department of health and human services.

“Lure and Attraction of a Paramour" in Not an Affirmative Defense to Cruel and Inhuman Treatment.

In Dodd v Colbert, 881 N.Y.S.2d 711 (3 Dept 2009) plaintiff’s amended complaint included allegations, under the ground of cruel and inhuman treatment, that defendant entered into an illicit sexual relationship with a named individual. Defendant served an unverified amended answer with five affirmative defenses. The Appellate Division held that Supreme Court properly denied plaintiff's motion to dismiss the affirmative defense regarding specificity of the complaint on the cause of action alleging cruel and inhuman treatment. A complaint in a divorce action must particularize the nature and circumstances of the other party's alleged misconduct "and the time and place of each act complained of" (CPLR 3016 [c] ). Exact dates need not be furnished to comply with this statute, as long as the allegations sufficiently inform the defendant of the misconduct which will be addressed at trial. However, plaintiff's allegations covering the entire period of the marriage or the previous five years, without any attempt at further specificity, were too vague to apprise defendant of the accusations being leveled against her. The Appellate Division held that because only one paragraph of the complaint's cause of action alleging cruel and inhuman treatment contained a date (with month and year) and the remaining allegations were merely alleged to have occurred "[d]uring the course of the marriage and especially within five (5) years prior to the date of commencement," this affirmative defense should not have been dismissed as to that cause of action. As to the constructive abandonment cause of action, the Court held that complaint was sufficiently particularized so as to render this affirmative defense inapplicable. Plaintiff was entitled to dismissal of the affirmative defense that "the lure and attraction of a paramour" was the basis for the divorce. The Legislature has not provided any defenses to a divorce action based on the ground of cruel and inhuman treatment. Despite the absence of a defense, "defendant may show that misconduct by plaintiff, such as the lure and attraction of a paramour, is the reason for plaintiff seeking a divorce rather than the alleged cruel and inhuman treatment". While evidence related to this topic is relevant to the cause of action, it does not constitute an affirmative defense. Supreme Court should have dismissed the affirmative defense that any abandonment was justified. To establish abandonment as a ground for divorce, the plaintiff must prove that the defendant refused to fulfill the basic marital obligations for a period of one year or more, without consent by the abandoned spouse and without justification. Because the lack of justification is an element the plaintiff must prove to establish abandonment, the issue of justification would not take a plaintiff by surprise or raise issues not appearing in the complaint; thus, it is not an affirmative defense (see CPLR 3018[b]). Accordingly, plaintiff was entitled to dismissal of the affirmative defense of justification. The Appellate Division also held that Plaintiff was entitled to receive a verified answer to all allegations except those relating to adultery. Upon receiving the unverified answer, plaintiff immediately informed defendant of that defect, thus preserving the objection to lack of verification (see CPLR 3022). All pleadings in matrimonial actions must be verified, unless they are in response to charges of adultery (see DRL 211). Even where adultery is not alleged as a ground, portions of a pleading are not required to be verified if they concern matters that the party would be privileged from testifying about as a witness. (see CPLR 3020[a]). As adultery is still a crime (Penal Law 255.17), defendant would not be required to testify concerning allegations of an illicit affair (CPLR 4501). While a defendant need not verify the privileged portion of the answer, the remainder of the answer must be verified. Thus, defendant was required to verify all but her response to the allegations implicating her in adulterous conduct.

Proponent of Claim of Separate Property Required to Demonstrate Portion of Disability Pension Considered Separate.

In Rosenberger v Rosenberger, 63 A.D.3d 898, 882 N.Y.S.2d 426 (2 Dept 2009) the Appellate Division held that Supreme Court did not err in concluding that the parties' stipulation of settlement entitled the defendant to receive a share of his entire accident disability pension. The stipulation by which the parties agreed that the defendant would receive her "marital coverture portion" of the plaintiff's pension pursuant to a Qualified Domestic Relations Order (QDRO) was clear and unambiguous, and did not on its face reflect an intent to draw a distinction between the portion of the pension which

would be considered marital property, and the portion which would be considered separate property, if this matter had been adjudicated pursuant to Domestic Relations Law 236(B)(5)(b). Furthermore, although a retiree spouse is entitled to treat, as separate property, that portion of an accident disability pension which constitutes compensation for personal injury, where that issue is adjudicated pursuant to Domestic Relations Law 236(B)(5)(b) "[t]he proponent of the claim of separate property is required to demonstrate the portion of the disability pension which is to be considered separate" (see Palazzolo v. Palazzolo, 242 A.D.2d 688, 663 N.Y.S.2d 58). Here, the plaintiff, a former New York City firefighter, suffered a line-of-duty injury and applied for an accident disability pension before entering into the subject stipulation. Thus, he clearly was aware of or chargeable with knowledge of the prospect of his eventual disability retirement when he entered into the stipulation" (Pulaski v. Pulaski, 22 A.D.3d at 821, 804 N.Y.S.2d 404). Although the plaintiff acknowledged in the stipulation of settlement that he had been advised of and understood his rights pursuant to the equitable distribution provisions of the Domestic Relations Law, the stipulation of settlement nevertheless provided for a division of his pension without reference to whether the pension was based on accident disability or referable to ordinary service retirement. Moreover, the QDRO authorizing the defendant to receive a share of the plaintiff's entire pension in accordance with the Majauskas formula (see Majauskas v. Majauskas, 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15) was entered upon the plaintiff's consent after his application for an accident disability pension had been approved. Under these circumstances, the Supreme Court properly denied the plaintiff's motion, in effect, to amend the QDRO.

August 17, 2009

Loss of Health Insurance Benefits Added as Factors in Equitable Distribution and Maintenance Awards

Laws of 2009, Ch 229 amends the domestic relations law, in relation to maintenance and equitable distribution of marital property, effective September 14, 2009 to add “the loss of health insurance benefits upon dissolution of the marriage as a factor to be considered by the court in making a maintenance award and in making a property distribution.

Domestic Relations Law § 236 [B][5][d],subparagraphs 5, 6, 7, 8, 9, 10, 11, 12 and 13 were renumbered subparagraphs 6, 7, 8, 9, 10, 11, 12, 13 and 14, and a new subparagraph 5 was added to read as follows: (5) the loss of health insurance benefits upon dissolution of the marriage. Domestic Relations Law § 236 [B][6][a][10] was amended to read as follows: (10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration. Domestic Relations Law 236 [B][6][a][11] was renumbered subparagraph 12 and a new subparagraph 11 was added to read as follows: (11) the loss of health insurance benefits upon dissolution of the marriage. The amendments apply to any action or proceeding commenced on or after the effective date of September 14, 2009. See Laws of 2009, Ch 229, § 4.

Spouse Seeking Pendente Lite Counsel Fees May Not Press Claim after the Spouse from Whom Such Relief Was Sought Dies.

In King v Kline, --- N.Y.S.2d ----, 2009 WL 2431950 (N.Y.A.D. 1 Dept.) the Appellate Division held that a spouse seeking pendente lite counsel fees may not continue to press such a claim in a divorce action after the spouse from whom such relief was sought dies. In February 2008, the wife moved for omnibus pendente lite relief. The resulting order directed the husband, among other things, to pay accrued professional fees to the wife's outgoing attorneys, her incoming attorneys, and her accountants. In September 2008, the wife moved by order to show cause to compel the husband and his employer to comply with outstanding discovery or, in the alternative, for various sanctions. In addition to that relief, the wife sought $200,000 in additional interim counsel fees, "virtually all of [which]" she argued "were made necessary by plaintiff's dilatory behavior and litigation strategy." The motion court, inter alia, awarded the wife $25,000 in counsel fees, "subject to reallocation at trial." The wife perfected an appeal of the order on February 23, 2009. On March 18, 2009, before his brief was due, the husband died. An estate representative was substituted as plaintiff and the parties stipulated that the discovery issues addressed in the wife's brief were moot. The wife disagreed with the estate that the issue of counsel fees was also academic. The estate moved to dismiss the appeal, arguing that, upon the husband's death, the divorce action ended. The Appellate Division pointed out that it is well settled that "a suit for divorce abates at the death of either party, because the marriage relation sought to be dissolved no longer exists" (Cornell v. Cornell, 7 N.Y.2d 164, 169 [1959] ). As the wife's claim for interim counsel fees was necessarily dependent on the existence of a divorce action in which to make the claim, it was extinguished along with the litigation. The death of the husband precluded the wife from seeking counsel fees because "it is only where the parties to the action stand in the relation of husband and wife that the latter is entitled to" such fees (Farnham v. Farnham, 227 N.Y. 155, 158 [1919] ). The wife argued, relying on the holding in Peterson v. Goldberg (180 A.D.2d 260 [1992], lv dismissed 81 N.Y.2d 835 [1993] ), that her claim may proceed because her right to an award of interim counsel fees is "vested." However, that case was distinguishable because that was an action for equitable distribution following a foreign judgment of divorce. The court noted that there is no reason for a rule providing that the right to seek pendente lite counsel fees survives the death of a party to a divorce action. The purpose of pendente lite relief counsel fees is to level the playing field, to sustain the nonmonied spouse pending resolution of a divorce action so a fair result can be reached. Once, as here, the action abates, any concerns about the nonmonied spouse's ability to litigate on a level playing field no longer exist. Accordingly, there was no reason for the court to retain jurisdiction over the application for interim counsel fees, notwithstanding the abatement of the action.

Provision Imposing Interest as a Consequence of a Payment less than 30 Days Late Constituted Unenforceable Penalty.

In Chumsky v Chumsky, 881 N.Y.S.2d 774 (4 Dept 2009) the Appellate Division reversed on the law an order granting defendant's motion to enforce that part of a post-judgment order requiring plaintiff to pay defendant a distributive award in monthly installments pursuant to the terms of the parties' stipulation that was incorporated but not merged in the post-judgment order. The stipulation provided that, in the event that any installment payment was more than 15 days overdue, plaintiff was obligated to pay 9% interest on the balance due at the time of the late payment, calculated from the initial payment due date. In addition, the stipulation provided that, if any payment was more than 30 days late, the entire unpaid balance was immediately due and payable. Plaintiff's installment payments exceeded the 15-day grace period on several occasions, over a 16-month period. The Appellate Division held that the provision of the post-judgment order imposing interest as a consequence of a payment less than 30 days late constituted an unenforceable penalty. Whether a contractual provision 'represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances. Where, as here, a stipulation provides for an amount to be paid as a consequence of a breach that is " 'plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced' " (JMD Holding Corp., 4 N.Y.3d at 380). The Court found that the imposition of interest on the unpaid balance of the distributive awards pursuant to the post-judgment order would nearly double the original amount agreed upon. Given that disproportionate consequence, it concluded that enforcement of that part of the post-judgment order providing for the imposition of interest as a result of payments overdue by more than 15 days but less than 30 days constituted an unenforceable penalty.

To Be Entitled to Reformation Mistake Must Vitally Affect a Fact on the Basis of Which The Parties Contracted

In True v True, 63 A.D.3d 1145, 882 N.Y.S.2d 261 (2 Dept 2009) the parties were married on May 26, 1991, and divorced by judgment dated March 28, 2005, which incorporated the parties' February 2, 2005 stipulation of settlement, which provided, in Article XIII, that the plaintiff's stock awards from his employer, Goldman Sachs, would be "divided 50-50 in kind." To that end, the agreement specified that 3,655 shares of the stock awards were available for division and provided, based on a formula created by the plaintiff, that the defendant would receive 1,894 of those shares. The defendant thereafter redeemed 1,894 shares and later, the plaintiff learned that only 150 shares remained. After the defendant rejected the plaintiff's demand that she remit to him the shares or the value thereof in excess of her 50% share, the plaintiff commenced an action for reformation. The plaintiff moved for summary judgment and argued that a mutual mistake led the parties to erroneously use the gross number of shares, 3,655, which were the number of delivered and outstanding shares available prior to the payment of taxes, fees, and other withholdings, instead of the net number of shares. The plaintiff accordingly sought reformation of the agreement to reflect the net number of shares actually available for division. The defendant argued that the only mistake was made by the plaintiff and, in any event, even if her receipt of 1,894 shares did not result in a 50- 50 division of the shares, she specifically agreed to receive those shares in return for forgoing additional maintenance and health insurance. The Appellate Division held that for a party to be entitled to reformation of a contract on the ground of mutual mistake, the mutual mistake must be material, i.e., it must involve a fundamental assumption of the contract . A party need not establish that the parties entered into the contract because of the mutual mistake, only that the material mistake vitally affects a fact or facts on the basis of which the parties contracted. Proof of mistake must be of the highest order and must 'show clearly and beyond doubt that there has been a mistake' and it must show with equal clarity and certainty 'the exact and precise form and import that the instrument ought to be made to assume, in order that it may express and effectuate what was really intended by the parties'. Since the thrust of a reformation claim is that a writing does not set forth the actual agreement of the parties, both the parol evidence rule and the statute of frauds are inapplicable. Thus, a party seeking to reform a contract based on, for example, mutual mistake, may rely on extrinsic evidence even if the agreement is not ambiguous. The Court found that the plaintiff established, prima facie, that Article XIII of the agreement contained a mutual mistake. First, both the final agreement and all five prior drafts thereof refer to the gross number of shares, as set forth in Goldman Sachs equity award summaries, as being available for division between the parties Although an equity award summary dated January 25, 2005, was generated by the plaintiff in his capacity as a Goldman Sachs employee, he immediately shared that summary with the defendant and the defendant did not dispute the plaintiff's contention that the parties and their counsel each relied on the summary during the final negotiation session on February 2, 2005. Although footnotes 3 and 4 on page 4 of that summary explain the distinction between gross and net shares, neither the parties nor their counsel apparently realized that the "3,655" number of shares they were using, based on page 2 of the summary, represented the gross shares, not the net shares that would actually be delivered after Goldman Sachs paid taxes and fees, and made other withholdings. As such, the reference in Article XIII to the defendant receiving 1,894 shares was erroneously based on one-half of the gross shares, as the parties did not consider that upon the defendant's redemption of 1,894 shares, Goldman Sachs would use a significant number of the total number of gross shares to pay taxes and fees, and make other withholdings. Accordingly, the plaintiff established, prima facie, that the parties' use of 3,655 gross shares was a mutual mistake because it undermined their intent to divide the net shares available for division, 50-50 in kind, and she was entitled to summary judgment. Turning then to the remedy to which the plaintiff was entitled, the Appellate Division held that "in kind" division does not indicate the parties' intent to "bear any burden upon the shares resulting from their redemption." Rather, a practical interpretation of Article XIII supported the conclusion that the parties intended "in kind" to mean actual shares or their equivalent monetary value. Accordingly, it reformed Article XIII to refer to the net shares available for division, and to provide that each of the parties were to receive one-half of those net shares or their equivalent monetary value.

August 3, 2009

Domestic Relations Law § 177 has been repealed, and replaced by Domestic Relations Law § 255, which was signed into law on July 11, 2009. It becomes effective 90 days after the date it was signed into law and applies to all actions in which judgment has not been entered as of the effective date. (See Laws of 2009, Ch 143)

Domestic Relations Law § 255, subdivision 1 provides that prior to signing a judgment of divorce or separation, or a judgment annulling a marriage or declaring the nullity of a void marriage, the court must ensure that both parties have been notified, at such time and by such means as the court determines, that once the judgment is signed, a party thereto may or may not be eligible to be covered under the other party's health insurance plan, depending on the terms of the plan. In the case of a defaulting defendant, service upon the defendant, simultaneous with the service of the summons, of a notice indicating that once the judgment is signed, a party thereto may or may not be eligible to be covered under the other party's health insurance plan, depending on the terms of the plan, shall be deemed sufficient notice to a defaulting defendant. (Go to http://www.nysdivorce.com to download a suggested Notice of Possible Loss of Eligibility For Health Care Coverage)

Domestic Relations Law § 255, subdivision 2 provides that if the parties have entered into a stipulation of settlement or agreement, on or after the effective date of Section 255, resolving all of the issues between the parties, the stipulation of settlement or agreement must contain a provision relating to the health care coverage of each party. The provision must either: (a) provide for the future coverage of each party, or (b) state that each party is aware that he or she will no longer be covered by the other party's health insurance plan and that each party shall be responsible for his or her own health insurance coverage, and may be entitled to purchase health insurance on his or her own through a COBRA option, if available. The requirements subdivision 2 may not be waived by either party or counsel. In the event that it is not complied with, the court must require compliance and may grant a thirty day continuance to afford the parties an opportunity to procure their own health insurance coverage. (Go to http://www.nysdivorce.com to download a suggested Agreement-Stipulation Provision for Compliance with Domestic Relations Law § 255)

Attorney Removed as Counsel to 11-year-old in Paternity and Visitation Case Because He Had Not Ascertained and Followed Wishes of the Child.

In Matter of Mark T. v. Joyanna U., \_\_AD2d\_\_, \_\_NYS2d\_\_, No. 504630 (3 Dept 2009) the mother moved to dismiss the paternity and visitation petition based on the ground of equitable estoppel. After a hearing, Family Court dismissed the petitions. Petitioner appealed. No appeal has been was taken on behalf of the child. The child was represented by a different attorney on the appeal, who filed a brief in support of an affirmance of Family Court's order, which was a position counter to that taken by the attorney representing the child in Family Court. The child's appellate attorney appeared at oral argument of the appeal and, in response to questions from the Court, revealed that he had neither met nor spoken with the child. He explained that, while he did not know the child's position on the appeal, he was able to determine his client's position at the time of the trial from his review of the record, and he decided that supporting an affirmance would be in the 11½-year-old child's best interests. The Appellate Division relieved that attorney, assigned new counsel and held the decision in abeyance. It pointed out that the Family Court Act identifies, as one of the primary obligations of the attorney for the child, helping the child articulate his or her position to the court (see Family Ct Act § 241). As with the representation of any client this responsibility requires consulting with and counseling the client. Expressing the child's position to the court, once it has been determined with the advice of counsel, is generally a straightforward obligation, regardless of the opinion of the attorney. It noted that the Rules of the Chief Judge (22 NYCRR § 7.2) direct that in all proceedings other than juvenile delinquency and person in need of supervision cases, the child's attorney "must zealously advocate the child's position" and that, in order to determine the child's position, the attorney "must consult with and advise the child to the extent of and in a manner consistent with the child's capacities". The rule also states that "the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests" and that the attorney "should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests" . The rule further advises that the attorney representing the child would be justified in advocating a position that is contrary to the child's wishes when he or she "is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent serious harm to the child". In such situations the attorney must still "inform the court of the child's articulated wishes if the child wants the attorney to do so". In October 2007, the Administrative Board of the Courts of New York issued a policy statement, entitled "Summary of Responsibilities of the Attorney for the Child," which outlines the necessary steps that form the core of effective representation of children. These enumerated responsibilities, which apply equally to appellate counsel, include – but are not limited to – the obligation to: "(1) [c]ommence representation of the child promptly upon being notified of the appointment; (2) [c]ontact, interview and provide initial services to the child at the earliest practical opportunity, and prior to the first court appearance when feasible; (3) [c]onsult with and advise the child regularly concerning the course of the proceeding, maintain contact with the child so as to be aware of and respond to the child's concerns and significant changes in the child's circumstances, and remain accessible to the child." The Appellate Division concluded that the child in this proceeding had not received meaningful assistance of appellate counsel. He was, at the least, entitled to consult with and be counseled by his assigned attorney, to have the appellate process explained, to have his questions answered, to have the opportunity to articulate a position which, with the passage of time, may have changed, and to explore whether to seek an extension of time within which to bring his own appeal of Family Court's order. The child was entitled to be appraised of the progress of the proceedings throughout. It appeared that none of these services was provided to the child . There was nothing in the record to indicate that the child suffered from any infirmity which might limit his ability to make a reasoned decision as to what position his appellate attorney should take on his behalf. The Appellate Division held that absent any of the extenuating circumstances set forth in 22 NYCRR 7.2 (d) (3), the appellate attorney should have met with the child and should have been directed by the wishes of the child, even if he believed that what the child wanted was not in the child's best interests. By proceeding on the appeal without consulting and advising his client, appellate counsel failed to fulfill his essential obligation.

If Credit for Increase in Equity Attributable to Payment of Mortgage Principal Is Given, That Return of Equity Should Be Subtracted from the Increased Value of Marital Residence to Arrive at Net Increased Value.

In Kost v Kost, 63 A.D.3d 798, 881 N.Y.S.2d 141 (2 Dept 2009) the Appellate Division held that the husband was entitled to an equitable share in the increase in the value of the marital residence over the course of the marriage, notwithstanding that the residence was the separate property of the wife. The increase in the value of separate property remains separate property "except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse" , at which point the increase in value becomes marital property. The record established that the appreciation in the value of the marital residence was attributable to the joint efforts of the parties .The husband was, thus, entitled to share equitably in that increased value. Accordingly, the Supreme Court should have awarded the parties equal shares in the increase in the value of the marital residence. The Supreme Court determined that the husband was entitled to a credit representing his 50% share of the reduction in the principal of the mortgage obligation referable to the residence. The Appellate Division held that if that credit for the increase in equity attributable to the payment of mortgage principal is made, however, that return of equity should be subtracted from the increased value of the marital residence to arrive at the net increased value. Moreover, the husband was entitled to a return of the total contribution he made toward the purchase of the marital residence from his separate property.

Unnecessary for Supreme Court to Provide in Judgment That Maintenance Shall Terminate upon the Death of Either Party or Plaintiff's Valid or Invalid Marriage

In Lorenz v Lorenz, 63 A.D.3d 1361, 881 N.Y.S.2d 208 (3 Dept 2009) after more than 33 years of marriage, plaintiff commenced a divorce action. There were two emancipated children of the marriage. After a bench trial, at which time both parties were 54 years of age, Supreme Court, equally distributed the marital property and awarded maintenance to plaintiff of $500 per week, retroactive to September 4, 2007 and until such time as plaintiff can draw full Social Security benefits, apparently when she becomes 66. Defendant asserted that the court abused its discretion in awarding maintenance because plaintiff was capable of being self-supporting and, in the alternative, that the amount and duration were excessive. The Appellate Division modified the duration to reflect that maintenance shall terminate when plaintiff begins to draw Social Security benefits, or when she reaches full Social Security age, whichever occurs first. It rejected defendant's assertion that Supreme Court erred in failing to order that maintenance shall terminate upon the death of either party or plaintiff's valid or invalid marriage. Such language is unnecessary because the Domestic Relations Law, in more than one place, provides for the termination of any order of maintenance "upon the death of either party or upon the recipient's valid or invalid marriage.

July 16, 2009

Domestic Relations Law 236 [B] [2] was amended, by Laws of 2009, Chapter 72, § 1, effective September 1, 2009, to add a subdivision b, which provides for automatic restraining orders that come into effect upon the commencement of a matrimonial action and bind both parties.

Domestic Relations Law § 236 (B) (2) (b) provides that the plaintiff shall cause to be served upon the defendant, simultaneous with the service of the summons, a copy of the automatic orders set forth in subdivision (b). This paragraph places upon the plaintiff a duty to serve upon the defendant automatic orders which bind both parties. The automatic orders are binding upon the plaintiff upon the commencement of the action by the filing of the summons or summons and complaint. They are binding upon the defendant upon service of the Summons or ‘Summons and Complaint. The automatic orders remain in full force and effect during the pendency of the action, unless terminated, modified or amended by further order of the court, upon motion of either of the parties, or upon written agreement between the parties duly executed and acknowledged. The automatic orders are as follows: (1) Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action.(2) Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keough accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court. (3) Neither party shall incur unreasonable debts hereafter, including, but not limited to further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action. (4) Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical hospital and dental insurance coverage in full force and effect. (5) Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect. (Go to http://www.nysdivorce.com to download a suggested form notice of automatic restraining orders)

Mailing Notice of Appeal Requires Deposit in a Post Office or Official Depository Within the State

In M Entertainment, Inc. v. Leydier, 62 A.D.3d 627, 880 N.Y.S.2d 40 (1 Dept 2009) the Appellate Division dismissed an appeal for failure to obtain appellate jurisdiction, where the notice of appeal was mailed from New Jersey. It pointed out that an appeal as of right must be taken within 30 days after service by a party upon the appellant of a copy of the judgment or order appealed from, with notice of entry (CPLR 5513 [a]). An appellant takes such an appeal by serving upon adverse parties a notice of appeal, and filing same with the clerk of the court in which the judgment or order has been entered (CPLR 5515 [1]. Where applicable, CPLR 2103 (b) (2) provides for service of papers upon an attorney by mailing to the address designated for that purpose. "Mailing," under the statute, requires the deposit of those papers "in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state" (CPLR 2103 [f] [1]). It was undisputed that plaintiffs, who opted for service by mail, did not place the notice of appeal it sent to one of the defendants in a post office or depository within this State. It held that the notice of appeal was of no effect because service was not completed within the meaning of CPLR 2103. The Court noted that the Third Department had excused late service of a notice of appeal upon a showing of mistake or excusable neglect (Peck v Ernst Bros., 81 AD2d 940 [1981]), but the Court of Appeals has categorically held that "[t]he power of an appellate court to review a judgment is subject to an appeal being timely taken" (Hecht v City of New York, 60 NY2d 57, 61 [1983]. Thus, plaintiffs' improper service of their notice of appeal was a fatal jurisdictional defect.

Error to Award a Counsel Fee Without Application or Documentation

In Horowitz v Horowitz, --- N.Y.S.2d ----, 2009 WL 1797864 (N.Y.A.D. 2 Dept.) the Appellate Division found that Supreme Court awarded the wife's attorney a $10,000 fee without an application from either the wife or her attorney, and without any supporting documentation or other evidence demonstrating the propriety of such an award. Accordingly, the award was an improvident exercise of discretion. It also held that the court erred in directing that $10,000 from the husband's Interactive Brokers, LLC account be paid to the wife following its deposit into the escrow account of her attorney. The court indicated that this money was to be paid as "past due maintenance" pursuant to a prior order of the court, and as a "temporary distributive award." However, the record disclosed that, in requesting the funds from the subject brokerage account, the wife was not seeking maintenance or a distributive award. Rather, she alleged that the husband had "fled the jurisdiction with the parties' children." She claimed that by "cutting off" the husband's "supply of funds," the court might induce him to return to New York and that, if the funds were in her possession, she would make sure they were not "dissipated" and would be held for the benefit of the children. The Court held that these concerns were adequately addressed by the provisions of an order restraining the account and directing that a portion of it be transferred to the escrow account of the wife's attorney.

Error to Award Pendente Lite Relief Sua Sponte

In Clair v Fitzgerald, --- N.Y.S.2d ----, 2009 WL 1798127 (N.Y.A.D. 2 Dept.) between December 24, 2007, and February 25, 2008, the husband made three motions primarily seeking either temporary custody of the parties' five-year-old daughter, or enforcement of an oral agreement to share physical custody of the child. The wife opposed the husband's motions, but did not cross-move for any affirmative relief. Supreme Court resolved the issues raised by the husband's motions by directing the parties to comply with their oral visitation agreement. Although not requested by the wife, the court also directed the husband to pay pendente lite child support , to continue to maintain medical insurance for the wife and the child, and to pay 75% of unreimbursed medical expenses. The Appellate Division reversed. It stated:” Generally, a court may, in its discretion, "grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" (Frankel v. Stavsky, 40 AD3d 918, 918; see HCE Assoc. v. 3000 Watermill Lane Realty Corp., 173 A.D.2d 774). Here, however, the pendente lite relief directed by the court was completely different from the relief requested by the husband in his three motions, which raised issues relating to custody of and visitation with the child. In opposing the husband's motions, the wife did not indicate that she had any need for pendente lite child support, and there was nothing in the record to suggest that the husband intended to discontinue medical coverage for the wife and child. Since no request for pendente lite relief was made by the wife, the husband was not afforded an opportunity to address the necessity for such relief. Under these circumstances, the court erred in, sua sponte, awarding the wife pendente lite relief.

4% Annual Increase in Maintenance is Inappropriate

In Quinn v Quinn, --- N.Y.S.2d ----, 2009 WL 857603 (N.Y.A.D. 3 Dept.) the parties were married in 1991 and had two children (born in 1993 and 1996). In December 2005, plaintiff commenced this divorce action. Following a bench trial, Supreme Court awarded maintenance to plaintiff of $10,000 per month for 12 years and set defendant's monthly child support obligation at $8,058. The parties' marital assets were distributed equally, with the exception of defendant's medical business, of which plaintiff was awarded 30% of the stipulated value. The Appellate Division found that Supreme Court properly decided to distribute to plaintiff 30% of the value of defendant's interest in the medical business. The court recognized that, prior to the marriage, defendant obtained his medical degree and license, and was also an established orthopedic surgeon. Although plaintiff indirectly contributed to the medical business as a parent and homemaker, she made no direct contributions, financial or otherwise, to defendant's business. In addition she received a substantial award of maintenance. The Appellate Division found that in permitting defendant, the noncustodial parent, to declare the tax exemptions, Supreme Court reasoned that defendant was the sole source of income for the children and that allowing him to take the full benefit of the tax exemptions would "maximize the total available income to implement [the court's] decision." It recognized that where a noncustodial parent meets all or a substantial part of a child's financial needs, a court may determine that the noncustodial parent is entitled to declare the child as a dependent. Here, defendant was unable to take advantage of the benefits of the tax exemptions because his income exceeded the threshold set forth in 26 USC 151(d)(3). While defendant correctly replied that such provision contained a sunset clause causing it to expire in 2010 (see 26 USC 151[d][3][F] ), the court found no reason to deprive the parties of the opportunity to realize any tax benefit for the 2008 and 2009 taxable years. Accordingly, it held that plaintiff could claim the parties' children as dependants for income tax purposes for the 2008 and 2009 tax years, and for such further time until defendant was no longer precluded from the benefit of such dependency tax exemption. The parties were married for 14 years and, at the time of trial, defendant was 50 years old and earning over $1.1 million per year as a partner in a lucrative orthopedic practice. Plaintiff was 52 years old at the time of trial and, while gainfully employed prior to the marriage, sacrificed a career in retail management in order to undertake the role of a full-time wife and mother. Her prolonged absence from the retail market and lack of a college degree made it highly unlikely that she will ever be able to achieve reasonable parity with the marital standard of living through her own employment. Further, the parties' lifestyle prior to their divorce was lavish. Plaintiff would now be responsible for her own health insurance, property taxes, homeowner's insurance, and automobile expenses. In light of these facts, the monthly maintenance award was reasonable. However, its duration was reduced to eight years to encourage rehabilitation and self-sufficiency. Mindful that the primary purpose of maintenance is to encourage self-sufficiency by the recipient it found that the 4% annual increase in the amount of maintenance was inappropriate. Supreme Court did not abuse its discretion in setting the child support obligation at $8,058 per month. Supreme Court specifically found that strict application of the statutory figure of 25% to all income in excess of $80,000- which would yield a monthly child support obligation of $21,642-would be inappropriate.. The court then properly considered the factors listed in Domestic Relations Law s 240(1- b)(f), including the financial resources of the parents, the children's lavish predivorce standard of living, as well as the cost of the children's numerous after-school activities, including piano, skiing, tennis and horseback riding, and determined that a reduced percentage of 8% to all remaining income over $80,000 would be appropriate. While a distributive award to be paid by one parent to the other is a factor that the trial court may consider in awarding child support Supreme Court did not abuse its discretion in failing to reduce the child support obligation due to the size of plaintiff's distributive award.

Proper to Direct Recalculation of Child Support Payments in Future

In Ansour v Ansour,--- N.Y.S.2d ----, 2009 WL 1046552 (N.Y.A.D. 1 Dept. ) the Appellate Division held that income was properly imputed to defendant from her interest in a limited partnership, which she reported on her federal income tax return as tax-exempt. This was appropriate in light of the court's finding that defendant was not forthcoming about this interest (cf. Brenner v. Brenner, 52 AD3d 322 [2008] ). As to Supreme Court's direction that child support be recalculated in 2008 to include defendant's income from maintenance, the Appellate Division held that such maintenance payments received and reported on a party's most recently filed income tax return should be included as income for purposes of calculating child support. It noted that upon expiration of the maintenance payments in 2010, defendant could seek to modify the child support award accordingly. In light of the considerable distributive award and defendant's conduct unnecessarily protracting and complicating this action, the trial court providently exercised its discretion in awarding defendant only a portion of her counsel and expert fees.

July 1, 2009

Townhouse is Marital Property Even Though Wife Did Not Contribute To Downpayment or Its Management

In Fields v Fields, 2009 NY Slip Op 05274 (1st Dept 2009) the parties were married in 1970, and had a son on March 19, 1973. The wife worked outside the home until February 1973, and returned to work outside the home six months after the birth. In 1978, the couple decided to purchase a house and found a five-story townhouse with 10 apartments on the Upper West Side of Manhattan. The purchase price was $130,000, with $30,000 down and the balance made up through two mortgages. The husband's mother arranged for her son to get the down payment from his grandparents; $15,000 represented a bequest that he would have gotten, and $15,000 that his mother agreed to repay to the grandparents. At the time of trial, the townhouse was appraised at $2,625,000. The husband closed on the townhouse on August 31, 1978 and conveyed a one-half interest to his mother, as a joint owner, on September 6, 1978. From 1982 to 2001, the husband and his mother managed the townhouse as a formal partnership. The mortgages, as well as the maintenance and most renovations, were satisfied through rents and refinancing. Certain renovations were made and paid for by the husband's mother. The couple and their five-year-old child moved into apartment 2 until apartment 1 was turned into a duplex with the basement apartment in 1979. The husband and his parents each paid rent to the partnership, of $1,100 per month, for their respective apartments, until 2002. The couple lived in apartment 1 for five months, until the wife became ill. She ultimately moved into apartment 2, but returned to apartment 1 to practice piano and take baths. The wife purchased some furniture for apartment 1 and "occasionally" swept and vacuumed the hall in front of the apartment entrance. She testified that she would clean up the lobby during renovations. She also purchased a $600 vacuum cleaner to clean the lobby three times a week, cleaned the mailbox vestibule, swept the interior and exterior steps, used bleach to clean dog excrement from the sidewalk, and raked leaves from a maple tree in the backyard. In the summers, when the husband would go to France to spend time with his mother, the wife took responsibility for disposing of the building's refuse. She washed lobby curtains, cleaned lobby windows and polished the lobby mirror. She also decorated apartment 1, planted and maintained the backyard, and bought patio furniture. In addition to these services, the wife purchased a carpet, and a $500 Formica countertop for the marital apartment, as well as paying $700 for flooring in the foyer. She paid $400 for a [\*3]foyer mirror, and paid for couches, a basement door installation, linen closet, bathroom cabinets and a chandelier. Citing to Maczek v Maczek (248 AD2d 835, 837 [1998] ["A party is entitled to a return of the total contribution he [or she] made toward the purchase of the marital residence from his [or her] separate property", the Special Referee found that the $30,000 down payment to be the husband's separate property, and a baby grand piano and an oak table owned by the wife to be her separate property. The Special Referee found that the wife was entitled to 35% of the marital property. With respect to the townhouse, he found that the wife "participated in and made countless contributions to the building, both directly and indirectly"even though she "was not interested in the investment," and that the "building expenses were paid from rent proceeds." The special referee also found that the wife contributed to the building indirectly as spouse and mother. Supreme Court confirmed the Special Referee's report in the judgment of divorce, entered June 22, 2007. The Appellate Division affirmed. It held that the fact that the husband used separate property for the down payment and that the property was titled in his and his mother's name did not change the fact that his half interest in the property was bought during the marriage and was a marital asset. These circumstances merely entitled the husband to a credit for his contribution of separate property toward the purchase of the marital residence, which was accounted for by the Referee. The husband asked the Appellate Court to deem 100% of his half interest in the increase in the property's value as his separate property because his 69-year-old wife did not contribute to the down payment or to the management of the property. The Court held that this position was inconsistent with Domestic Relations Law § 236(B)(1)(c), which defines marital property as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement of the commencement or a matrimonial action, regardless of the form in which title is held". Although the wife was not involved in the renovations of the property to the extent that the wife was in Heine v Heine, it was clear that the property's appreciation in value, as in Heine v Heine (176 AD2d 77 [1992]) had nothing to do with the husband's down payment. The appraiser testified that market forces accounted for the greatest increase in value. The parties treated the property as their marital residence. They lived in it since 1978, raised their child there, and the wife maintained the property by vacuuming, raking leaves, cleaning up after workers, as well as by doing many other chores typical of a person living in a marital residence. To deprive the wife of her equitable share of the value of this property was not only contrary to settled precedent, but also against public policy. The husband's half interest in the townhouse was therefore marital property subject to distribution.

Enhanced Earning Capacity Valuation Based upon Husband's Base Salary and Bonuses and 7% Discount Rate.

In Jayaram v Jayaram, --- N.Y.S.2d ----, 2009 WL 1478006 (N.Y.A.D. 2 Dept.), an action for a divorce, Supreme Court, inter alia, awarded the plaintiff former wife $1,053,500 as her 35% share of the husbands enhanced earning capacity, prejudgment interest on her distributive award of $432,954.85, child support of $1,654 per week, and counsel fees of $125,000. The parties were married on April 20, 1992, and had two children. Prior to the marriage, the husband earned a Masters in Science Degree and a Ph.D in mechanical and aerospace engineering. At the time of their marriage, both the husband and wife were employed by IBM. At the beginning of 1995 the husband entered a Columbia University program to earn a Masters in Business Administration and he earned that degree in 1996. The husband then embarked on a career in finance, obtaining a position as an investment banker at a brokerage firm with earnings that far exceeded his earnings at IBM. After obtaining his position at the brokerage firm, the husband also obtained certain licenses issued by the National Association of Securities Dealers. On appeal, the husband contended that the Supreme Court erred in concluding that his MBA degree and NASD licenses provided him with an enhanced earning capacity subject to equitable distribution. The Appellate Division disagreed holding that an academic degree may constitute a marital asset subject to equitable distribution, even though the degree may not necessarily confer the legal right to engage in a particular profession. While the husband presented some evidence that an MBA degree was not an actual prerequisite to his employment at the brokerage firm, there was also ample evidence, including expert testimony, to support the court's finding that the attainment of this degree made the husband a more attractive candidate for a position in investment banking. The knowledge of financial products, including options and derivatives, which the husband acquired during his MBA studies, assisted in his advancement at the firm. Although the wife did not make direct financial contributions to the husband's attainment of his MBA degree and NASD licenses, she made substantial indirect contributions by supporting the husband's educational endeavors, working full-time and contributing her earnings to the family, being the primary caretaker of the couple's children, cooking family meals, and participating in housekeeping responsibilities. It held that the court should not have relied solely upon the wife's expert in valuing the husband's enhanced earnings capacity at $4,300,000. The methodology employed by the expert essentially consisted of deducting the husband's baseline earnings from his topline earnings, and projecting this differential over his expected work life. This methodology resulted in overstating the husband's enhanced earning capacity, because it failed to adequately account for the fact that the MBA degree was only one factor in the husband's employment and advancement at the brokerage firm. The wife's expert employed only a risk free 3% discount rate in projecting the likelihood that the husband would achieve his projected earnings. The court attempted to arrive at a more accurate valuation of the husband's enhanced earnings by applying a 30% coverture fraction to account for the husband's premarital educational achievements. In view of the strong evidence that the mathematical skills which the husband honed prior to the marriage during his engineering studies made him a highly desirable employee at the brokerage firm, application of the coverture fraction was insufficient to arrive at an equitable determination of the wife's share of enhanced earnings. The Appellate Division adopted the $2,100,000 enhanced earning capacity valuation recommended by the court-appointed neutral accountant, which considered both the husband's base salary and bonuses in determining his topline salary, and reflected a more conservative 7% discount rate. Applying a 30% coverture fraction to $2,100,000, it found that the wife's 35% share of the husband's enhanced earning capacity was $514,500. The Appellate Division held that the court should not have awarded the wife prejudgment interest on her distributive award. The distributive award was largely comprised of the wife's interest in the husband's enhanced earning capacity, which was not fixed until after trial. Thus, this was not a tangible asset which the wife was deprived the use of during the pendency of the litigation.

Maintenance Payments Received Should Be Included as Income for Purposes of Calculating Child Support.

In Ansour v Ansour,--- N.Y.S.2d ----, 2009 WL 1046552 (N.Y.A.D. 1 Dept. ) the Appellate Division affirmed a judgment which, inter alia, imputed income to defendant from her interest in a limited partnership, which she reported on her federal income tax return as tax-exempt. The Court held that this was appropriate in light of the court's finding that defendant was not forthcoming about this interest (cf. Brenner v. Brenner, 52 AD3d 322 [2008] ). As to the court's direction that child support be recalculated in 2008 to include defendant's income from maintenance, it held that such maintenance payments received and reported on a party's most recently filed income tax return should be included as income for purposes of calculating child support. It noted that upon expiration of the maintenance payments in 2010, defendant could seek to modify the child support award accordingly.

June 15, 2009

Error to Permit "Licensed Mental Health Counselor"To Offer Opinion Based in Part upon Interviews with Collateral Sources

Who Did Not Testify

In Matter of Murphy v Woods,--- N.Y.S.2d ----, 2009 WL 1565164 (N.Y.A.D. 4 Dept.) the the Appellate Division held that Family Court erred in permitting a "licensed mental health counselor," who examined the parties' child and was called as a witness

by the mother, to offer an opinion that was based in part upon his interviews with collateral sources who did not testify at trial. There are two exceptions to the general rule requiring that opinion evidence be based on facts in the record or on facts

personally known to the witness: if the opinion is based upon out-of-court material "of a kind accepted in the profession as reliable in forming a professional opinion or if it comes from a witness subject to full cross-examination on the trial" (Hambsch

v. New York City Tr. Auth., 63 N.Y.2d 723, 726, 480 N.Y.S.2d 195, 469 N.E.2d 516). Neither exception applied in this case. At the fact-finding hearing, the expert testified that material portions of his opinion were based not only upon his interviews with

the parties, but also were based on his interviews with collateral sources. The Appellate Division was unable to determine the extent to which the expert relied on those collateral source interviews in forming his opinion. Furthermore, the collateral

sources did not testify at trial, and there was no evidence establishing their reliability. The court could not conclude that the admission of the expert's opinion was harmless error because, without the admission of that opinion or the testimony of the collateral sources, there was insufficient evidence in the record to support the court's determination. It reversed the order and remitted the matter to Family Court for a new hearing before a different adjudicator.

Laws of 2009, Ch 32, repealed Family Court Act 516 Relating to Compromise Agreements in Paternity Proceedings, effective May 19, 2009.

Custody Stipulation Entitled to Little If Any Weight Where it Was Based upon Parties' Stipulation Without a Hearing When Father Was 19 Years Old, Having Been the Victim of Mother's Sexual Abuse

In Matter of Timothy V v Renee W,--- N.Y.S.2d ----, 2009 WL 1544388 (N.Y.A.D. 3 Dept.) Petitioner (father) and respondent (mother) were parents of a son born in 1994, just after the father turned 16 years of age and the mother was 28 years of age.

The father, who had absconded from a social services' placement at the age of 14 and commenced living with the mother as her boyfriend, continued to reside with her and her two young children until he was 18 years old. In 1997, when the father was

19 years old, the parties, acting pro se, entered into a stipulated custody order in Family Court which granted the mother sole legal and physical custody of the son, and provided the father with three weekends of parenting time per month. In 2007, the

then 29- year-old father filed this petition for modification of custody seeking sole legal and physical custody alleging that the mother had failed to adequately provide for the son's educational, counseling, and medical/dental needs. Following fact

finding, including a Lincoln hearing with the parties' then 13- year-old son, Family Court made lengthy findings and issued an order of modification awarding the parties joint legal custody, continuing the mother's primary physical custody until the end of the 2007-2008 (eighth grade) school year, and awarding the father primary physical custody thereafter. The Appellate Division affirmed. Family Court's determination to change primary physical custody to the father was supported by a sound

and substantial basis in the record. Although this was an established custody arrangement of some 10 years, presumably requiring a substantial change in circumstances analysis, it was based upon the parties' stipulation without a hearing when the father was 19 years old, having been the victim of the mother's sexual abuse. It held that under these extraordinary circumstances, the parties' stipulation was entitled to little, if any, weight .

Fivefold Increase in Earnings Is Substantial Change in Circumstances Warranting Downward Modification of Support.

In Vincent Z v Dominique K, --- N.Y.S.2d ----, 2009 WL 1181913 (N.Y.A.D. 1 Dept.), the Appellate Division held that Respondent's fivefold increase in earnings constituted a substantial change in circumstances warranting a downward modification of petitioner's child support obligations.

Not Error to Decline to Award Temporary Child Support Where Parties Reside Together and Children Supported

In Mueller v Mueller, --- N.Y.S.2d ----, 2009 WL 943725 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an award of pendente lite maintenance of $650 per week, which directed the defendant to pay the carrying charges on the marital residence,

including mortgage payments, taxes, utilities, pool maintenance, and other household expenses. Moreover, the defendant was directed to maintain various types of insurance coverage for the plaintiff and the parties' children, and to pay reasonable expenses associated with the parties' vehicles. Under these circumstances, the temporary maintenance award was sufficient to meet the plaintiff's reasonable needs during the pendency of this action. It held that the plaintiff's contention that the Supreme Court erred in declining to award her pendente lite child support for the parties' two children was without merit. “Both the plaintiff and the children continued to reside with the defendant in the marital residence, and there was no evidence that the children were not being properly cared for by the defendant (cf. Cataldi v. Shaw, 101 A.D.2d 823, 824).”

Issue of reconciliation irrelevant in face of the contract language requiring a written termination of the separation agreement

In Sifre v Sifre, --- N.Y.S.2d ----, 2009 WL 1150156 (N.Y.A.D. 3 Dept.) concluding that plaintiff substantially complied with the parties separation agreement, Supreme Court denied defendant's motion to dismiss the complaint and partially denied

plaintiff's cross motion for summary judgment dismissing the defense of reconciliation finding questions of fact with respect to said defense. The Appellate Division modified. It stated that a plaintiff may obtain a conversion divorce when the parties have lived separate and apart pursuant to a written separation agreement for more than one year and the plaintiff has substantially complied with the terms of the agreement (DRL 170[6] ). While reconciliation is a defense, mere sporadic cohabitation and sexual relations are not enough to vitiate a separation agreement; there must be intent to reconcile and intent to abandon the agreement. The parties 2002 separation agreement stated that none of its provisions "shall be changed or modified, nor shall this Agreement be discharged or terminated in whole or in part, except by an instrument in writing." The

parties therefore required that a termination of the separation agreement--I .e., an abandonment of it--must be in writing. While the parties' affidavits raised questions of fact concerning whether they reconciled, that issue was irrelevant in the face of the

contract language requiring a written termination of the agreement. Nothing in the record raised questions concerning fraud, coercion or anything else that would affect the validity of the agreement or that provision. Based upon the language of the

agreement and the lack of any writing evidencing the parties' intent to abandon or terminate the agreement, plaintiff was entitled to dismissal of the reconciliation defense. Once that defense was removed, he was also entitled to summary judgment

granting him a divorce.

Family Court Lacks Jurisdiction to Apply Doctrine of Equitable Estoppel to Adjudicate Paternity of Female Partner of Mother

In Matter of H.M. v E.T. , --- N.Y.S.2d ----, 2009 WL 1477264 (N.Y.A.D. 2 Dept.) the child's birth mother sought to have another female, lacking legal ties to her, and lacking biological and legal ties to the child, adjudicated a parent of the child and required

to pay child support. Justice Covello, In an opinion for the majority held that because the application was not of a type that the Family Court, a court of limited jurisdiction, has been specifically authorized to entertain, the Family Court lacked subject

matter jurisdiction to entertain the action. He noted that the dissent concluded, as the Family Court did, that the availability of the doctrine of equitable estoppel, applicable in a proceeding pursuant to Family Court Act article 5 (see Matter of Shondel J. v. Mark D., 7 NY3d 320, 326; Matter of Sharon GG. v. Duane HH., 95 A.D.2d 466, 468, affd 63 N.Y.2d 859, 862), warranted the denial of E.T.'s motion to dismiss. However, although the doctrine of equitable estoppel can be applied in a proceeding pursuant to Family Court Act article 5, when the Family Court applies the doctrine, the Family Court is merely precluding a party from "denying a certain fact" because equitable considerations so warrant. This is not the same thing as the Family Court granting equitable relief, something the Family Court lacks the power to do. Hence, when the Family Court applies the doctrine, the Family Court is doing so as a means of granting relief specifically authorized by the Constitution or statute. That is, the Family Court is applying the doctrine as a means of adjudicating a "male" "the father" of a child, or as a means of declaring that a "male" is "not the father" of a child. Here, however, H.M. demanded certain relief the Family Court is not specifically authorized by the Constitution or statute to grant. Under these circumstances, the Family Court could not apply the doctrine, and necessarily cannot reach the issues of whether E.T. should be estopped from denying her parentage of the subject child, and whether estopping E.T. from denying her parentage of the child would be in the child's best interests. If the

Family Court applied the doctrine as a means of granting relief not specifically authorized by the Constitution or statute, that would be tantamount to the Family Court granting equitable relief.

June 1, 2009

Non-custodial Parent Does Not Retain Decision-making Authority Pertaining to Education of Child Where Custodial Parent Granted Exclusive Custody of the Child and Decree and Custody Order Are Silent as to Right to Control Such Decisions.

In Fuentes v Board of Educ. of City of New York, --- NY3d ----, 2009 WL 1148636 (2009) Plaintiff Jesus Fuentes and his wife were divorced in 1996. Family Court entered an order granting the wife exclusive custody of the three children, including a son, M.F., who, due to a genetic disorder, was legally blind. M.F. attended public school in New York City and received special education services to accommodate his disability. In 2000, plaintiff believed that M.F.'s special education services and accommodations were inadequate and requested a reevaluation. When the Committee on Special Education for the Hearing, Handicapped, and Visually Impaired responded that M.F's services were adequate, plaintiff requested a hearing from the Impartial Hearing Office of the New York State Department of Education to review that determination. In 2001, plaintiff's request for a hearing was denied based on his status as the non-custodial parent of M.F. The Office concluded that because plaintiff was not the "person in parental relation" (Education Law 3212), he did not have the right to make educational decisions pertaining to M.F. and, consequently, did not have a right to request a hearing. Plaintiff then commenced an action in the United States District Court, alleging, among other things, that he was denied his right under the federal Individuals with Disabilities Education Act (IDEA) to a hearing to review the determinations of the Board of Education. After a dismissal, appeal, and remand on issues not pertinent to the certified question, the district court dismissed plaintiff's case for lack of standing under the IDEA. On appeal, the United States Court of Appeals for the Second Circuit found that no precedent from the Court of Appeals directly addressed the dispositive issue and certified a question, which the Court of Appeals reformulated: “ Whether, under New York Law, the non-custodial parent of a child retains decision-making authority pertaining to the education of the child where (1) the custodial parent is granted exclusive custody of the child and (2) the divorce decree and custody order are silent as to the right to control such decisions. “ As reformulated the certified question was answered in the negative. The Court of Appeals noted that it is well settled in the Appellate Division that, absent specific provisions in a separation agreement, custody order, or divorce decree, the custodial parent has sole decision-making authority with respect to practically all aspects of the child's upbringing. It declined to recognize an implied right of non-custodial parents to exercise decision-making authority with respect to their child's education notwithstanding the custody order's silence on this subject and emphasized the importance of parties determining these issues at the time of separation or divorce. The Court noted the distinction between a non-custodial parent's right to "participate" in a child's education and the right to "control" educational decisions. Generally, there is nothing which prevents a non-custodial parent (even one without any decision making authority) from requesting information about, keeping apprised of, or otherwise remaining interested in the child's educational progress. However, unless the custody order expressly permits joint decision-making authority or designates particular authority with respect to the child's education, a non-custodial parent has no right to "control" such decisions. This authority properly belongs to the custodial parent.

Not Necessary to Plead Justification as Defense to Abandonment Where Not a Claim That Would Be Likely to Take the Plaintiff by Surprise, and Does Not Raise Issues of Fact Not Appearing on the Face of the Complaint

In Gulati v Gulati, 60 A.D.3d 810, 876 N.Y.S.2d 430 (2 Dept 2009) the Appellate Division pointed out that pursuant to DRL 170(2), an action for a divorce on the ground of abandonment may be maintained when the defendant abandons the plaintiff

for a period of one or more years. To establish entitlement to a divorce on this ground, a plaintiff must demonstrate that the defendant unjustifiably and without the plaintiff's consent abandoned the plaintiff for a period of one or more years. Here, the plaintiff made a prima facie showing of her entitlement to summary judgment on the ground of abandonment by submitting evidence that the defendant moved out of the marital residence in April 2003 without her consent, and without justification. In opposition, the defendant submitted evidentiary proof sufficient to raise triable issues of fact as to whether an abandonment occurred. The submissions raised issues of fact as to whether the plaintiff consented to his initial departure from the marital residence and to his continued absence from the home, and whether his actions were justified. Accordingly, plaintiff's motion for summary judgment on her cause of action for a divorce based on abandonment should have been denied. The Court rejected plaintiff's contention that the defendant waived the right to argue that he was justified in leaving and remaining away from the marital residence because he did not plead justification as an affirmative defense in his answer. Since abandonment cannot be established merely by evidence of a separation, a plaintiff seeking a divorce on this ground has an obligation to prove, as an element of his or her prima facie case, that the defendant unjustifiably left and remained away from the marital residence for a period of more than one year. Although the Court has recognized that it is permissible to plead justification as an affirmative defense (see Del Galdo v. Del Galdo, 51 A.D.2d 741, 379 N.Y.S.2d 479), it held that it is not necessary that it be so pleaded where, as here, it is not a claim that would be likely to take the plaintiff by surprise, and does not raise issues of fact not appearing on the face of the complaint (see CPLR 3018[b] ). In this regard, the Court noted that the plaintiff alleged in her complaint that the defendant had abandoned the marital residence without cause or provocation, and the defendant denied these allegations in his answer. Under these circumstances, the defendant, who has not defaulted, should not be precluded from arguing that he was justified in leaving and remaining away from the marital residence.

Failure to Substantiate Testimony by Submission of Documentary Evidence Warrants Denial of Downward Modification

In re Virginia S. v Thomas S., --- N.Y.S.2d ----, 2009 WL 36601 (N.Y.A.D. 1 Dept.) the Appellate Division pointed out that the party seeking modification of a support award bears the burden of proving a substantial change in circumstances, and that in a prior order in 2005 (22 A.D.3d 415, 803 N.Y.S.2d 54), it had rejected respondents submission of an unattested financial disclosure affidavit and a single pay stub as warranting such a reduction, while noting evidence of respondent's considerable financial resources and earning capacity. At the new hearing held on remand, respondent again failed to provide documentation of his income and assets sufficient to justify a modification of his scheduled payments. Although his testimony supported his claim of a substantial change of circumstances, he failed to provide any documentation to substantiate it. His evidence consisted of an unsigned and unattested financial affidavit, and unsigned tax returns from 2004 and 2005. He produced no other tax returns, nor any verification that he was receiving public assistance or any evidence of good faith efforts to obtain employment commensurate with his experience and qualifications. In a related enforcement proceeding, it was undisputed, that respondent had failed to make any support payments since 2005. The only question that remained was whether this violation was willful. Failure to pay support as ordered constitutes prima facie evidence of a willful violation (Family Ct Act 454[3][a] ). The burden then shifts to the supporting party, who must offer some competent, credible evidence of his inability to make the required payments. Only when such evidence is presented does the burden shift back to the recipient to contradict that proof. At the violation hearing, respondent offered only his own testimony regarding his income and assets, his health status, and his inability to find work. However, he again failed to substantiate his claims with documentation, such as signed tax returns, a completed and attested financial affidavit, or the testimony of his doctors regarding his alleged disabilities. Nor did he provide any documentation about his efforts to obtain employment, such as a resume, job applications, or a job search diary. Notably, respondent even admitted that although he had applied for social security disability, his application was rejected because he was not deemed to be disabled. He had a potentially high earning capacity as a stockbroker and holder of a commercial driver's license. Respondent failed to overcome the prima facie evidence that his violation was willful. That being the case, petitioner was not required to come forward with evidence to contradict respondent's assertions.

When Child Support Ordered for More than One Child, Emancipation of Oldest Child Does Not Automatically Reduce Amount of Support Owed under Order for Multiple Children

In Matter of Wrighton v Wrighton, --- N.Y.S.2d ----, 2009 WL 1153590 (N.Y.A.D. 2 Dept.) on October 18, 2005, approximately 15 months after the older of the two children attained the age of 21, the father filed a petition for a downward modification of child support. The father's petition was dismissed after he failed to serve it on the mother. Thereafter, the father continued paying support for the older child. On May 23, 2007, the father filed a petition to terminate the order of support based on both children having attained the age of 21 and requested that any overpayment be applied to arrears. The Support Magistrate granted his petition to terminate the order of support, but did so without prejudice to the payment of arrears. The Family Court denied the father's objection to that part of the Support Magistrate's order. The Appellate Division affirmed. It held that when child support has been ordered for more than one child, the emancipation of the oldest child does not automatically reduce the amount of support owed under an order of support for multiple children. In addition, a credit should not be allowed for any alleged overpayments made on behalf of such emancipated child, absent or prior to a parent's legal action for a downward modification of support. The father's October 18, 2005, petition to modify the order of support, based on the older child attaining the age of 21, was dismissed after he failed to serve the mother with the petition. Thus, the father failed to meet his burden of proving that the amount of unallocated child support was excessive based on the needs of the remaining child. As such, the father was not entitled to a credit toward arrears for the alleged overpayments made on behalf of the oldest child after her emancipation.

May 18, 2009

Court of Appeals Holds payments made to a former spouse and/or children of an earlier marriage, even if made pursuant to court order, are not type of liabilities entitled to recoupment. A student loan, which is both incurred and fully paid for during marriage, is a marital obligation for which responsibility is to be shared between the parties. As a matter of public policy, a “party to litigation may not take a position contrary to a position taken in an income tax return.”

In Mahoney-Buntzman v Buntzman, --- N.Y.3d ----, 2009 WL 1227875 (2009) the Court of Appeals established the general rule that “where payments are made before either party is anticipating the end of the marriage, and there is no fraud or concealment, courts should not look back and try to compensate for the fact that the net effect of the payments may, in some cases, have resulted in the reduction of marital assets. Nor should courts attempt to adjust for the fact that payments out of separate property may have benefitted both parties, or even the non-titled spouse exclusively. The parties' choice of how to spend funds during the course of the marriage should ordinarily be respected. Courts should not second-guess the economic decisions made during the course of a marriage, but rather should equitably distribute the assets and obligations remaining once the relationship is at an end.” Thus, the Court held that payments made to a former spouse and/or children of an earlier marriage, even if made pursuant to court order, are not the type of liabilities entitled to recoupment. And, a student loan, which was both incurred and fully paid for during the marriage, was a marital obligation for which responsibility was to be shared between the parties. The Court also held that, as a matter of public policy, a “party to litigation may not take a position contrary to a position taken in an income tax return.”

The parties were married in New York in 1993 and had two daughters. The wife had an adult child from a previous relationship. The husband was married once before, and had two adult children from that marriage. Pursuant to a divorce judgment, the husband was obligated to pay his first wife maintenance. During the present marriage, the husband and another individual formed Educational Video Conference Inc. (EVCI), a New York Corporation that went public in 1999. At the time of the action, the husband owned a number of shares and options of EVCI stock, all of which were acquired during marriage. Prior to his marriage to plaintiff, the husband had an interest in Arol Development Corporation (ADC), a real estate development company he founded with his father in 1971. In 1983, the husband founded another company, Big Apple Industrial Buildings, Inc., 80% of which he sold to ADC in 1989. In 1998, the husband entered into an agreement with his father whereby he agreed to relinquish his stock ownership in both corporations in exchange for a lump sum payment. The agreement provided that the payment would be reported on a "1099" form issued to him by the purchasing company. In order to account for the increased tax liability that the husband would incur as a consequence of treating the payment as ordinary income rather than as a sale of stock, the payment was increased by 17 percent. This money, amounting to $1.8 million was received by the husband during the marriage and reported on the parties' joint income tax return as self-employment business income. In May 1996, the husband obtained a doctorate in education from Fordham University for which he had taken out a student loan that was repaid two years later. On May 19, 2003, the wife commenced the divorce action.

Supreme Court granted wife a divorce on the grounds of abandonment and distributed the various assets and debts of the parties' marriage (13 Misc.3d 1216A [Sup Ct Westchester Co 2006] ). As it pertained to the EVCI stock and options, the court found that the husband played a substantial role in changing the direction of the company and in its expansion. Nevertheless, the court rejected the husband's claims that the appreciation in the value of the EVCI's stock was due solely to his efforts, holding that there were significant contributions of others to the operations of EVCI and no evidence directly linking the increase in the value of its stock solely to husband. Consequently, the court used the date of trial for valuation purposes of the EVCI stock and options. The court declined to give wife credit for one-half of the maintenance paid by husband to his first wife during the marriage. It noted that both parties had used marital assets to assist other relatives. For instance, the wife had used marital sums to provide support for her daughter and her father. The court stated "neither party may be heard to complain about the other's use of marital funds to pay for their own obligations or to aid other family members, when that approach was evidently an accepted part of their lifestyle." For the same reasons, the court declined to give the wife a credit for monies used to repay the student loan. Supreme Court also held that the husband was estopped from arguing that the funds received from the sale of his corporate interests to his father were the proceeds from the sale of stock and thus, separate property, because he had reported the funds as business income on the parties' joint tax returns. The court also noted that in his 1993 Judgment of Divorce from his first wife, the husband represented that he owned no stock at the time.

The Appellate Division modified the judgment of Supreme Court by holding that wife was entitled to an equitable distribution credit of one-half of the amount of court-ordered maintenance paid by husband to his former wife from marital funds (51 AD3d 732). It held that the maintenance obligation to his first wife constituted debt incurred by him prior to the parties' marriage and was therefore his sole responsibility. It also awarded wife a 50% credit, $24,081.45, for the student debt incurred by husband during the marriage to attain his degree, concluding that because a court-appointed expert had determined that husband's advanced degree did not enhance his earnings, the wife received no benefit from it, and therefore, the student loan was incurred to satisfy husband's separate property interest making the loan his sole obligation. As modified, the Appellate Division affirmed.

The Court of Appeals modified the order of the Appellate Division in an opinion by Judge Pigott. He pointed out that the Domestic Relations Law recognizes that the marriage relationship is an economic partnership. As such, during the life of a marriage spouses share in both its profits and losses. When the marriage comes to an end, courts are required to equitably distribute not only the assets remaining from the marriage, but also the liabilities. A trial court considering the factors set forth in the Domestic Relations Law has broad discretion in deciding what is equitable under all of the circumstances. Indeed, when it comes to the equitable distribution of marital property, Domestic Relations Law s 236(B)(5)(d)(13) authorizes the trial court to take into account "any other factor which the court shall expressly find to be

just and proper". Consequently, the trial court has substantial flexibility in fashioning an appropriate decree based on what it views to be fair and equitable under the circumstances. However, during the life of any marriage, many payments are made, whether of debts old or new, or simply current expenses. If courts were to consider financial activities that occur and end during the course of a marriage, the result would be parties to a marriage seeking review of every debit and credit incurred.

Judge Pigott stated the “...general rule, that where the payments are made before either party is anticipating the end of the marriage, and there is no fraud or concealment, courts should not look back and try to compensate for the fact that the net effect of the payments may, in some cases, have resulted in the reduction of marital assets. Nor should courts attempt to adjust for the fact that payments out of separate property may have benefitted both parties, or even the non-titled spouse exclusively. The parties' choice of how to spend funds during the course of the marriage should ordinarily be respected. Courts should not second-guess the economic decisions made during the course of a marriage, but rather should equitably distribute the assets and obligations remaining once the relationship is at an end.”

With this holding in mind, the Court reviewed the four issues raised on the appeal. The wife sought to recoup money that was expended during the marriage to pay husband's obligation to his former spouse for maintenance. It held that the wife was not entitled to such recoupment. Expenditures made during the life of the marriage towards maintenance to a former spouse, as well as payments made pursuant to a child support order, are obligations that do not enure solely to the benefit of one spouse. Payments made to a former spouse and/or children of an earlier marriage, even if made pursuant to court order, are not the type of liabilities entitled to recoupment. The Court cautioned that this is not to say that every expenditure of marital funds during the course of the marriage may not be considered in an equitable distribution calculation. Domestic Relations Law s 236(B)(5)(d)(13) expressly and broadly authorizes the trial court to take into account "any other factor which the court shall expressly find to be just and proper" in determining an equitable distribution of marital property. There may be circumstances where equity requires a credit to one spouse for marital property used to pay off the separate debt of one spouse or add to the value of one spouse's separate property (citing e.g. Micha v. Micha, 213 A.D.2d 956, 957-958 [3d Dept 1995]; Carney v. Carney, 202 A.D.2d 907 [3d Dept 1994] ). Further, to the extent that expenditures are truly excessive, the ability of one party to claim that the other has accomplished a "wasteful dissipation of assets" (DRL 236[B][5] [d][11] ) by his or her expenditures provides protection. The payment of maintenance to a former spouse, however, does not fall under either of these categories.

The Court also held that the wife was not entitled to a credit for payments made during the marriage towards husband's student loan. The husband incurred the student loan during the parties' marriage, and had his degree conferred an economic benefit, wife would have been entitled to a share in its value (see O'Brien v. O'Brien, 66 N.Y.2d 576 [1985] ). Thus, the loan, which was both incurred and fully paid for during the marriage, was a marital obligation for which responsibility was to be shared between the parties. The Court noted in a footnote that if the student loan debt was still outstanding, however, it may have been appropriate for the trial court to conclude that defendant alone was required to bear the obligation of repayment of the balance of his student loan.

The Court of Appeals also held that the trial court providently exercised its discretion by setting the valuation date for the EVCI stock and options as the date of trial (citing generally McSparron v. McSparron, 87 N.Y.2d 275 [1995] ). Similarly, it found that the trial court properly exercised its discretion when it classified the money received by husband pursuant to the settlement agreement as marital property, given the fact that husband made representations that the money was business income for tax purposes. The Court held that a “party to litigation may not take a position contrary to a position taken in an income tax return.” The husband did not dispute that, in accordance with his settlement agreement, he reported the $1,800,000 in settlement proceeds as business income on his federal income tax return, in which he swore that the representations contained within it were true. The Court could not, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns.

Court of Appeals Holds When Pendente Lite Award Of Maintenance Is Found At Trial To Be Excessive Or Inequitable Court May Make An Appropriate Adjustment In Equitable Distribution Award. However, There Is "Strong Public Policy Against Restitution Or Recoupment Of Child Support Overpayments".

In Johnson v Chapin, - N.Y3d -, 2009 WL 1227869 (2009) the Court of Appeals, in an opinion by Judge Pigott, held that when a pendente lite award of maintenance is found at trial to be excessive or inequitable, the Court may make an appropriate adjustment in the equitable distribution award. However, it rejected the husband's claim that he should be entitled to a credit for excess child support payments pointing out that it has long been held that there is a "strong public policy against restitution or recoupment of support overpayments".

The Husband and wife were married in 1991 and had one child. The husband had four children from a previous marriage and was required to pay both maintenance and child support. At the time the parties married, both were working attorneys. The Wife stopped working outside the home when the parties' son was three years old. The Husband was a partner at a law firm from 1968 until 1999, and thereafter became a managing director at a major investment banking firm until 2001. Prior to the marriage, the husband owned a home on approximately 160 acres of land in Claverack, New York. During the marriage the parties spent approximately $2 million to renovate and improve the property. While the husband played a larger role in these improvements, the wife also participated in some of the project's details. In November 2001, the wife commenced an action for divorce after discovering husband was having an extramarital affair. Prior to trial, she made an application for interim maintenance and child support. Supreme Court imputed an average annual income of $2,273,680 to the husband and ordered him to pay $18,465 monthly maintenance to wife and child support of $10,625 per month. The Husband was also ordered to pay the wife interim counsel fees of $100,000.

A judgment of divorce on the grounds of cruel and inhuman treatment was awarded to the wife. The Trial court recognized that the Claverack property was the husband's separate property, but held the funds spent on the renovations to be marital property subject to equitable distribution. The court awarded 50% of the appreciation of the Claverack estate to the wife. It also credited the wife with 50% of the marital property the husband used to pay the maintenance and child support obligations to his first wife. After considering that the wife had not worked outside the home for nine years and that it would take six years to develop her career, the court awarded the wife durational maintenance of $6,000 per month for six years. It also awarded wife legal fees and expert fees to be determined by a referee due in part to the fact that wife and her son "have suffered day to day crises resulting from the [husband's] harassment of them."

The Appellate Division modified the judgment by reducing the wife's share of the enhanced value of the Claverack property to 25% and by crediting the husband for his pendente lite maintenance obligations (49 AD3d 348). The majority noted that the husband had consistently been less than forthcoming regarding his income and that Supreme Court had found him incredible in the reporting of his income and assets. The majority therefore upheld the imposition of legal and expert fees on husband, noting that he "engaged in a pattern of obstructionist conduct which unnecessarily delayed and increased the legal fees incurred in the litigation".

The Court of Appeals, in an opinion by Judge Pigott, held that when a pendente lite award of maintenance is found at trial to be excessive or inequitable, the Court may make an appropriate adjustment in the equitable distribution award. Thus, Supreme Court did not abuse its discretion in giving husband a credit representing the amount of the pendent lite maintenance he paid that exceeded what he was required to pay under the final maintenance award. In determining the temporary maintenance award, Supreme Court imputed an average salary in excess of $2 million to husband. However, at trial, it was established that his income was significantly lower. Given the disparity in the maintenance amounts, under the circumstances of this case, it was appropriate for the husband to receive a credit.

The Court of Appeals rejected the husband's claim that he should have been entitled to a credit for excess child support payments, pointing out that it has long been held that there is a "strong public policy against restitution or recoupment of support overpayments" and nothing in this record showed it was error to deny that relief.

Judge Pigott noted that under the equitable distribution statute any appreciation in the value of separate property due to the contributions or efforts of the nontitled spouse will be considered marital property (Price v. Price, 69 N.Y.2d 8 [1986] ). This includes any direct contributions to the appreciation, such as when the nontitled spouse makes financial contributions towards the property, as well as when the nontitled spouse makes direct nonfinancial contributions, such as by personally maintaining, making improvements to, or renovating a marital residence. Thus, Supreme Court properly held that the improvements were marital, since the increase in the property was a result of both parties' efforts. He found that the Appellate Division did not abuse its discretion in reducing the award to wife from 50% to 25% of the property appreciation. The husband's income was the sole source of the funds expended on the property and, the husband's involvements in the renovations were far more extensive. The Court noted that it had held that when "exercising its discretionary power to award counsel fees, a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions" (citing DeCabrera v. Cabrera-Rosete, 70 N.Y.2d 879 [1987]). Here, when awarding the fees, the court considered the parties' financial positions as well as the delay incurred as a result of husband's obstructionist tactics. Thus, it declined to disturb those awards. Finally, the Court held that the wife was not entitled to the 50% credit representing the money paid during the marriage towards husband's pre-marital obligations to pay his first wife maintenance and child support (citing "Mahoney-Buntzman v. Buntzman, NY3d", which it decided the same day).

May 1, 2009

Husband’s Admission in Bank Loan Application Provides Basis for Valuation of His Company

In Steinberg v Steinberg, 59 A.D.3d 702, 874 N.Y.S.2d 230 (2 Dept 2009) the defendant husband appealed from a judgement of Supreme Court, after trial, which awarded the plaintiff one half of the marital assets, imputed income to him of $300,000, awarded the plaintiff nondurational maintenance, and awarded the plaintiff $200,000 in attorney's fees, and the plaintiff cross-appealed from portions of the judgment which awarded the defendant a separate property interest in his JP Morgan Chase investment account in the amount of $276,724, his interest in Phoenix Capital & Management Company in the amount of $333,333, and a note payable to him by Phoenix Capital & Management Company in the amount of $173,167. The Appellate Division held that Supreme Court providently exercised its discretion in dividing the marital assets equally between the parties. When both spouses equally contribute to a marriage of long duration, as here, the division of marital property should be as equal as possible. However, Supreme Court improvidently exercised its discretion in awarding the defendant a separate property interest with respect to his JP Morgan Chase investment account. Property acquired during the marriage is presumed to be marital property and the party seeking to overcome such presumption has the burden of proving that the property in dispute is separate property. Here, the assets in question were acquired during the marriage, and the defendant's testimony that the source of the assets could be traced to premarital property, unsupported by documentary evidence, was insufficient to overcome the marital presumption. Also, the defendant's JP Morgan Chase investment account, as well as the parties' AB Watley account, both active assets, should have been valued at $351,724.35 and $6,152.97 respectively, which was their value as of the date of commencement of this action. Supreme Court also should have awarded the plaintiff a marital share of Phoenix Capital & Management Company and a note payable to the defendant by Phoenix. Although Phoenix was created two years prior to the parties' marriage, the defendant could not recollect what Phoenix did during the time that preceded the marriage. Instead, the defendant testified that Phoenix acquired an office building two years after the marriage, which was its only asset, and that he and other partners contributed money to Phoenix to manage the property after its purchase. The defendant did not trace the source of his portion of the building's acquisition costs to separate pre-marital funds and likewise did not establish that his actual financial contributions to the building's acquisition and management costs were not derived from marital funds. Marital property is to be viewed broadly, while separate property is to be viewed narrowly. Where, as here, a party fails to trace sources of money claimed to be separate property, a court may treat it as marital property. By extension, the note payable to the defendant as a result of his financial contributions to Phoenix during the marriage should have been considered marital property as well. The Supreme Court valued the defendant's one-third interest in Phoenix at $333,000, based on the defendant's testimony that the property was worth $3 million and was subject to a $2 million mortgage. However, in a prior sworn bank loan application dated May 12, 2005, the defendant estimated the value of the office building to be $4 million. Given the credibility problems that pervaded the defendant's testimony generally, the court's discretion in valuing the property should have been exercised in favor of the defendant's most recently documented admission that the property was valued at $4 million. Accordingly, it set the value of the defendant's interest in Phoenix at $666,666 rather than $333,333, subject to the plaintiff's 50% equitable distributive share. The defendant's contention that the Supreme Court improperly imputed income to him in determining his maintenance obligation was without merit. A court need not rely upon a party's own account of his finances, but may impute income based upon the party's past income or demonstrated future potential earnings. Supreme Court properly imputed an annual income of $300,000 to the defendant given his employment history and his current ownership of a successful, growing business. In light of the plaintiff's age, health, and history of low earnings over the course of a 23-year marriage, the Supreme Court properly found it to be unlikely that she would become self-supporting and, consequently, providently exercised its discretion in awarding her nondurational maintenance.

Failure to Provide “Paper Trail” Documenting Source of Money Used to Purchase Marital Residence Not Fatal to Separate Property Claim. Court Did Not Violate DRL 248 by Ordering That Maintenance Would Terminate in the Event That Wife Resided with an Unrelated Adult Male for More than 30 Days

In Juhasz v Juhasz, --- N.Y.S.2d ----, 2009 WL 281303 (N.Y.A.D. 4 Dept.) the parties were married in 1990 and had three minor children. The Appellate Division held that Supreme Court properly determined that a brokerage account with Julius Baer (JB account) was defendant's separate property inasmuch as it was funded entirely from defendant's premarital sale of stock in a family business. The court erred in failing to credit defendant for his contribution of separate property toward the purchase of the marital residence. A spouse is entitled to a credit for his or her contribution of separate property toward the purchase of the marital residence, including any contributions that are directly traceable to separate property. Before the marriage, defendant purchased a home for $240,000 with funds that he derived from his sale of the stock. During the marriage, defendant contributed $200,000 from the JB account to purchase a vacation home for approximately $450,000, and he secured a mortgage for the balance. That mortgage was also paid with funds from the JB account. The parties subsequently sold both homes and purchased the marital residence for $216,000. The Appellate Division concluded that defendant was entitled to a credit of $216,000 for his contribution of separate property to purchase the marital residence, and modified the amended judgment accordingly. While defendant did not provide a paper trail documenting the source of the money used to purchase the marital residence, nothing in either party's testimony suggested that any other possible source for the money existed. In view of its determination concerning defendant's entitlement to a credit for separate property with respect to the marital residence, the Appellate Division rejected the contention of plaintiff on her cross appeal that she should have been awarded title to the marital residence as a matter of equity. It also rejected defendants contention that he was entitled to a credit for separate property that he contributed for renovations to the marital residence. Although the marital residence was appraised for $420,000 four months prior to the trial, defendant failed to establish that the separate property funds spent on renovations added value to the residence apart from the appreciation in value resulting from market forces over the period of ownership and, if so, the amount by which the value of the property was increased. It also held that Supreme Court properly imputed income to defendant of $180,000 per year. The record established that defendant derived substantial income from his investments. The amount awarded for child support was vacated because the court failed to articulate any basis for that portion of the award based on the parental income exceeding $80,000. It modified the amended judgment by vacating that amount, and remitted the matter to Supreme Court to determine defendant's child support obligation in compliance with the Child Support Standards Act. It concluded that the court properly ordered defendant to continue to pay for the private school education of the children. It also rejected the contention of plaintiff on her cross appeal that the court violated Domestic Relations Law 248 by ordering that maintenance would terminate in the event that she resided with an unrelated adult male for more than 30 days. That section, entitled "Modification of judgment or order in action for divorce or annulment," provides in relevant part that a husband may apply for modification of a judgment of divorce if the wife remarries or if she is "habitually living with another man and holding herself out as his wife, although not married to such man." The court held that here it was concerned with an initial award of maintenance and not an application to modify an existing judgment or order. Inasmuch as courts have the discretionary power to "fashion a fair and equitable maintenance award" it concluded under the circumstances of this case that the condition imposed by the court is not improper (cf. Florio v. Florio, 25 AD3d 947, 950).

Direction to Pay College Expenses for Seven Year Old is Premature

In Bogannam v Bogannam, --- N.Y.S.2d ----, 2009 WL 884937 (N.Y.A.D. 2 Dept.) Supreme Court awarded the defendant durational maintenance in the sum of $3,000 per month for 10 years, directed him to pay the college expenses of the parties' younger child, directed him to pay child support, specified the terms by which child support would be reduced upon emancipation of each child, awarded the defendant an attorney's fee in the sum of $40,000, and directed the parties to share equally the payment of the remaining expert fees. The Appellate Division held that Supreme Court providently exercised its discretion in imputing income to defendant of $200,000 per year for the purpose of calculating his child support and maintenance obligations . It also providently exercised its discretion in awarding the defendant durational maintenance of $3,000 per month for 10 years. This award allowed her an opportunity to become self-supporting, after almost 20 years of marriage in which she was the stay-at-home parent. The plaintiff correctly contended that the Supreme Court erred in directing him to pay college expenses for the parties' younger child, who was only seven years old at the time of the entry of judgment. The court may direct a parent to contribute to a child's college education pursuant to Domestic Relations Law 240(1-b)(c)(7). However, when college is several years away, and no evidence is presented as to the child's academic interests, ability, possible choice of college, or what his or her expenses might be, a directive compelling the plaintiff to pay for those expenses is premature and not supported by the evidence. The Supreme Court properly provided for a method of reducing the plaintiff's child support obligation, in accordance with the required statutory percentages, upon the older child attaining 21 years of age or emancipation, whichever is earlier, since more than one child was the subject of the order. Considering the parties' relative financial positions, the Supreme Court providently exercised its discretion in awarding the defendant an attorney's fee

in the sum of $40,000, and directing the parties to share equally the payment of the remaining expert fees. It found that the plaintiff waived his right to a hearing to determine the amount of the attorney's fee, since he never requested a hearing, the parties' finances were explored at trial, and they agreed that the issue would be determined upon the submission of papers.

April 16, 2009

Pendente Lite Child Support Properlty Denied Where Plaintiff and Children Continued to Reside with Defendant in Marital Residence, and No Evidence That Children Not Being Properly Cared for by Defendant

In Mueller v Mueller, --- N.Y.S.2d ----, 2009 WL 943725 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an award of pendente lite maintenance of $650 per week, which directed the defendant to pay the carrying charges on the marital residence, including mortgage payments, taxes, utilities, pool maintenance, and other household expenses. Tthe defendant was also directed to maintain various types of insurance coverage for the plaintiff and the parties' children, and to pay reasonable expenses associated with the parties' vehicles. It held that the plaintiff's contention that the Supreme Court erred in declining to award her pendente lite child support for the parties' two children was without merit: “Both the plaintiff and the children continued to reside with the defendant in the marital residence, and there was no evidence that the children were not being properly cared for by the defendant (cf. Cataldi v. Shaw, 101 A.D.2d 823, 824).” Given the disparity in the parties' financial circumstances, it held that Supreme Court should have granted plaintiff's motion for an award of interim counsel fees of $25,000 (see Prichep v. Prichep, 52 AD3d 61, 65-66), rather than only $10,000.

Equitable Estoppel May Not Be Invoked to Create Custody Standing in Favor of Party to Vermont Civil Union

In Debra H. v Janice R., --- N.Y.S.2d ----, 2009 WL 943772 (N.Y.A.D. 1 Dept.) Petitioner sought joint legal and physical custody of respondent's biological child, born approximately one month after the parties entered into a civil union in the State of Vermont, and more than two months after they registered as domestic partners in New York City. Although the record indicated that petitioner served as a loving and caring parental figure during the first 2 1/2 years of the child's life, she never legally adopted the child. The Appellate Division held that the matter was governed by the Court of Appeals decision in Matter of Alison D. v. Virginia M. (77 N.Y.2d 651 [1991] ), which provides that a party who is neither the biological nor the adoptive parent of a child lacks standing to seek custody or visitation rights under Domestic Relations Law 70, even though that party may

have developed a longstanding, loving and nurturing relationship with the child and was involved in a prior relationship with the biological parent. It noted that Supreme Court concluded that denial of petitioner's right to invoke equitable

estoppel herein would be inconsistent with the application of that doctrine in similar proceedings (citing e.g. Matter of Shondel J. v. Mark D., 7 NY3d 320 [2006]; Jean Maby H. v. Joseph H., 246 A.D.2d 282, 285 [1998] ). However, to the extent such inconsistencies exist, its reading of precedent was such that the doctrine of equitable estoppel may not be invoked where a party lacks standing to assert at least a right to visitation (citing see Anonymous v. Anonymous, 20 AD3d 333 [2005];

Matter of Multari v. Sorrell, 287 A.D.2d 764 [2001] ).

Separation Agreement Survives Judgement of Divorce Without Non-merger Clause Where That Was Parties Intent

In Makarchuk v Makarchuk, 59 A.D.3d 1094, 874 N.Y.S.2d 649 (4 Dept 2009) Plaintiff commenced an action in 2006 seeking to enforce defendant's obligation to pay carrying costs on the marital residence pursuant to a separation agreement (agreement) executed by the parties in 1970. The carrying costs consisted of taxes, insurance and most of the maintenance costs. The agreement further provided that it would "survive any decree of divorce ... [and would] not merge in[ ] nor be superseded by any divorce decree or judgment." A decree of divorce was entered in 1971 and, although the decree expressly incorporated the agreement, it did not contain a nonmerger clause. In 1975 Supreme Court modified the decree by ordering that defendant was no longer responsible for paying the carrying costs on the marital residence. The Appellate Division held that Supreme Court erred in granting that part of defendant's motion seeking to dismiss the complaint. It is well settled that a separation agreement that is incorporated into but not merged with a divorce decree is an independent contract binding on the parties unless impeached or challenged for some cause recognized by law. Furthermore, such an agreement cannot be modified by a change to the divorce decree absent a clear expression by the parties of such an intent. Here, the parties expressed no such intent. It is of no consequence that the decree did not contain a nonmerger clause inasmuch as the parties' intent to incorporate and not merge the agreement in the decree was clear from the language of those instruments. It concluded that plaintiff retained the right to enforce the agreement notwithstanding the 1975 order modifying the decree. Contrary to the contention of defendant, the action was not time-barred. Plaintiff was seeking to enforce a continuing obligation under a contract, and she therefore could seek damages for those breaches that have occurred within the six years prior to the commencement of the action. (see CPLR 213[2]). The court further erred in determining that dismissal of the complaint was warranted based on the theory of laches inasmuch as laches is inapplicable in actions at law.

Agreement Not Properly Reviewed for Compliance with FCA 516, May Not Be Used to Preclude Later Proceeding to Modify

In re Barbara N. v James H.N.,--- N.Y.S.2d ----, 2009 WL 824731 (N.Y.A.D. 1 Dept.) Petitioner became pregnant after a brief relationship with respondent and gave birth in September 1991. In 1992, the parties negotiated a child support agreement which was conditioned upon positive blood test results establishing respondent's paternity. The agreement provided, among other things, for respondent to pay a total of $126,050 in installments over a period of nine years, to cover support, child care, education, medical (past and future) and all other expenses of the child until she reached age 21, and was submitted to the Family Court for approval as required by Family Court Act 516(a). Notice of the petition for approval of the agreement was served on the Commissioner of Social Services pursuant to Family Court Act 516(b). The parties, each represented by counsel, along with a representative from Social Services, appeared before a Hearing Examiner who reviewed the agreement. The Hearing Examiner requested that the guideline calculation of the Child Support Standards Act (CSSA) be added to the agreement. At that point, the parties exchanged financial disclosure affidavits for the first time. Respondent's annual child support obligation under the guidelines was calculated to be $21,052. The parties agreed, however, that in lieu of the support provisions required by CSSA, respondent would make certain lump sum payments and payments for medical coverage, and that these would best serve the interests of the child. Petitioner specifically agreed that the agreement was in compliance with CSSA, and waived any right to future child support under that statute. The Hearing Examiner reviewed the changes to the agreement made by the representative from Social Services, and the CSSA child support calculation, and then made a brief inquiry of the parties as to whether they understood the changes and their obligations under the agreement. After the parties answered in the affirmative, he then approved the agreement. Shortly thereafter, respondent acknowledged paternity and an order of filiation was entered by the court. The order incorporated by reference the support agreement. Respondent made all payments required under that agreement. In January 2007, petitioner commenced a proceeding to vacate the 1992 order

and conduct a new hearing for purposes of issuing a new support order. She claimed that the 1992 support agreement did not comply with the provisions of Family Court Act 516 and also argued that the statute was unconstitutional because it discriminates between children born in wedlock and outside wedlock, in that a child born to married parents is eligible for an upward modification of child support under the formula set forth in Family Court Act 413(c), but section 516(c) bars such re-evaluation for nonmarital children where a support agreement approved by the court under 516(a) is completely performed. Prior to serving his answer, respondent moved to dismiss the petition on the grounds that he had completely performed his obligations under the agreement. The matter was referred to a Support Magistrate, who directed the petition be dismissed "due to no prima facie change of circumstances." Since review of the record led to the conclusion that the hearing examiner failed to comply with the requirements of section 516 in approving the 1992 agreement, the Appellate Division reversed and directed a new hearing, at which the burden will be upon the petitioner to establish that the support obligations no longer provide for the best interests of the child. The Court pointed out that Section 516 of the Family Court Act allows a mother and putative father of a nonmarital child to settle a paternity proceeding by entering into a binding support agreement, but only when the court determines that adequate provision has been made for the support of the child, and it approves the agreement. Even though the statute does not outline any particular line of inquiry for determining the adequacy of the support provisions, "courts have generally considered the parties' financial positions, the child's support and education needs throughout childhood and the interests of the State" (see Matter of Clara C. v. William L., 96 N.Y.2d 244, 250 [2001] ). Although the Hearing Examiner purportedly reviewed the agreement and the CSSA calculations, it was evident that the agreement did not provide for adequate support for the child for 21 years. Concededly, there is no requirement that the agreement provide for support in accordance with the amount set forth in the CSSA guidelines. Nevertheless, the lump sum payment of $126,050 (to be paid over a period of nine years), averaged out to approximately $6,000 per year for 21 years, while the calculation under the CSSA would have provided for $21,054 in annual basic child support, even without factoring in any statutory add-ons. The Court held that the gross disparity between the two figures should at least have prompted the Hearing Examiner to conduct further inquiry. While the agreement may have been in the best interests of the parents, it clearly was not in the best interests of the child, whom the Hearing Officer was obligated to protect. As was noted by the Court of Appeals, where there has not been proper judicial review and approval of an agreement for compliance with the provisions of section 516, the agreement may not be used to preclude a later proceeding to modify the support provisions (Clara C. at 250). Accordingly, the matter was remanded for further proceedings on petitioner's application for modification of the 1992 child support agreement. The Court observed that, to the extent the statute precludes attempts to reverse support agreements for nonmarital children, its constitutionality is questionable.

April 1, 2009

Adverse Party Called As a Witness May Be Treated As a Hostile Witness

In Ferri v Ferri, --- N.Y.S.2d ----, 2009 WL 564624 (N.Y.A.D. 2 Dept.) Supreme Court awarded the plaintiff $2,000 per month maintenance through September 2010 and $3,260 per month child support, valued his ownership of four businesses at $953,641 and awarded the plaintiff 30% of that value. The Appellate Division held that Supreme Court properly permitted the defendant to be treated as a hostile witness at the trial. Where, as here, an adverse party is called as a witness, it may be assumed that such adverse party is a hostile witness, and, in the discretion of the court, direct examination may assume the nature of cross-examination by the use of leading questions. Moreover, the general rule prohibiting a party from impeaching his or her own witness does not preclude a hostile witness from being impeached by prior statements made either under oath or in writing. The Supreme Court did not improvidently exercise its discretion in allowing the plaintiff's counsel to question the defendant, who was an adverse party, in the nature of cross-examination, and to impeach him with alleged inconsistencies in his prior statements. It rejected the defendant's contention that the amount and duration of the maintenance award was excessive.

Misrepresentation That Husband Was Biological Father Did Not Constitute "Egregious Fault"

In Howard S. v. Lillian S., --- N.Y.S.2d ----, 2009 WL 674133 (N.Y.A.D. 1 Dept.) the Appellate Division, in an opinion by Justice Freedman, held that defendant-wife's alleged misrepresentation to her husband that he was the biological father of one of their children, when in fact the child was conceived during her adultery and fathered by her lover, did not constitute "egregious fault" sufficient to be considered in equitably distributing the marital property. According to the verified complaint plaintiff married defendant in May 1997 and they had four children. In February 2004, defendant had an extramarital affair with an unnamed man and became pregnant with a child, Charles, who was born in December 2004. Plaintiff contended that defendant knew or should have known that plaintiff was not Charles's biological father, but concealed that information from him. Plaintiff stated that he "raised Charles as his own child, nurturing him and providing the same financial and emotional support as all his other children." The complaint alleged that in February 2007 defendant began another affair with the named co-respondent which "continues to this day." Defendant also concealed this second adulterous relationship from plaintiff, but in the spring of 2007, she suggested that they separate and enter into a collaborative law process. During this period plaintiff had become suspicious about Charles's parentage, allegedly "due to all the jokes within his and [defendant's] circle of family and friends that Charles looked nothing like him." Without telling his wife, plaintiff in February 2008 arranged for a DNA test of himself and Charles. The test confirmed that plaintiff was not Charles's biological father. Defendant acknowledged that plaintiff was not Charles's biological father, but claims that she learned this from the DNA test results and denied that she deliberately concealed the truth about Charles's parentage from plaintiff. The complaint asserted causes of action for divorce based on both cruel and inhuman treatment and adultery, and asserts a separate claim based on fraud. As damages for the fraud claim, plaintiff sought to recover his child support expenses for Charles, the fees for the parties' collaborative law process, and profits from the couple's investments "from the time of Charles's conception until the commencement of this action." Defendant answered and counterclaimed for divorce on the ground of abandonment. Defendant moved for an order dismissing or severing the fraud claim; plaintiff cross-moved for "expanded discovery" to prove "defendant's egregious fault," the fraud claim, and her lack of contribution to and dissipation of the marital property. The motion court denied the motion to dismiss or sever the fraud claim, but limited the recoverable damages to plaintiff's share of the fees for the collaborative law process. The court also denied plaintiff's cross motion for expanded discovery as to defendant's marital fault on the ground that defendant's alleged misconduct did not constitute egregious fault and had no bearing on prospective spousal maintenance and equitable distribution. The Appellate Division pointed out that marital fault may be considered pursuant to clause (d)(13) of DRL 236 (B)(5), the "catchall" provision that allows the court to take "any other factor" which may be "just and proper" into account. Marital fault can only be considered where the misconduct "is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship-misconduct that shocks the conscience' of the court, thereby compelling it to invoke its equitable power to do justice between the parties. In Havell v. Islam, 301 A.D.2d 339, 344 [2002], the Court adopted the analysis set forth in McCann v. McCann (156 Misc.2d 540 [1993] ), and concluded that to be deemed egregious, the conduct must callously imperil the value our society places on human life and the integrity of the human body. It noted that the only cases in which reprehensible behavior has been deemed to constitute egregious fault sufficient to affect equitable distribution have involved extreme violence. It noted that egregious fault had also been found in instances of rape, and protracted and severe physical abuse. Conversely, conduct that courts have found not to be egregious include adultery, alcoholism, abandonment , and verbal harassment coupled with several acts of minor domestic violence. Here, defendant's alleged misconduct did not rise to the level of egregious fault, since defendant neither endangered the lives or physical well-being of family members, nor deliberately embarked on a course designed to inflict extreme emotional or physical abuse upon them. The court held that given the absence of egregious fault, the motion court correctly precluded any disclosure in connection with defendant's marital fault. Justice Nardelli dissented in an opinion.

Secreting Assets Supports Finding of Economic Fault

In Michaelessi v Michaelessi, 59 A.D.3d 688, 874 N.Y.S.2d 207 (2 Dept 2009) the plaintiff admitted that she did not truthfully fill out her net worth statement, and failed to provide an adequate explanation as to how she was able to afford to pay for a significant elective-surgical procedure with her claimed level of assets. The Appellate Division held that secreting assets in order to prevent the trial court from making an equitable distribution of property supports a finding of economic fault. Once such a finding is made, the trial court must consider the missing assets in making it distributive award. The Supreme Court providently exercised its discretion in taking the missing assets into account and limiting the plaintiff's share of the value of the defendant's pension to 25%. The remainder of the marital property distributed was distributed on a 50/50 basis.

Transferring Assets to Joint Account Investment or Brokerage Account Raises Presumption that Funds Are Marital Property

In Fehring v Fehring, --- N.Y.S.2d ----, 2009 WL 139488 (N.Y.A.D. 3 Dept.) the parties, married in 1990. Plaintiff received a $50,000 payment in August 2005 after having surgery for a condition covered by a previously purchased "specified disease coverage" insurance policy. He deposited the check in a brokerage account that was held and used jointly by the parties. In January 2006, plaintiff used $50,000 from that account to purchase (with another individual) real property on River Road in Esopus, Ulster County. Supreme Court determined that the proceeds from plaintiff's half interest in the River Road property, which was in the process of being sold, would be divided equally between the parties. The court further determined that a First Investors account, which was valued at about $38,800 when the divorce action was commenced in December 2006 and $26,000 at the time of trial in June 2007 (with defendant making all withdrawals during such time), should be valued as of the trial date and split equally. The Appellate Division affirmed. It held that transferring assets that were separate property into a joint account raises a presumption that the funds are marital property to be disbursed among the parties according to the principles of equitable distribution. This presumption may be rebutted by proof that such deposits were made as a matter of convenience, without the intention of creating a beneficial interest. The fact that the deposit is not made into a traditional banking account, but instead into a joint brokerage or investment account, does not change the application of this well-established principle. There was evidence that the account was used by both parties. After the subject deposit and before the withdrawal to purchase the real property, there was proof that further deposits were made into the account by the parties and withdrawals were made for payments toward items such as credit card bills. Given this commingling, plaintiff failed to rebut the presumption and Supreme Court properly treated the funds as marital property. Supreme Court did not abuse its discretion in distributing equally the value of the interest in real property purchased with the funds from the joint account rather than awarding him substantially more of the value. Supreme Court's award was equitable in light of the overall distribution of marital property reflected in the record, including, the fact that the division of other marital real property resulted in plaintiff receiving property valued about $20,000 more than defendant. The Appellate Division held that although marital property is generally valued at the time the action is commenced, valuation at the time of trial is justified where valuation on the date of the action would be inequitable. Supreme Court explained that defendant, who did not earn a salary during the marriage and received no maintenance award, used the funds in the First Investors account between the date of commencement and date of trial to make expenditures for items such as mortgage payments, car payments, maintaining the home, and other household expenses. The court also noted that, during this time, plaintiff was receiving income from the family business while making no payments to defendant. There was no evidence that defendant wastefully dissipated the assets. It was unpersuaded that Supreme Court erred in valuing the account as of the time of trial.

March 16, 2009

Defendant Entitled to Recoup Share of Marital Funds Expended in Connection with Separate Property Condominium

In Bonanno v Bonanno, 57 A.D.3d 1260, 870 N.Y.S.2d 551, (3 Dept 2008) the parties were married in February 1998 and had three children. In September 2005, plaintiff commenced the action for divorce. Supreme Court denied defendant any interest in the appreciation of plaintiff's separate property, a condominium, and determined that plaintiff was entitled to retroactive credit for certain pension benefits. The Appellate Division rejected the defendants contention that Supreme Court abused its discretion in not equitably distributing the appreciated value as marital property. The condominium, having been purchased by plaintiff prior to the marriage, was clearly separate property and, therefore, any increase in value remains separate property "except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse" (Domestic Relations Law s 236[B][1][d][3]). Defendant, as the nontitled spouse claiming such interest, bore the burden of establishing that the increased value was due in part to his efforts as opposed to market forces or other unrelated factors. Defendant testified regarding the general maintenance that the parties performed at the condominium, which included painting, caulking, arranging for carpet installation and replacement of appliances, and also his dealings with the Boston Housing Authority in regard to tenant matters. No renovations or structural changes to the condominium were made during the course of the marriage. Plaintiff's testimony established that property values had increased dramatically as a result of revitalization of the neighborhood due in large part to the recent construction of luxury condominiums across the street from the condominium. Under all the circumstances, it could not say that Supreme Court abused its discretion in finding that the increase in value resulted from market forces. It did find merit in defendant's contention that he was entitled to recoup his share of the marital funds expended in connection with the condominium. The rents from the condominium were deposited into a joint account and reported on the parties' joint tax returns. Once the rents were commingled in the parties' joint account, that money presumptively became marital property. The record established that $112,570 was expended during the course of the marriage to pay the mortgage and other expenses associated with the condominium. The rental income totaled $76,718, and all of this amount could be traced to paying expenditures associated with the condominium. Therefore, to that extent, plaintiff overcame the presumption that the rents, once deposited, became marital property. After the rents were applied to the $112,570 total costs, that left the amount of $35,852 in condominium expenses that were paid using marital funds. Accordingly, it found that defendant was entitled to recoup his equitable share of that amount, less any tax savings received as a result during the course of the marriage. Because defendant testified that the tax rate changed from year to year during the course of the marriage, the matter had to be remitted for a determination of the sum of the tax savings to be factored into the amount due defendant.

No Hearing Required Where Court Possesses Adequate Information to Make Informed Determination on Temporary Visitation

In Rosenberg v Rosenberg, --- N.Y.S.2d ----, 2009 WL 563527 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order that denied the mothers motion for an evidentiary hearing on the issue of interim visitation and directed certain visitation between the father and the parties' child. It held that a hearing is not necessary where, as here, the court possesses adequate relevant information to enable it to make an informed and provident determination as to the child's best interests. Supreme Court examined the parents over several court appearances and conducted an in camera interview of the child to ascertain her wishes. These actions were sufficient to enable the Supreme Court to make an informed and provident determination on the issue of interim visitation.

Parenting Coordinator to Resolve Visitation Issues Between the Parties Is Improper Delegation of Courts Authority

In Matter of Edwards v Rothschild, --- N.Y.S.2d ----, 2009 WL 564430 (N.Y.A.D. 2 Dept.) Family Court denied both parents' requests for sole custody, and instead awarded joint custody. The Appellate Division modified to award the father sole custody. It reversed that portion of the order which directed that, on the alternate weekends that the mother does not have the children, she shall, unless the father made plans with the children, have parenting time on those Sundays from 10:00 A.M. until 7:00 P.M. This provision unfairly infringed upon the father's parenting time. It deleted the provision thereof the Parenting Coordinator to resolve issues between the parties, since this constituted an improper delegation of the court's authority to determine issues relating to visitation.

Family Court Has Jurisdiction to Direct Judgment for Cost of Forensic Evaluations Conducted by Court-appointed Agency

In Matter of Donohue v MacIssaac--- N.Y.S.2d ----, 2009 WL 564436 (N.Y.A.D. 2 Dept.) the Appellate Division held that the Family Court had the jurisdiction to direct the issuance of a money judgment against the parties for the cost of forensic evaluations conducted by a court-appointed agency, which it had previously directed them to pay (citing Sciacca v. Sciacca, 173 Misc.2d 756, 758 n). However, Family Court erred in directing the issuance of the money judgment in the absence of an application for such relief from the court-appointed agency and notice to the parties. It reversed the money judgment insofar as entered against the father.

Appellate Divisions Construes Child Support Provision that “Child Support Paid Shall Be Reduced Proportionately”

In Kosnac v Kosnac, --- N.Y.S.2d ----, 2009 WL 564534 (N.Y.A.D. 2 Dept.) the stipulation of settlement in which the father agreed to pay support for the parties' five children in a sum which exceeded his statutory obligation under the Child Support Standards Act provided that as each child becomes emancipated, "support for such child shall cease and the child support paid shall be reduced proportionately." The Appellate Division held that this provision was clear and unambiguous, and reflected an intent to reduce the father's support obligation by one fifth of the original amount as each child becomes emancipated. It also held that under the circumstances of this case, it was also proper for the Supreme Court to deny the mother's request for an audit of the corporate books and records of the father's business. The parties' stipulation directed the father to pay additional child support if his annual income exceeds the sum of $100,000, but provided a mechanism for verifying his income by requiring him, inter alia, to give the mother copies of his annual income tax returns. The father provided the mother with copies of his federal tax returns, and the mother had not demonstrated an evidentiary basis for her contention that the these returns did not reflect his true income.

Income Derived From Separate Property Not Immune from Consideration in Calculating a Maintenance Obligation.

In Karl v Karl, --- N.Y.S.2d ----, 2009 WL 137336 (N.Y.A.D. 3 Dept.) the parties were married for 33 years, After a nonjury trial, Supreme Court distributed the husband's pension pursuant to the formula set forth in Majauskas v. Majauskas (61 N.Y.2d 481, 494 [1984] ) and concluded that the payments he received from his private disability insurance policy were separate property not subject to equitable distribution. The court awarded the wife $800 a month in maintenance for 10 years, with the proviso that this figure would be reduced bythe amount that she received as her Majauskas share of the husband's pension ($523 per month), resulting in a final maintenance award of $277 per month. The Appellate Division affirmed. It rejected the husbands argument that any calculation of maintenance should not include the income that he received for his disability. It held that among the factors to be considered in determining maintenance is the total amount of each party's income, including that which each receives from separate property that is not otherwise subject to equitable distribution. The fact that a portion of that income is derived from an asset determined to be separate property not subject to equitable distribution does not render that income immune from consideration in calculating a party's maintenance obligation. The disability benefits were not the result of a veteran's disability which would otherwise be precluded from consideration with respect to maintenance (see 10 USC 1408; Hoskins v. Skojec, 265 A.D.2d 706, 707 [1999], lv denied 94 N.Y.2d 758 [2000] ). It also rejected the husbands argument that Supreme Court erred when it failed to impute to the wife income that she could have earned. At the time of trial, the wife was 51 years old and, other than providing child care, had not worked outside the home in over 10 years. She did not attend college and had no vocational training that would have enhanced her employment skills. While the parties were married, the wife did not work and did not develop any meaningful employment skills that would have enhanced her earning capacity because the husband had requested that she devote all of her time to the family home. After the husband left the marital home, the wife began a day care business that she operated out of her home and, while her income at the time of trial had been significantly reduced, this reduction was due in large part to the fact that she was no longer being reimbursed for care that she provided for two children that had been adopted by her daughter. Supreme Court did not abuse its "considerable discretion" in finding that it was inappropriate to impute income to the wife. The husband, a former correction officer, while disabled, had a total monthly income from Social Security disability and private disability of approximately $2,800, in addition to his pension. In contrast, the wife, while gainfully employed early in the marriage as a switchboard operator, stopped working in 1995 when the husband asked her to devote herself full time to the upkeep of the parties' home and her present income was approximately $1,000 per month, plus her share of the husband's pension, out of which she had to pay $470 per month for health insurance. The court directed that maintenance would cease before the husband stopped receiving income from his private disability policy. These factors provided ample support for the maintenance determination.

March 2, 2009

Second Department Disagrees With First Department Holding No Appeal lies from Maintenance and Property Distribution Granted on Default in Appearing for Trial.

In Sarlo-Pinzur v Pinzur, --- N.Y.S.2d ----, 2009 WL 387201 (N.Y.A.D. 2 Dept.) Supreme granted the husband's attorney's motion to withdraw as counsel and refused to adjourn the trial further following counsel's withdrawal. Upon his subsequent default in appearing at the trial able distribution, Supreme Court awarded the wife maintenance of $500 per month for four years and equitably distributed the marital property. The Appellate Division dismissed the appeal from the judgment, except insofar as it brought up for review the granting of the husband's attorney's motion to withdraw as counsel and the denying of the husband's request to adjourn the trial, in effect, pursuant to CPLR 321(c). It held that the judgment from which the husband appealed was entered on default, since he left the courtroom as the trial commenced. Although no appeal lies from a judgment entered on the default of the appealing party (CPLR 5511), an appeal from such a judgment does bring up for review those 'matters which were the subject of contest' before the Supreme Court. Here, those matters consisted of the granting of the motion of the husband's attorney to withdraw as counsel and the Supreme Court's denying of the husband's request to adjourn the trial, in effect, pursuant to CPLR 321(c). It pointed out that as a general rule, CPLR 321(c) requires that there be a 30-day stay of all proceedings after counsel is permitted to withdraw over the client's objection. Where, however, the attorney's withdrawal is caused by a voluntary act of the client, the court has the discretion to permit the matter to proceed without such a stay. The husband's counsel moved for leave to withdraw on the ground that the husband had refused to provide financial information necessary to the trial of the case. The motion was properly granted on the basis of the husband's failure to cooperate with his counsel. Supreme Court providently exercised its discretion in refusing to adjourn the trial further. COMMENT: In Warner v Houghton, 43 A.D.3d 376, 841 N.Y.S.2d 499 (1st Dept., 2007), affirmed 10 N.Y.3d 913, 862 N.Y.S.2d 321 (2009) defendant did not appear at a compliance conference and the matter was set down for an inquest on the issue of equitable distribution. After the inquest, at which he did not appear, the court granted a divorce, and made awards concerning the request for equitable distribution and counsel fees. The Appellate Division held that while the issue of whether the divorce was properly granted may not be reviewable, the distribution award was a separate issue, and was still subject to review, even after a default. It found that the defendant was improperly precluded and modified the awards. On review of submissions pursuant to 22 NYCRR 500.11 the Court of Appeals held that CPLR 5511 does not bar review of the equitable distribution components of a divorce judgment where, as here, defendant was improperly precluded from contesting the awards. It held that the Appellate Division did not abuse its discretion as a matter of law in vacating Supreme Courts preclusion order.

Waiver of Right to Counsel in Neglect Proceeding Requires Searching Inquiry By Court

In Matter of Casey N, --- N.Y.S.2d ----, 2009 WL 387635 (N.Y.A.D. 2 Dept.) the Appellate Division held that a party in a proceeding pursuant to Family Court Act article 10 has both a constitutional right and a statutory right to be represented by counsel. A party may waive the right to counsel and opt for self-representation. Before permitting a party to proceed pro se, the court must determine that the party's decision to do so is made knowingly, intelligently, and voluntarily. To ascertain whether a party's waiver of the right to counsel meets these requirements, the court must conduct a "searching inquiry" of that party. While there is no "rigid formula" to the court's inquiry, there must be a showing that the party was aware of the dangers and disadvantages of proceeding without counsel. For example, the court may inquire about the litigant's age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver. Denial of the right of self-representation is not subject to harmless error analysis. Family Court failed to sufficiently advise the mother of the risks of self-representation. The only inquiry the Family Court conducted was to ask the mother twice whether she wanted Mr. Eisenberg to represent her. Otherwise, it made only one declaratory statement to the mother that generally cautioned her against self-representation, without detailing the dangers and disadvantages of doing so, and informed her that she would have to follow the same legal rules as the other parties. Family Court failed to conduct a sufficiently searching inquiry of the mother to be reasonably certain that she understood the dangers and disadvantages of giving up the fundamental right of counsel. Also absent was any inquiry by the Family Court to evaluate the mother's competency to waive counsel and her understanding of the consequences of self-representation. To the extent the colloquy could be read to indicate that the court delegated its duty to conduct a searching inquiry to the mother's counsel, there is no authority for the court to have done so, nor was there any evidence that counsel conducted a searching inquiry. Because the court did not ensure that the mother's waiver of her right to counsel was made knowingly, intelligently, and voluntarily, it reversed the order of disposition relating to the mother without regard to the merits and remitted the matter to the Family Court for a new hearing and determination.

Failure to Recoup Value from Unprofitable Business Operated During Marriage Constitutes Wasteful Dissipation of That Asset

In Scala v Scala, --- N.Y.S.2d ----, 2009 WL 281681 (N.Y.A.D. 4 Dept.) Plaintiff appealed from a judgment of divorce that confirmed the report of the Matrimonial Referee appointed to hear and report and ordered plaintiff husband to pay maintenance to defendant wife. Plaintiff contended that the Referee erred in precluding him from testifying concerning the nature of his alleged physical injuries based on his willful failure to furnish requested medical authorizations. The Appellate Division rejected that contention, and concluded under the facts and circumstances of this case that the Referee neither abused nor improvidently exercised his discretion in precluding that testimony. Plaintiff further contended that Supreme Court erred in confirming the Referee's report both to the extent that the Referee found that the closure by plaintiff of his masonry business constituted a wasteful dissipation of assets and to the extent that the Referee valued the business. With respect to wasteful dissipation, the Court pointed out that it had previously stated that the failure to recoup value from an unprofitable business operated during the marriage constitutes wasteful dissipation of that asset (see Baker v. Baker [appeal No. 2], 199 A.D.2d 967, 968). Thus, it necessarily is a wasteful dissipation of assets to fail to recoup the value of a profitable business, such as plaintiff's masonry business. It also rejected the contention with respect to the valuation of the masonry business. The determination of a fact-finder as to the value of a business, if it is within the range of the testimony presented, will not be disturbed on appeal where valuation of the business rested primarily on the credibility of expert witnesses and their valuation techniques. The Referee, whose report was adopted by the court, credited the conclusion of defendant's expert with respect to the value of the business, and plaintiff presented no expert testimony that would support a different valuation. It agreed with plaintiff, however, that the court erred in awarding nondurational maintenance to defendant. Based on the statutory factors, including the parties' respective ages and financial circumstances, it concluded that defendant was entitled to maintenance for 12 years from the date of the judgment.

Nontitled Party Seeking a Distributive Share of Enhanced Earnings Resulting from Law Degree and License must Demonstrate That They Made a Substantial Contribution to the Titled Party's Acquisition of That Marital Asset

In Kriftcher v Kriftcher, --- N.Y.S.2d ----, 2009 WL 262707 (N.Y.A.D. 2 Dept.) Supreme Court awarded the plaintiff wife $828,699.20 as her 40% share of the husbands enhanced earning capacity, an attorney's fee of $30,000, declined to award her maintenance, awarded her $1,229.71 per week in child support, and failed to award her equitable distribution of the husband's bonus for the calendar year 2005, which the husband received in 2006. The Appellate Division found that Supreme Court correctly concluded that the enhanced earnings resulting from the law degree and license obtained by the husband during the marriage were marital property subject to equitable distribution. Nevertheless, it is incumbent upon the nontitled party seeking a distributive share of such assets to demonstrate that they made a substantial contribution to the titled party's acquisition of that marital asset and where only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree or professional license, and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit the distributed amount of that enhanced earning capacity. Here, the wife's minimal contributions to the husband's obtaining of his degree and license entitled her to a share of only 10% in the enhanced earnings that have resulted. Supreme Court also erred in failing to distribute the husband's bonus for the calendar year 2005, which he received in March 2006 and was in the gross sum of $360,000. Based upon the unrebutted testimony of the forensic expert, the husband's effective income tax rate was 38.25%, and, therefore, the net amount of the husband's bonus was the sum of $222,300. Since the divorce action was commenced on June 28, 2005, the marital portion of that asset was 50% of its net value, or $111,150. Considering all of the statutory factors the wife's equitable share of that marital asset was fixed at 50%, or $55,575. In determining the appropriate amount and duration of maintenance, the court is required to consider, among other factors, the standard of living of the parties during the marriage and the present and future earning capacity of both parties . (Haines v. Haines, 44 A.D.3d 901, 902, 845 N.Y.S.2d 77). Although the wife earned a teaching license during the course of the marriage, she was, at present, primarily a homemaker, who worked only part-time as a substitute teacher earning approximately $10,000 per year. In sharp contrast, the husband was an attorney making approximately $500,000 per year. It held that a maintenance award of $1,000 per week for 10 years was appropriate.

February 16, 2009

Family Court May Not "Bootstrap"Pins Adjudication onto One for Juvenile Delinquency by Using its Inherent Contempt Power

In Matter of Daniel I, 57 A.D.3d 666, 871 N.Y.S.2d 183 (2 Dept 2008) the appellant originally was brought before the Family Court on a petition to adjudicate him a person in need of supervision pursuant to Act article 7. After he was adjudicated a PINS, he allegedly violated certain electronic monitoring conditions of probation, imposed as part of the disposition of that proceeding, by damaging the strap of his electronic monitoring device and breaking curfew. The presentment agency then commenced juvenile delinquency proceedings pursuant to Family Court Act article 3, alleging that the appellant committed acts which, if committed by an adult, would have constituted the crimes of criminal mischief in the fourth degree and obstruction of governmental administration in the second degree. After fact-finding and dispositional hearings, he was adjudicated a juvenile delinquent on both charges, and ultimately placed in a secure facility with the Office of Children and Family Services for a period of 12 months. The Appellate Division reversed and dismissed. It pointed out that a PINS is one who is, inter alia, "incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care". PINS behavior includes running away from home, breaking curfew, and truancy. The placement of a child in a secure facility is not permitted in a PINS proceeding. In situations where a PINS absconds from placement, the Family Court may not "bootstrap" the PINS adjudication onto one for juvenile delinquency by using its inherent contempt power to punish a runaway status offender with criminal consequences. The act of eloping from a treatment facility, although violative of the Family Court's orders, is nevertheless an act consistent with PINS behavior, not with juvenile delinquency. This is so even when the court is faced with a situation where the PINS respondent persistently absconds from every nonsecure placement facility in which he or she has been placed. The Court noted that it had previously determined that the FamilyCourt may not "bootstrap" a PINS adjudication onto one alleging juvenile delinquency by charging a PINS who absconds from a nonsecure facility with conduct that, if committed by an adult, would constitute escape (see Matter of Sylvia H., 78 A.D.2d 875, 433 N.Y.S.2d 29). Here the appellant's acts were consistent with PINS behavior, not with juvenile delinquency, and were more harmful to him than to society. Thus, by finding that he committed acts which, if committed by an adult, would have constituted the crimes of criminal mischief in the fourth degree and obstruction of governmental administration inthe second degree, the Family Court improperlybootstrappedthe PINS adjudicationontoone for juvenile delinquency.

Maintenance Provisions and Interest on Promissory Note Provided in Separation Agreement Set Aside as Unconscionable

In Santini v Robinson, --- N.Y.S.2d ----, 2008 WL 5376525 (N.Y.A.D. 2 Dept.) the parties were married in 1973, and had three children. Their principal assets included theirapproximately$100,000 equityinterest in the marital residence, their Individual Retirement Account and joint bank accounts, the plaintiff's deferred compensation plan, and his future retirement pension, valued at more than $242,000. The plaintiff left the marital residence in July 1991, and in November 1991 the defendant commenced the underlying action for a divorce. The parties entered into a separation agreement dated January9, 1992. The defendant was represented byan attorneyin connection with the negotiation of the separation agreement, while the plaintiff represented himself. At that time, the plaintiff was 42 years old and employed bythe CountySheriff's Department, while the defendant was 41 years old,unemployed,and legallyblind,albeit able to work part-time and receiving SocialSecuritydisability benefits. The parties visited the defendant's attorney twice in connection with the separation agreement, and the attorney advised the plaintiff repeatedly, both in writing and orally, that he should retain separate counsel. The plaintiff testified that he voluntarilysigned the agreement on January9, 1992, althoughhe merely"scanned"the agreement and had not understood the provisions that he read.The agreement prepared bycounsel contained the general terms previouslyagreedupon between the parties during their own negotiations. The separation agreement provided that the marital residence subject to the mortgage, the IRAs and joint bank accounts, and the plaintiff's deferred compensation plan in the form of promissory notes would be distributed to the defendant and that she would receive child support and lifetime maintenance even upon remarriage. Further, the agreement provided that the maintenance payment would be increased by a percentage each timeone of the children was emancipated and by an additional 4% per annum. The plaintiff retained his pension, his automobile, some bank accounts, and certain furniture. The agreement was incorporated, but not merged, into a 1992 judgment of divorce. In 1998 the defendant remarried. In March 2000, the plaintiff commenced the action to set aside the separation agreement as unfair, inequitable, and unconscionable. After the Appellate Division reversed an order granting summary judgment dismissing the complaint on the issues of unconscionability and ratification (see Santini v. Robinson, 306 A.D.2d 266), and following that hearing, the Supreme Court, set aside the provisions of the parties' separation agreement awarding the defendant 100% of the plaintiff's deferred compensation and the parties' IRAs, terminated the defendant's exclusive possession of the marital home, limited the plaintiff's obligation for college expenses of the parties' three children to $15,000 per year, terminated the defendant's lifetime maintenance as of the date of her 1998 remarriage, awarded a money judgment to the defendant for all interest payable on a $19,000 promissory note dated January9, 1992, and awarded a credit of $33,488 to the plaintiff for his maintenance payments after the defendant's remarriage.

The Appellate Division modified. It held that Supreme Court erred in setting aside the parties' entire separation agreement as unconscionable since the equitable distribution of the marital property was not manifestly unjust. Pursuant to the separation agreement, the defendant was awarded, inter alia, the marital residence and most of its contents, the IRAs and the payment of certain promissory notes by the plaintiff, while the plaintiff retained his pension, his car, and some furniture. The plaintiff acknowledged at trial that he was willing to give the defendant everything as long as he retained his pension. Any inequity in this property division was not "so strong and manifest as to shock the conscience and confound the judgment" of this Court (Christian v. Christian, 42 N.Y.2d at 71) Accordingly, these provisions of the separation agreement were reinstated, except as provided in the decision. The Appellate Division agreed with the Supreme Court that the interest provision in the promissory note and the lifetime escalating maintenance provisions were unconscionable (citing Tartaglia v. Tartaglia, 260 A.D.2d at 629; Yuda v. Yuda, 143 A.D.2d at 659). The plaintiff executed a promissory note for $19,000 in the defendant's favor with an annual interest rate of 9%, which represented her one-half portion of the plaintiff's unused vacation and sick time. Although the unused vacation and sick time were not in "Pay Out" status until the plaintiff's future retirement, the note provided that the annual 9% interest would accrue immediately upon execution. This interest provision was manifestlyunjust. Furthermore, the plaintiff was obligated to pay child support and all college expenditures for three children, as well maintenance payments which increased each year during the defendant's lifetime. The lifetime nature of the maintenance and its 4% increase each year for the rest of the defendant's life, on top of a percentage increase following the emancipation of each of their children, represented a sum far in excess of the value of the plaintiff's marital distribution. Testimony elicited at trial revealed that by the time the plaintiff was 65 years of age, he would be exhausting his primary marital asset by giving the defendant almost one half of his yearly pension. This Court found "that no reasonable and competent person would have consented to" this lifetime escalating maintenance provision. Contrary to the Supreme Court's termination of the defendant's maintenance upon her remarriage, a maintenance period of 16 years, from the 1991 commencement of the matrimonial action to the 2007 order and judgment appealed herein, was more appropriate under the extant circumstances and in accordance with Domestic Relations Law 236(B)(6)(a). Given this determination, the plaintiff was not entitled to any recoupment of maintenance he paid between 1998 and 2007.

In Light Of Parties Long Separation Prior to Divorce, Standard of Living Not a Consideration in Awarding Maintenance.

In Dowd v Dowd, --- N.Y.S.2d ----, 2009 WL 139210 (N.Y.A.D. 3 Dept.) the parties were married in 1976, separated in 1999 and divorced in 2007. During the lengthy separation, defendant was ostensibly supported, in part, by her live-in boyfriend. Her sporadic employment history involved low-wage jobs. Of their four children, only a 17-year-old daughter remained unemancipated at the time of divorce and she resided with plaintiff. Neither party graduated from high school. At the time of trial, plaintiff earnedroughly$60,000 per year working for a manufacturer of heavyequipment. Supreme Court directed plaintiff to paymaintenance of $500 per month until defendant is eligible for Social Securityretirement benefits at age 62 in 2019 and, thereafter, at a reduced rate of $250 per month until she is eligible for health care through Medicare at age 65 in 2022, at which time maintenance ceases. The Appellate Division modified by reversing so much of the judgment as awarded defendant monthlymaintenance of $500 until 2019, when she reaches age 62, and $250 until 2022, when she reaches age 65. Defendant was awarded monthlymaintenance of $500 for a period five years from the date of entryof Supreme Court's judgment. It held that the purpose of maintenance is to provide financial support for the recipient spouse while he or she gains the skills and employment necessaryto become self-sufficient. It noted that in light of the long separation of the parties prior to the divorce action, the standard of living during the marriage was not a consideration. The marital residence was the only property of significant value and it was essentiallydivided equally, with defendant receiving a distributive award of $100,000. Plaintiff was 50 years old, healthy and had a job that he would likely be able to continue for the rest of his working life. Defendant was 49 years old and had a similar educational background as plaintiff. While she had a sporadic employment history, there was no reasonthat she shouldnot be able to obtain a modest and sustainable levelof income within a reasonable time. Her purported health problems were not supported bycompetent medical proof. She had no responsibilityfor anyunemancipated children and had lived independently of plaintiff for a considerable period of time. During the long separation, plaintiff provided the primary support to the children and also dealt with the marital debt. Two Justices Dissented.

February 1, 2009

New Rules of Professional Conduct (22 NYCRR Part 1200) Replace Existing Disciplinary Rules, Effective April 1, 2009.

The New Rules of Professional Conduct, which are based on the American Bar Association Model Rules of Professional Conduct, introduce a number of important ethics changes for New York lawyers. They are intended to ease ethical research and guidance by New York lawyers, and are in addition to the Rules in 22 NYCRR Parts 1210, 1215, 1230 and 1400. Some of the rules impose new ethical obligations on New York lawyers. One rule obligates a lawyer to act with reasonable diligence and promptness' in representing a client (22 NYCRR Part 1200, Rule 1.3[a]). Another rule requires a lawyer to keep the client reasonably informed about the status of the matter, and to promptly comply with a client's reasonable requests for information' (22 NYCRR Part 1200, Rule 1.4[a][3], [4]). In some cases, the new rules liberalize a former New York rule. For example one rule sets forth a lawyer's duty and obligation to a “prospective client,” including a client with whom the lawyer never enters into an attorney-client relationship. It expressly exempts from the benefit of the rule's protections potential clients who consult with a lawyer merely for the purpose of disqualifying the lawyer from representing an adverse party. Another rule allows attorneys to disclose confidential information to advance the best interests of the client when it is either reasonable under the circumstances or customary in the professional community (22 NYCRR Part 1200, Rule 1.6(a)(2)). In our special supplement Joel R. Brandes discusses the rules that particularly effect New York Matrimonial and Family law attorneys.

Maintenance Provisions and Interest on Promissory Note Provided in Separation Agreement Set Aside as Unconscionable

In Santini v Robinson, --- N.Y.S.2d ----, 2008 WL 5376525 (N.Y.A.D. 2 Dept.) the parties were married in 1973, and had three children. Their principal assets included their approximately $100,000 equity interest in the marital residence, their Individual Retirement Account and joint bank accounts, the plaintiff's deferred compensation plan, and his future retirement pension, valued at more than $242,000. In November 1991 the defendant commenced the underlying action for a divorce. The parties entered into a separation agreement dated January 9, 1992. The defendant was represented by an attorney, while the plaintiff represented himself. At that time, the plaintiff was 42 years old and employed by the County Sheriff's Department, while the defendant was 41 years old, unemployed, and legally blind, albeit able to work part-time and receiving Social Security disability benefits. The parties visited the defendant's attorney twice in connection with the separation agreement, and the attorney advised the plaintiff repeatedly, both in writing and orally, that he should retain separate counsel. The plaintiff testified that he voluntarily signed the agreement on January 9, 1992, although he merely "scanned" the agreement and had not understood the provisions that he read. The agreement contained the general terms previously agreed upon between the parties during their own negotiations. It provided that the marital residence subject to the mortgage, the IRAs and joint bank accounts, and the plaintiff's deferred compensation plan in the form of promissory notes would be distributed to the defendant and that she would receive child support and lifetime maintenance even upon remarriage. Tthe agreement provided that the maintenance payment would be increased by a percentage each time one of the children was emancipated and by an additional 4% per annum. The plaintiff retained his pension, his automobile, some bank accounts, and certain furniture. The agreement was incorporated, but not merged, into a 1992 judgment of divorce. In 1998 the defendant remarried. In March 2000, the plaintiff commenced the action to set aside the separation agreement as unfair, inequitable, and unconscionable. After a hearing Supreme Court set aside the provisions of the parties' separation agreement awarding the defendant 100% of the plaintiff's deferred compensation and the parties' IRAs, terminated the defendant's exclusive possession of the marital home, limited the plaintiff's obligation for college expenses of the parties' three children to $15,000 per year, terminated the defendant's lifetime maintenance as of the date of her 1998 remarriage, awarded a money judgment to the defendant for all interest payable on a $19,000 promissory note dated January 9, 1992, and awarded a credit of $33,488 to the plaintiff for his maintenance payments after the defendant's remarriage. The Appellate Division modified. It held that Supreme Court erred in setting aside the parties' entire separation agreement as unconscionable since the equitable distribution of the marital property was not manifestly unjust. Pursuant to the separation agreement, the defendant was awarded, inter alia, the marital residence and most of its contents, the IRAs and the payment of certain promissory notes by the plaintiff, while the plaintiff retained his pension, his car, and some furniture. The plaintiff acknowledged at trial that he was willing to give the defendant everything as long as he retained his pension. Any inequity in this property division was not "so strong and manifest as to shock the conscience and confound the judgment" of this Court (Christian v. Christian, 42 N.Y.2d at 71) Accordingly, these provisions of the separation agreement were reinstated, except as provided in the decision. The Appellate Division agreed with the Supreme Court that the interest provision in the promissory note and the lifetime escalating maintenance provisions were unconscionable. The plaintiff executed a promissory note for $19,000 in the defendant's favor with an annual interest rate of 9%, which represented her one-half portion of the plaintiff's unused vacation and sick time. Although the unused vacation and sick time were not in "Pay Out" status until the plaintiff's future retirement, the note provided that the annual 9% interest would accrue immediately upon execution. This interest provision was manifestly unjust. Furthermore, the plaintiff was obligated to pay child support and all college expenditures for three children, as well maintenance payments which increased each year during the defendant's lifetime. The lifetime nature of the maintenance and its 4% increase each year for the rest of the defendant's life, on top of a percentage increase following the emancipation of each of their children, represented a sum far in excess of the value of the plaintiff's marital distribution. Testimony elicited at trial revealed that by the time the plaintiff was 65 years of age, he would be exhausting his primary marital asset by giving the defendant almost one half of his yearly pension. This Court found "that no reasonable and competent person would have consented to" this lifetime escalating maintenance provision. Contrary to the Supreme Court's termination of the defendant's maintenance upon her remarriage, a maintenance period of 16 years, from the 1991 commencement of the matrimonial action to the 2007 order and judgment appealed herein, was more appropriate under the extant circumstances and in accordance with Domestic Relations Law 236(B)(6)(a). Given this determination, the plaintiff was not entitled to any recoupment of maintenance he paid between 1998 and 2007.

Assuming Judicial Estoppel Applied Appropriate Remedy Is Not to Transform Separate Assets into Marital Assets.

In Rachimi v Rachimi, 869 N.Y.S.2d 414 (1 Dept 2008) the action for a divorce in this 20-year marriage was commenced in 2003, when the parties were in their sixties. At the outset, the Appellate Division held that the Domestic Relations Law 236(B)(5)(d) factors do not have to be specifically cited by the trial court when the factual findings of the court otherwise adequately articulate that the relevant statutory factors were considered especially where a comprehensive record and extensive factual findings provide a basis for informed review. The Referee set forth all his factual findings, indicated which testimony he found credible and which was not, cited the appropriate factors to be considered in making an equitable distribution award, and ultimately identified the facts he was relying on in making his award. That he did not specifically state which 236(B)(5)(d) factor he was relying on regarding each individual component of the equitable distribution award was not fatal. The relevance of each pertinent factor was clear from the extensive record. Given all the circumstances and its award of one-third of the marital apartment to plaintiff, the Appellate Division rejected plaintiff's contention that the Referee erroneously awarded 100% of FCC Corp to defendant. It found that the Referee erroneously concluded the Cedarhurst apartment was a marital asset subject to equitable distribution. While property acquired during the marriage is presumed to be marital in nature plaintiff's testimony and documentary evidence that she scrupulously maintained the proceeds from the sales of three properties she owned prior to the marriage separate and apart from marital assets, and traced those funds to the subsequent purchase of the Cedarhurst apartment, successfully rebutted the presumption that the apartment was marital property. It also found that the Referee improperly awarded defendant 100% of the marital apartment on Manhattan's Upper East Side. Considering the relevant 236(B)(5)(d) factors, it found that a distributive award to plaintiff of one-third (33 1/3%) of the fair market value of that apartment, determined as of the time of trial would be equitable under the circumstances. She was entitled to at least some portion of the marital apartment because of her advancing age, poor health, and absence from the work force for most of her adult life, with little prospect of finding employment to generate enough money for her own support. Contrary to the Referee's conclusion, plaintiff did contribute, financially and otherwise, to the household throughout the course of the marriage. A one-third share was sufficient given that plaintiff had other funds and property in her own name and was awarded $1,500 per month in maintenance until either of the parties dies or she remarried, and the Referee's finding that she did not contribute equally to the marriage. The Appellate Division held that the Referee correctly awarded the Bank Hapoalim account to defendant as his separate property. Even assuming the doctrine of judicial estoppel applied with respect to the contrary position taken by defendant in his prior divorce proceeding that he had no assets, the appropriate remedy is not to transform his separate assets into marital assets. Plaintiff's invocation of the doctrine of unclean hands was similarly misplaced. She did not argue that defendant deliberately committed perjury in an effort to place assets out of her reach in this action, which would preclude him, as a matter of public policy in order to protect the integrity of the court, from claiming rightful ownership of that property. Rather, she argued that his alleged perjury in the prior divorce action was an effort to place assets out of the reach of his former wife, and thus the doctrine was inapplicable here.

January 16, 2009

No Share of Enhanced Earning Capacity to Wife Where Her Contributions Modest

In Evans v Evans, --- N.Y.S.2d ----, 2008 WL 4659439 (N.Y.A.D. 3 Dept.) the Plaintiff and defendant were married in 1985 and had two children. Plaintiff claimed on appeal that Supreme Court erred by determining that defendant's engineering degree did not enhance his earning capacity and that, even if it had, plaintiff did not make a substantial contribution toward his efforts in obtaining it, and was not entitled to a distributive share of it. The Appellate Division held that while the parties agreed that much of the work put forth by defendant to earn this degree occurred during the marriage, to be entitled to a share of its value plaintiff had to demonstrate that the degree enhanced defendant's earning capacity and that she, in a meaningful and substantial way, contributed to his efforts in obtaining it . Approximately 68% of the value of this degree was earned during the marriage and was a marital asset. Supreme Court found that "the value of [defendant's] enhanced earnings are zero as a result of having attained an engineering [d]egree, because the testimony established that he could have attained the position of Manager of Global Sourcing without his engineering [d]egree." In support of this conclusion, it accepted the testimony of defendant's expert, a certified public accountant, who concluded that whatever promotions defendant obtained during his employment were likely the product of his professional competence and would have occurred "even if [defendant] had not obtained the [d]egree." There was no basis to conclude that the court's resolution of this issue was an abuse of its discretion. Supreme Court also found that, even if defendant's degree enhanced his earning capacity, plaintiff failed to demonstrate that she made any meaningful contributions that assisted defendant in earning it. Where only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree or professional license, and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit the distributed amount of that enhanced earning capacity. Plaintiff's contributions, while significant, "can be seen more as overall contributions to the marriage rather than an additional effort to support defendant in obtaining his license". It found that no error in the court's conclusion that plaintiff was not entitled to share in the value of this degree. Plaintiff claimed that Supreme Court erred in its calculation of maintenance because, in arriving at its final figure, the court appeared to reduce the amount of defendant's annual pretax income by a portion of the value it placed on his engineering degree as a marital asset, yet, in its final decision, failed to award plaintiff any part of the value of that degree. Supreme Court found that "[i]n an effort to avoid duplication between any maintenance award and distribution as property of the marital portion of [defendant's] [d]egree I find that the total pre-tax income available from him for maintenance is $77,520.00." The court also found that "[t]here is a permanent disparity in the earnings and earning potential of the parties here in favor of [defendant], even after taking into account any [Grunfeld ] duplication analysis." Considering the fact that Supreme Court did not distribute any portion of the value of defendant's degree to plaintiff as a marital asset, it erred by calculating maintenance based upon an annual income figure of $77,520, after a Grunfeld duplication analysis. Rather, the award for maintenance should have been, in part, based upon defendant's annual income of $93,500. Therefore, the basis upon which Supreme Court issued its maintenance award was improper and had to be modified. This was a long-term marriage with two children, one of whom had special needs. Plaintiff's annual income as a self-employed hairstylist was $17,047, as opposed to defendant's annual salary of $93,500, and a permanent disparity, as noted by Supreme Court, existed in the parties' respective earning potential. The Appellate Division found that defendant should pay maintenance to plaintiff of $1,000 per month until plaintiff was eligible to receive Social Security benefits.

Award of Counsel Fees in Custody Proceedings “In Nature of Support” and Not Discharged in Bankruptcy

In Matter of Ross v Sperow, --- N.Y.S.2d ----, 2008 WL 5352258 (N.Y.A.D. 3 Dept.) in

2005, a petition for violation of a prior order of custody and visitation was filed by the mother and, in response, multiple cross petitions were filed by the father alleging violations by the mother and seeking modification of custody. In an August 2006 order resolving the parties' petitions, Family Court sustained the mother's motion for counsel fees and ordered that the father pay $5,000 of her counsel fees. The father subsequently filed for bankruptcy under chapter 7 of the Bankruptcy Code and listed the award of counsel fees as an unsecured debt. The father was discharged by the Bankruptcy Court in January 2007 and, the mother commenced a proceeding in Family Court for the violation of a court order based upon the father's failure to pay the counsel fees. Family Court concluded that the counsel fees were a nondischargeable domestic support obligation, denied the father's motion and found the father to be in violation of a prior order. The Appellate Division affirmed. It noted that state and federal courts have concurrent jurisdiction over the issue of the dischargeablity of a particular debt following the discharge of the debtor in bankruptcy. Under the Bankruptcy Code, "domestic support obligation[s]" are exempt from discharge in bankruptcy. As was relevant here, a domestic support obligation is a debt owed to or recoverable by a child of the debtor or such child's parent in the nature of support of the child of the debtor or such child's parent, without regard to whether such debt is expressly so designated, ... established by ... an order of a court of record .(11 USC 101[14A][A][i]; [B], [C][ii] ). When determining the effect of a debtor's discharge in bankruptcy on a particular debt, the Court began with the well-established principle of bankruptcy law that dischargeability must be determined by the substance of the liability rather than its form. Here, while the award of counsel fees was not explicitly characterized as a support obligation in Family Court's order, family court judges cannot reasonably be expected to anticipate future bankruptcy among the parties to a custody [or visitation] proceeding, and the inquiry into whether the debt at issue is in the nature of support is undertaken without regard to whether such debt is expressly so designated. It looked to not only to Family Court's order, but also to the record of the proceedings in determining the actual nature of the obligation. With this in mind, a review of the record revealed that the mother's initial petition commencing the proceeding clearly raised issues of financial need and hardship. Similarly, the mother's motion for counsel fees, which was sustained by Family Court in the August 2006 order, proposed consideration of her circumstances as one basis for an award of counsel fees. Also informing its conclusion was Family Court's acknowledgment in its order that Domestic Relations Law 237(b), which provides for consideration of "the circumstances of the case and of the respective parties" when awarding counsel fees to a parent in custody or visitation matters, furnished a basis for its award of fees. In light of the foregoing, and mindful that the term "in the nature of support" is to be given a broad interpretation in the context of the discharge of debt obligations in bankruptcy, it agreed with Family Court's determination that the award of counsel fees in its prior order was, in part, "in the nature of support" and, therefore, excepted from discharge in bankruptcy.

Appellate Review and Review By Family Court Not Precluded by Failure to Timely File Objections. Strict Adherence to the Deadlines of Family Court Act 439(e) is not required

In Matter of Latimer v. Cartin,-- N.Y.S.2d ----, 2008 WL 5352279 (N.Y.A.D. 3 Dept.) the father filed a petition for downward modification of his child support obligation on the basis of the surrender of his medical license and a subsequent loss of income and earning capacity. Following a hearing, the Support Magistrate concluded that the father had failed to meet his burden of proving an involuntary and unavoidable change in financial circumstances or that he made reasonable and diligent efforts to obtain employment, and declined to downwardly modify his support obligation on these grounds. Family Court denied the father's objections to the Support Magistrate's order. The Appellate Division considered the father’s appeal, rejecting the mother's contention that appellate review was precluded due to the father's failure to timely file objections to the Support Magistrate's order. It held that strict adherence to the deadlines of Family Court Act 439(e) is not required and it did not find Family Court's decision to review the merits of the father's objections, which were filed one day after the statutory deadline, to have been an abuse of discretion.

Wife's Inability to Testify with Specificity as to How She Spent the Proceeds of Loan Suggested She Dissipated Marital Assets in Contemplation of Divorce.

In Abrams v Abrams, --- N.Y.S.2d ----, 2008 WL 5376644 (N.Y.A.D. 2 Dept.) the Appellate Division pointed out that "The overriding purpose of a maintenance award is to give the spouse economic independence, and it should be awarded for a duration that would provide the recipient with enough time to become self-supporting". It held that the trial court properly awarded the former wife maintenance, but it improvidently exercised its discretion in extending the duration of the maintenance award beyond five years, and concluded that an award of $2,500 per month for five years was appropriate. It also found that the former husband correctly contended that he was entitled to a portion of the proceeds of a home equity loan that the wife obtained with respect to certain investment residential property, especially in light of the wife's inability to testify with specificity as to how she spent the proceeds of that loan. This suggested that the wife dissipated these marital assets in contemplation of divorce. The judgment was modified to award the husband a credit which represented his share of the proceeds of that loan, after accounting for the taxes paid by the wife on both the marital residence and the investment residential property. It noted that a parent has no legal obligation to provide for or contribute to the support of a child over the age of 21 Therefore, the court erred in failing to direct that the husband need only maintain the child as a beneficiary on his life insurance policy until the child reached the age of 21 or was sooner emancipated.

January 1, 2009

New Rules of Professional Conduct Effective April 1, 2009

The Rules of Professional Conduct (22 NYCRR Part 1200) replace the existing Part 1200 of the Disciplinary Rules, effective April 1, 2009, and introduce many ethics changes for New York lawyers. The Rules are based on the American Bar Association Model Rules of Professional Conduct, which has generated a national body of ethics law. Their adoption will ease ethical research and guidance by lawyers seeking to research and follow New York’s ethics rules. The Rules are in addition to the Rules in Part 1210 (Statement of Clients Rights), Part 1215 (Written Letter of Engagement Rule), Part 1230 (Fee Arbitration), and Part 1400 ( Procedure for Attorneys in Domestic Relations Matters). Rule 1.18 governs a lawyer’s duties to a prospective client when that person and the lawyer ultimately do not form an attorney-client relationship. It applies the same duty of confidentiality owed to former clients. However, a lawyer or law firm may nonetheless oppose a former prospective client if the lawyer’s current client and former prospective client give informed written consent, or the law firm may do so if certain conditions are met, including timely screening of the disqualified lawyer and prompt written notice to the former prospective client. The protections of Rule 1.18 are expressly denied to a prospective client who communicates with a lawyer in order to disqualify the lawyer from handling a materially adverse representation in the same or a substantially related

matter. The new Rules of Professional Conduct are available at http://www.nycourts.gov/rules/jointappellate/

Improper to Include Future Maintenance Payments as Part of Defendant's Income for Purposes of Calculating Child Support

In Simon v Simon, --- N.Y.S.2d ----, 2008 WL 4736658 (N.Y.A.D. 1 Dept.) the Appellate Division deleted the award of child support and included an award of health insurance coverage separate from plaintiff's other maintenance obligations, and remanded the matter to the trial court for a recalculation of the parties' respective child support obligations, and for a finding as to the cost of health insurance for defendant at the predivorce level of coverage. The Appellate Division held that while no basis existed to disturb the trial court's crediting of plaintiff's testimony regarding the reduction in his income and its resulting finding that the parties' predivorce lifestyle cannot be supported by their present combined income, under the circumstances, including the disparity in the parties' future earning capacity and defendant's ongoing health problems, the court should have directed that plaintiff pay defendant the cost of private health insurance, in addition to his regular nondurational maintenance obligation of $10,000 per month. As the record did not permit a finding as to the cost of such health insurance, it remanded for a determination thereof and for a recalculation of child support, required because the court improperly included future maintenance payments as part of defendant's income (see Huber v. Huber, 229 A.D.2d 904 [1996] ). It directed that upon recalculation, the trial court should deduct from the plaintiff's income the amount he pays in maintenance, but should not add the same amount to defendant's income (see Tryon v. Tryon, 37 A.D.3d 455 [2007] ).

Where Mutual Mistake Rendered Portion of Agreement Impossible Relevant Provision Was Reformed

In Banker v Banker, --- N.Y.S.2d ----, 2008 WL 4999166 (N.Y.A.D. 3 Dept.) the parties oral stipulation of settlement, which was incorporated but not merged into their 2005 divorce judgment, provided that the parties would subdivide a parcel of property located in Delaware County. In response to a motion by plaintiff to enforce the stipulation, Supreme Court, in February 2006, ordered defendant to, obtain subdivision approval from the Town. The Planning Board denied defendant's subsequent subdivision application upon discovering that the property was encumbered by a restrictive covenant against further subdivision. In March 2006, defendant moved to reargue and/or renew Supreme Court's February 2006 order and requested a hearing to determine equitable distribution. Supreme Court reserved decision on all pending matters pertaining to the parties until an appraisal of the property was completed. Because the parties could not agree on an appraiser, the court

appointed one and challenged the parties, once the appraisal was complete, to settle the matter in a private auction or buyout. The appraiser completed two appraisals in June 2006. By letter dated October 4, 2006, defendant requested the opportunity to offer further proof of value. Defendant made a similar request and explained that the parties had not been able to settle the matter or agree on a private auction. Plaintiff responded with a motion seeking that the parties' interests in

the property be declared in conformance with the terms set forth in the stipulation and the values established in the appraisal, as well as an order allowing her to buy out defendant's share of the property. Defendant opposed the motion, arguing that the appraisal should not be adopted without an opportunity by the parties to cross-examine the appraiser and submit other evidence of valuation. Supreme Court ordered a hearing to permit the parties to cross-examine the appraiser, but made it clear that no other testimony or evidence of valuation would be permitted. Following the hearing, at which Supreme Court again denied defendant's request to submit further evidence, the court determined the interests of the parties in the property to be 83% for plaintiff and 17% for defendant. The court, fixed the parties' interests as indicated above, appointed a receiver, and ordered the public sale of the property. Defendant appealed. The Appellate Division rejected defendant's argument that Supreme Court exceeded its authority by reforming the parties' stipulation of settlement. Where, as here, a mutual mistake rendered a portion of the parties' settlement agreement impossible or impracticable, "the relevant settlement provision was properly set aside" (Brender v. Brender, 199 A.D.2d 665, 666 [1993] ). No dispute existed that the parties' agreement to physically divide the property cannot occur given the restrictive covenant; indeed, defendant was not attempting to have the parties' stipulation enforced. Thus, after giving the parties ample opportunity to reach a new agreement, there was no error in Supreme Court's decision to move forward by appointing an appraiser so that an equitable distribution of the property, in as close accordance as possible with the intent of the parties as expressed in their settlement, could be achieved. The Court noted that to achieve reformation or recision of the stipulation of settlement, one of the parties should have commenced a plenary action, rather than proceeding by motion (see Brender v. Brender, 199 A.D.2d at 666 n. 2, 605 N.Y.S.2d 411) but, in the context of this matter, concluded the defect to be nonfatal. There was merit, however, in defendant's argument that the issue should not have been resolved without a full hearing permitting the parties to offer proof of valuation. The court is authorized to appoint an independent appraiser in a matrimonial action ( Domestic Relations Law 237; 22 NYCRR 202.18) but, unless the parties have stipulated otherwise, the court must afford the parties the opportunity to review the appraisal, cross-examine the appraiser and offer additional evidence on valuation. Although the record contained evidence that the parties consented to Supreme Court's appointment of the appraiser, it did not suggest that the parties agreed to be bound by the resulting appraisal. The order was reversed, on the law, and matter remitted to the Supreme Court for a full evidentiary hearing to determine the valuation of the parcels identified in the parties' stipulation of settlement.

No Authority to Order Sale of Separate Property Marital Residence

In Kilkenny v Kilkenny, --- N.Y.S.2d ----, 2008 WL 4260834 (N.Y.A.D. 2 Dept.) the Appellate Division held as the marital residence was the separate property of the wife, not subject to the imposition of a constructive trust, there was no authority to order its sale for the purpose of equitably distributing the proceeds. The husband was entitled to 50% equitable share in the increase in the value of the marital residence over the course of the marriage attributable to the parties joint efforts. Supreme Court also properly determined the husband was entitled to an award of $30,269.50, representing his 50% share of the reduction in the principal of the mortgage obligation referable to the residence, until the date of the commencement of the action. However, if that credit for the increase in equity attributable to the payment of mortgage principal was made, that return of equity should have been subtracted from the increased value of the marital residence to arrive at the net increased value. The Supreme Court properly determined that the husband was entitled to credit for 50% of the reduction in the principal remaining on the mortgage debt, in order to account for the mortgage and real property tax payments he made from the commencement of the action, until the termination date of the pendente lite order because those payments were not made with marital funds. The husband, in light of the modification made on appeal to the award of maintenance, was also entitled to a credit for all of the mortgage and real property tax payments he made pursuant to the pendente lite order. However, the credit was limited to the principal portion of the mortgage payments plus the real property tax payments, since the husband's mortgage interest payments was taken into consideration in determining that aspect of the appeal related to arrears for "utility" payments. Supreme Court improvidently exercised its discretion in limiting the duration of the award of maintenance so as to terminate on September 1, 2007. The Appellate Division extended the duration of the award to provide the wife with sufficient time to become self-supporting. Considering the wife's education and age, the number of years she had been out of the work force raising the parties' two minor children, the standard of living of the parties during the marriage, and the present and future earning capacities of both parties, the duration of the award was extended to the earlier of February 1, 2012, the death of either party, or the wife's remarriage. The parties' younger child would be 14 years old on that date and no longer in need of child care. The Appellate Division found that the amount of the unpaid balance of a loan that the husband obtained in connection with the college education of the second of his two daughters from his prior marriage, in the sum of $32,000, should not have been included in the calculation of marital debt.

December 16, 2008

Valuation of Enhanced Earning Capacity from MBA’s was "fatally flawed" Post-divorce Severance Package Not Marital Property

In Wiener v Wiener, --- N.Y.S.2d ----, 2008 WL 5083800 (N.Y.A.D. 1 Dept.) the Appellate Division held Plaintiff's expert's valuation of the enhanced earning capacity (EEC) from plaintiff's MBA was "fatally flawed" because he used the base line earnings of actuaries having 11 years of experience, when plaintiff was never an actuary. However, defendant's expert's final report was also flawed: he used one anomalously high year of plaintiff's earnings--earned three years before the commencement of this action and five years before trial--as the top line earnings. The most reasonable evidence in the record of plaintiff's EEC was defendant's expert's alternative calculation based on top line earnings of $177,000. This calculation resulted in an EEC of $1,111,000. The Court declined to disturb the percentage of EEC (10%) awarded by the Special Referee. It rejected plaintiff's argument on her cross appeal that she was entitled to part of defendant's post-divorce severance package because the first, originally offered $180,000 of the package was in exchange for defendant's years of service. Olivo v. Olivo (82 N.Y.2d 202 [1993] ) rejected a " 'length of service' test for marital property". "Instead, the test ... is whether the compensation in question is a form of deferred compensation" . As defendant was not entitled to even the original $180,000 severance package unless he signed, and did not revoke, a separation agreement and general release, the original $180,000 severance offer was akin to the "separation payment" that Olivo deemed not to be marital property.

Absent Express Finding of Willfulness Prejudgment Interest Improperly Imposed. When Findings of Support Magistrate Are Insufficient Family Court May Consider Affidavits and Other Submissions Without Holding a Hearing

In Matter of Regan v Zalucky, --- N.Y.S.2d ----, 2008 WL 4809541 (N.Y.A.D. 3 Dept.), the Family Court fixed the father's liability for arrears of child support and awarded interest at 9% per annum on each of his obligations. The Appellate Division reversed and remitted for further proceedings. It pointed out that once a money judgment has been ordered and entered, interest accrues until the judgment has been paid. Prejudgment interest can be ordered only after a finding of a willful disregard of a lawful court support order. Despite the statutory mandate directing that a money judgment shall be ordered when any amount of child support arrears are established (Family Ct Act § 454[2][a]) it appeared that no money judgment had been ordered or entered. It did not appear that Family Court made any express finding of willfulness before imposing prejudgment interest. Absent such a determination, prejudgment interest was improperly imposed. In a footnote the Appellate Division rejected the father's contention that Family Ct Act § 439(e) precludes Family Court, when it has concluded that the findings of the Support Magistrate are insufficient to render a final determination, from considering evidence in the form of affidavits and other submissions without holding a hearing. Where the court is endeavoring to fix amounts due on liability already established, and submissions are made on notice and with opportunity to respond, it found nothing to preclude Family Court, where possible, from rendering a final order based upon submissions.

Court Cannot Issue QDRO Encompassing Rights Not Provided in Underlying Stipulation. Absent Provision in Stipulation Specifically Awarding Plaintiff Accident Disability Benefits Supreme Court Could Not Issue More Expansive QDRO.

In Berardi v Berardi, 54 A.D.3d 982, 865 N.Y.S.2d 245 (2 Dept 2008) the original QDRO was inconsistent with the parties stipulation, which was incorporated into their judgment of divorce, insofar as it did not include any provision for a disability pension or incorporate the phrase "applicable formula" as the means of distributing the defendant's pension. When the defendant retired on December 31, 2002, after more than 20 years of service, he applied for accident disability retirement benefits in light of his disability for injuries. On October 13, 2004, the defendant's application for accident disability retirement benefits was approved, and his entitlement thereto became effective in April 2005, retroactive to his original retirement date. His pension benefits were increased by 25% in accordance with Administrative Code of the City of New York § 13-258. The plaintiff's allocable share of the defendant's variable supplement benefits was eliminated as a result of the defendant's eligibility for accident disability benefits. The plaintiff contacted the Police Pension Fund of the City of New York ( PPF) seeking her allocable share of the increase of the pension benefits derived from the defendant's accident disability retirement. After being advised by the PPF that her share of the defendant's accident disability pension would not attach without a modification of the original QDRO, the plaintiff moved to amend the original QDRO to include the defendant's disability payments payable pursuant to the applicable formula embodied in Majauskas v. Majauskas, 61 N.Y.2d 481, 490, 474 N.Y.S.2d 699, 463 N.E.2d 15. Supreme Court granted the motion and upon reargument adhered to the original determination. The defendant appealed and the Appellate Division modified the order. It stated that inasmuch as a portion of a spouse's ordinary disability pension represents deferred compensation related to length of employment occurring during the marriage, it constitutes marital property subject to equitable distribution. However, to the extent that a disability pension constitutes compensation for personal injuries, that compensation is separate property which is not subject to equitable distribution. Such is the case with an accident disability pension under the Administrative Code of the City of New York § 13-258 which is based on physical or mental incapacity proximately resulting from city service, not length of service. Applying these principles to the matter at bar, the Supreme Court's adherence, upon reargument, to its original determination granting the plaintiff's motion, was only partially correct. Although the court properly granted the plaintiff's motion to amend the original QDRO to conform to the stipulation by adding a provision for a disability pension and reflecting the parties' agreement to apply the "applicable formula" under Majauskas v. Majauskas, 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15, the court should not have made such amendment without differentiating between ordinary disability and accident disability. When the distribution of pension benefits between former spouses is accomplished through a QDRO obtained pursuant to a stipulation, such QDRO can convey only those rights to which the parties stipulated as a basis for the judgment. Where a QDRO is inconsistent with the provisions of a stipulation or judgment of divorce, courts possess the authority to amend the QDRO to accurately reflect the provisions of the stipulation pertaining to the pension benefits. A court cannot issue a QDRO more expansive or encompassing rights not provided in the underlying stipulation . While it was clear from the stipulation that the plaintiff was entitled to receive a percentage of the defendant's ordinary disability benefits for the relevant period, there was no provision for entitlement to accident disability benefits, which represented compensation for personal injuries and remained the defendant's separate property not subject to equitable distribution. Absent a provision in the stipulation specifically awarding the plaintiff accident disability benefits, the Supreme Court could not issue a more expansive QDRO. Since the original QDRO was inconsistent with the stipulation upon which it was based, the stipulation controls and the original QDRO had to be modified accordingly. Therefore, a hearing by, and/or further submissions to, the Supreme Court, was required for purposes of determining the nature and status of the defendant's pension and the plaintiff's allocable share thereof, and the Supreme Court was directed to thereafter enter an appropriate amended QDRO in accordance with the determination.

Failure to Establish Value of Business When Acquired Renders it Marital Property

In Petosa v Petosa, --- N.Y.S.2d ----, 2008 WL 4952770 (N.Y.A.D. 4 Dept.) the Appellate Division held that Supreme Court properly valued and distributed the assets of plaintiff's tax accounting business. The determination of a fact-finder as to the value of a business, if it is within the range of the testimony presented, will not be disturbed on appeal where valuation of the business rested primarily on the credibility of expert witnesses and their valuation techniques. Inasmuch as plaintiff failed to establish what the value of the business was at the time that he acquired it, the court was justified in treating the entire business as marital property. Plaintiff contended that the court abused its discretion in granting the application of defendant for counsel fees because her attorney failed to provide her with the requisite itemized bills at least every 60 days (see 22 NYCRR 1400.2,

1400.3). It rejected that contention holding that it is the right of the client, not the adversary spouse, to be billed at least every 60 days, and the client may waive that right. By providing defendant with the requisite statement of rights and responsibilities and executing the requisite written retainer agreement, her attorney complied with 22 NYCRR part 1400 (see Winkelman, 281 A.D.2d 908). Plaintiff failed to preserve for review his contention that the court abused its discretion in awarding defendant counsel fees in view of her distributive and support awards, inasmuch as he failed to request a hearing with respect to the ability of defendant to pay her own counsel fees.

Proper to Limit Juveniles “My Space” Use

In Matter of Ashley D., 55 A.D.3d 605, 866 N.Y.S.2d 222 (2 Dept 2008) the appellant admitted that she had committed an act which, if committed by an adult, would have constituted the crime of assault in the third degree. At the time of the allocution, the Family Court was presented with documents establishing that the appellant had violated a condition imposed on her interim release by using "MySpace" and attempting to change her photo and location to avoid discovery. In addition, the presentment agency demonstrated during the dispositional hearing that the appellant had bragged of her conduct on her "MySpace" site and had placed a link on that site to a video of the assault that had been posted by a third party on "YouTube," all in violation of the Family Court's earlier order. The Appellate Division held that the Family Court has the authority to impose conditions of probation that are reasonably related to rehabilitation (Family Ct. Act 353.2[2][h]). In the circumstances presented here, the Family Court providently exercised that discretion in adjudicating the appellant a juvenile delinquent and then placing her on probation for a period of 15 months, subject to certain conditions, including a prohibition on computer use for other than educational purposes.

December 1, 2008

Failure to Establish Value of Business at Time Acquired Justifies Finding it to Be Marital Property. Client May Waive Right to Bills Every 60 Days For Purposes of Counsel Fee Award

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application of defendant for counsel fees because her attorney failed to provide her with the requisite itemized bills at least every 60 days (see 22 NYCRR 1400.2, 1400.3). It rejected that contention holding that it is the right of the client, not the

adversary spouse, to be billed at least every 60 days, and the client may waive that right. By providing defendant with the requisite statement of rights and responsibilities and executing the requisite written retainer agreement, her attorney complied with 22 NYCRR part 1400. Plaintiff failed to preserve for review his contention that the court abused its discretion in awarding defendant counsel fees in view of her distributive and support awards, inasmuch as he failed to request a hearing with respect to the ability of defendant to pay her own counsel fees.

Preclusion of Expert Reports Rarely Warranted

In Nathel v Nathel, 55 A.D.3d 434, 866 N.Y.S.2d 153, ( 1 Dept 2008) the Appellate Division held that the referee properly exercised her discretion in denying plaintiff's application to preclude defendant from introducing two expert reports that were

served after the deadline set by the court. Preclusion of expert reports on the ground of failure to comply with the rules governing exchange of reports is generally unwarranted, absent a showing that the noncompliance was willful or the

party seeking preclusion was prejudiced by the lateness of the exchange. Here, defendant believed that the deadline for exchange of all expert reports had been extended one week. Even assuming defendant was mistaken, plaintiff did not show any prejudice resulting from the claimed one-week delay in service of the two expert reports. However, it found that the referee improvidently exercised her discretion in precluding plaintiff from using a real estate appraisal of the marital residence prepared or to be prepared pursuant to a court-ordered stipulation. Such a stipulation generally will be enforced unless the parties' agreement is shown to have been the product of fraud, overreaching or duress. Since no date was ever set for

completion of the appraisal, there was no basis for precluding it on the ground of lateness, especially since preclusion would result in a lack of evidence on a key issue to be determined at trial. It held that upon remand, the trial court should set a date

for the appraisal to be completed and furnished to the parties in advance of the expert's testimony.

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Children Not Parties To Stipulation of Settlement

In Baranek v Baranek, --- N.Y.S.2d ----, 2008 WL 4260896 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court erred in awarding the defendant summary judgment dismissing the complaint on the ground that the parties' minor children were necessary or indispensable parties who should have been joined in the action. In this plenary action to set aside the stipulation of settlement between the plaintiff and the defendant, the children were not parties to the contract whose rights may be prejudiced by the rescission thereof. It also held that Supreme Court improperly searched the record and awarded the defendant summary judgment dismissing the second, third, and fourth causes of action in the complaint, since the viability of the second, third, and fourth causes of action was not an issue presented in the plaintiff's motion papers. The parties' stipulation of settlement, set forth on the record in open court on October 7, 2004, stated that the parties had been made aware of the Child Support Standards Act and stated the amount of basic child support pursuant to the CSSA was $861 per month, which was less than the $900 per month awarded. However, the stipulation did not recite that the parties were aware that

the application of the CSSA guidelines would result in the calculation of the presumptively correct amount of support and the parties' reasons for their departure from the guidelines. Domestic Relations Law s 240(1-b)(h) requires these specific recitals, which were not in the parties' stipulation. The recitals in the findings of fact and conclusions of law and the judgment of divorce cannot rectify these defects since those documents were prepared and submitted by the attorney for the defendant

approximately 11 months after the stipulation was entered into. Accordingly, the provision of the stipulation of settlement which awarded basic child support in the sum of $900 per month was not enforceable and was vacated. Similarly, the provision of the parties' stipulation which provided that "[t]he parties will split all future unreimbursed medical expenses for the children" was set aside on the ground that that obligation is "directly connected with the basic child support calculation" (Cimons v. Cimons, 53 AD3d 125). However, it did not appear from the record that the basic child support provision was intertwined with other provisions of the stipulation, which included custody and visitation, equitable distribution of property, and a waiver of maintenance based upon equitable distribution of property. Accordingly, only the provisions awarding the defendant basic child support in the sum of $900 per month, and the provision which stated that "[t]he parties will split all future unreimbursed medical expenses for the children," was set aside.

November 17, 2008

DRL 240 (1-b) Applies Only to Basic Child Support, Which Does Not Include College Expenses

In Colucci v Colucci, --- N.Y.S.2d ----, 2008 WL 4170019 (N.Y.A.D. 2 Dept.) the plaintiff mother and the defendant father, who had two children were divorced in 1997. In their stipulation of settlement, which was incorporated but not merged into the judgment of divorce they agreed to be bound by, and for the stipulation to comply with, the provisions of the Child Support Standards Act (Domestic Relations Law 240[1-b]; Family Ct Act 413[1][b] ). The stipulation provided, under the section entitled "CHILD SUPPORT," that the father must pay the mother a set amount per month in basic child support, which amount was determined in accordance with the CSSA. The stipulation of settlement further provided, in the child support section, that the parties are to share on a pro rata basis any child care expenses incurred by the mother that are necessary for her work or for school leading to work, as well as the costs associated with the children's extracurricular activities. The stipulation of settlement also provided, in the child support section, that the parties are to exchange their federal income tax returns annually in order to make any necessary adjustments to the father's basic child support obligation and to the parties' pro rata basis underlying the amount of child support that would be due under the CSSA. Under a separate section of the stipulation of settlement entitled "COLLEGE EXPENSES," the father agreed to be solely responsible for the children's college education expenses. In June 2007, 10 years after the stipulation was executed and 2 months before the older child was to start college, the father moved, inter alia, for a downward modification of his obligation to pay for the children's college education expenses. Claiming that his income had decreased and the mother's had increased since the divorce, the father asked the Supreme Court to "reallocate" the parties' respective obligations with respect to the children's college education expenses, based on the parties' current incomes, so that he would pay 62% of the expenses, and the mother would pay the remainder. In opposition, the mother contended that, in accordance with the stipulation of settlement, the parties agreed that the father would pay 100% of the children's college education expenses regardless of any change in the parties' income. Concluding that there was a "change in circumstances," and purporting to take into account the best interests of the children, the Supreme Court granted that branch of the father's motion which was for a downward modification of his obligation to pay the children's college education expenses, to the extent of directing the father to pay 75% of those expenses. The Appellate Division reversed. It held that the terms of a separation agreement "incorporated but not merged into a judgment of divorce operate as contractual obligations binding on the parties" (Matter of Gravlin v. Ruppert, 98 N.Y.2d 1, 5). Further, a matrimonial settlement is a contract subject to principles of contract interpretation .and a court should interpret the contract in accordance with its plain and ordinary meaning. Where a matrimonial settlement "is clear and unambiguous on its face, the parties' intent must be construed from the four corners of the agreement, and not from extrinsic evidence. Here, the parties' stipulation of settlement expressly obligated the father to pay 100% of the children's college education expenses, in addition to, and separate and apart from, his obligation to pay child support. Notably, the provision in the stipulation requiring the father to pay 100% of the children's college education expenses is set forth in a section of the stipulation separate from the section containing his obligation to pay child support, and the two sections do not reference each other in any manner. Significantly, only the section pertaining to child support contains provisions regarding reallocation of the parties' respective obligations should there be any change in the income of either one. Under the circumstances, it was apparent that the parties agreed that college education expenses would not constitute a component of their obligation to pay basic child support. It was also apparent from the stipulation of settlement that the parties intended that the father's obligation to pay 100% of the children's college education expenses was not subject to modification based on any change in the parties' respective incomes. While Domestic Relations Law s 240(1- b)(h) requires stipulations and agreements to contain a provision that the parties were advised of the CSSA and knowingly "opted-out" of its provisions that provision specifically applies only to "[b]asic child support," which generally does not include college education expenses. Under such circumstances, there was no basis for the court to interfere with the parties' contractual agreement requiring the father to pay 100% of the children's college expenses.

Ability to Become Self-supporting with Respect to Some Standard of Living Does Not Obviate Need to Consider Predivorce Standard of Living. Voluntary Payment of Tuition May Not Be Recouped or Credited Against Pendente Lite Child Support

In Ruanne v Ruanne, --- N.Y.S.2d ----, 2008 WL 4491472 (N.Y.A.D. 2 Dept.) the parties were married in 1986 and had three children. In May 2003 the plaintiff commenced the action for divorce. The Appellate Division held that in determining the appropriate amount and duration of maintenance, the court is required to consider, among other factors, the standard of living of the parties during the marriage and the present and future earning capacity of both parties. While the Supreme Court properly found that the defendant was capable of returning to work and re-establishing her business, the wife's ability to become self-supporting with respect to some standard of living in no way obviates the need for the court to consider the predivorce standard of living. The maintenance award of $6,000 per month for eight years would permit the defendant to maintain a semblance of the predivorce standard of living while allowing her a reasonably sufficient time to become self-supporting. The Supreme Court properly denied those branches of the plaintiff's motion, made in April 2004 and referred to trial, which were, in effect, for a downward modification of his pendente lite support obligation and for a credit against support arrears for tuition payments made to the school of the two youngest children. Modifications of pendente lite awards should be sparingly made and then only under exigent circumstances such as where a party is unable to meet his or her own needs, or the interests of justice otherwise require relief. While the papers submitted on the motion demonstrated that the plaintiff's salary declined in 2003, the evidence adduced at trial established that he also accumulated over $100,000 in capital gains during that year. Accordingly, the plaintiff had the resources available to sufficiently provide for his family as established in the pendente lite award. Further, the pendente lite order did not address the issue of tuition payments for the children's school. Accordingly, the plaintiff's voluntary payment of tuition may not be recouped or credited against amounts owing under the order (Horne v. Horne, 22 N.Y.2d 219) In distributing the marital assets, the Supreme Court providently exercised its discretion in characterizing a life insurance policy and margin account as active assets and valued them as of the date of commencement of the action. The plaintiff depleted those assets during the pendency of the action, the majority going toward the purchase and furnishing of his new home and the installation of a new driveway and basketball court. Their decrease in value was thus due to the plaintiff's decisions and not mere market fluctuations.

Defendant Wife Awarded $25,000 Counsel Fee Where Complaint Dismissed

In Ciociano v Ciociano, 863 N.Y.S.2d 766 (2 Dept 2008) a matrimonial action in which the complaint was dismissed the Appellate Division reversed an order which denied the wife’s motion for an award of an attorney's fee and awarded her an attorney's fee of $25,000. It held that in a matrimonial action, an award of an attorney's fee should be based, inter alia, on the relative financial circumstances of the parties and the relative merit of their positions. It was undisputed that the defendant wife earned approximately $27,000 per year, while the plaintiff husband earned more than $100,000 per year. In light of the great disparity in income between the parties, the lack of merit to the husband's action, and the husband's failure to substantiate his allegations that the wife engaged in tactics to prolong the litigation, it held that the wife should have been awarded an attorney's fee in the sum of $25,000.

Absent Express Finding of Willfulness Prejudgment Interest Improperly Imposed. When Findings of Support Magistrate Are Insufficient Family Court May Consider Affidavits and Other Submissions Without Holding a Hearing

In Matter of Regan v Zalucky, --- N.Y.S.2d ----, 2008 WL 4809541 (N.Y.A.D. 3 Dept.), the Family Court fixed the father's liability for arrears of child support and awarded interest at 9% per annum on each of his obligations. The Appellate Division reversed and remitted for further proceedings. It pointed out that once a money judgment has been ordered and entered, interest accrues until the judgment has been paid ( Family Ct Act § 454[1]; §460[1]; CPLR 5003). Prejudgment interest can be ordered only after a finding of a willful disregard of a lawful court support order (Family Ct Act § 460 [1]; Matter of Kaltwasser v. Kearns, 235 A.D.2d 738, 740 [1997] ). Despite the statutory mandate directing that a money judgment shall be ordered when any amount of child support arrears are established ( Family Ct Act § 454[2][a]) it appeared that no money judgment had been ordered or entered. It did not appear that Family Court made any express finding of willfulness before imposing prejudgment interest. Absent such a determination, prejudgment interest was improperly imposed. In a footnote the Appelate Division rejected the father's contention that Family Ct Act § 439(e) precludes Family Court, when it has concluded that the findings of the Support Magistrate are insufficient to render a final determination, from considering evidence in the form of affidavits and other submissions without holding a hearing. Where the court is endeavoring to fix amounts due on liability already established, and submissions are made on notice and with opportunity to respond, it found nothing to preclude Family Court, where possible, from rendering a final order based upon submissions.

November 3, 2008

Court of Appeals Holds Rule 202.48 Does Not Apply to Order Granted as Result of Unnecessary Motion Which Results in Order Granting Same Relief Previously Granted.

In Farkas v Farkas, — NY3d —, 10/24/2008 N.Y.L.J. 27, (col. 3) the parties July 17, 1996 judgment of divorce included a decretal paragraph which gave the husband two options with regard to the payment of sums due to Chemical Bank, and provided that “In the event that [the husband] fails to comply with either option within 30 days from the date hereof, [the wife] shall be entitled to enter a money judgment against [the husband] for the total amount due and owing to Chemical Bank without further order .” An amended judgment of divorce entered on April 14, 1999 repeated this provision. In June 2000, the wife sought an 'Order...[p]ursuant to the Order [sic] of this Court dated July 17, 1996, entering a Final Judgment against [the husband] for the sum of $984,401.17. In a 2000 decision and order, Supreme Court granted the wife's application and restated, in its entirety, the relevant decretal paragraph from the 1999 amended judgment. In addition the order provided as follows: 'ORDERED that [the wife's] application...for a money judgment... is granted and [the wife] may settle the judgment thereon. Upon [the wife's] suggestion, such judgment shall contain language staying execution thereon pending determination or other disposition of the Chemical Bank foreclosure action' . In May 2005, the wife served the husband with a notice of settlement and proposed judgment regarding the monies owed Chemical Bank. The proposed judgment stated that the wife and Chemical Bank had settled the foreclosure action for $750,000 in August 2003; the proposed judgment against the husband was in the principal amount of $750,000. The husband opposed entry, citing 22 NYCRR 202.48. Subdivision (a) states that 'Proposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted.' Subdivision (b) specifies that failure to submit the order or judgment as directed within the 60-day time frame constitutes an abandonment of the motion or action except upon 'good cause . The Supreme Court signed the judgment. The Appellate Division reversed the judgment on the law, vacated it, and dismissed the underlying claim as abandoned pursuant to Rule 202.48 because the wife failed to provide any explanation for her untimely submission of the proposed judgment other than 'law office failure' (Farkas v. Farkas, 40 AD3d 207, 207, 211 [2007]). The Court of Appeals reversed in an opinion by Judge Read, which found that even though the wife was entitled to enter a judgment against the husband for the Chemical Bank monies, without a limitations period, under the terms of the 1999 amended judgment the wife's attorney unnecessarily moved for an order allowing the wife to enter a judgment against the husband for the Chemical Bank monies. The Court held that Rule 202.48 cannot deprive a party of a judgment where it has been improperly or unnecessarily invoked in the first place. The Court held that the 1996 judgment and the 1999 amended judgment were not subject to Rule 202.48's 60-day requirement. These judgments carried out the 1996 decision, which directed the parties to ‘settle judgment.' The decretal paragraph specifically addressing the Chemical Bank monies provided that the wife was 'entitled to enter a money judgment against the husband for the total amount due and owing to Chemical Bank without further order'. The Court held that this paragraph set out a 'simple judgment for a sum of money which speaks for itself,' and therefore fell outside the ambit of Rule 202.48 (citing Funk v. Barry, 89 NY2d 364, 367 [1996]). Judge Read pointed out that the Court emphasized in Funk, that the 'settle' or 'submit' trigger for the 60-day limitation of Rule 202.48(a) 'does not purport to govern the flow of the entry process, which is a ministerial recording function that is separate and distinct from the procedure of obtaining the court's signature on a proposed judgment'. (See www.brandeslaw.com for expanded discussion)

Court of Appeals Rejects Interpretation of Term "Cohabitation" in Parties Separation Agreement as Having Meaning which Contemplates "Changed Economic Circumstances"

In Graev v Graev, —NY3d—, --- N.E.2d ----, 2008 WL 4620698 (N.Y.) the Court of Appeals rejected an interpretation of the term "Cohabitation" in the parties separation agreement as having a meaning which contemplates "changed economic circumstances", or, is necessarily determined by whether a "couple shares household expenses or functions as a single economic unit". It held that no plain meaning could be ascribed to the term in the parties agreement, which provided for the termination of maintenance upon the occurrence of any of four "termination events"; namely, the wife's remarriage or death, the husband's death, or "[t]he cohabitation of the Wife with an unrelated adult for a period of sixty (60) substantially consecutive days." The agreement did not define "cohabitation. The Court referred the matter back to the trial court to determine the meaning of the term after a hearing. Rather than articulating a "clear rule of law", which was hardly fair to those who may have used the word "cohabitation" in an extant separation agreement, intending the meaning ascribed to it by those Appellate Division cases requiring financial interdependence, it stated, in a footnote that the wisest rule is for parties in the future to make their intention clear by more careful drafting. (See www.brandeslaw.com for expanded discussion)

First Department, in Case of First Impression, Holds that Value of Stock Owned By Husband Should Be Reduced By Embedded Taxes. Wife Awarded $27 million in Assets.

In Wechsler v Wechsler, --- N.Y.S.2d ----, 2008 WL 4635832 (N.Y.A.D. 1 Dept.) all the shares of a holding company, Wechsler & Co., Inc. (WCI), a Subchapter C corporation, were owned by the husband. The issue was the extent to which the value of the company should be reduced to reflect the federal and state taxes embedded in the securities it owned, which constituted virtually all of its assets, due to the unrealized appreciation of those securities. WCI had ceased trading securities for the accounts of customers and bought and sold securities solely for its own account. All of the experts agreed that WCI should be valued on a net asset basis by determining what a willing buyer would pay a willing seller, with neither being under a compulsion to buy or sell, and with both having reasonable knowledge of the relevant facts. The Appellate Division, in an opinion by Justice James M. McGuire, modified the judgment. He noted that Supreme Court adopted a "baseline" value of $70,848,107 on the date the action was commenced. That baseline value was determined by the neutral expert before any deduction for embedded taxes and then made adjustments to it that differed in various ways from the adjustments made by the neutral expert. The most significant adjustment was on the issue of the extent of the reduction for embedded taxes. Supreme Court rejected the approach of the Fifth Circuit in Matter of Dunn v Commissioner of Internal Revenue (301 F3d 339 [5th Cir2002] ), the approach embraced by the neutral expert. Pursuant to that approach, consistent with the assumption inherent in the net asset valuation methodology, an actual sale of the corporation's assets is assumed to occur on the valuation date. The value of the corporation is reduced on a dollar-for-dollar basis by the full amount of the tax liability that would arise from the sale of the assets by the hypothetical buyer on the valuation date. Both the neutral expert and the husband's expert testified, and the wife's expert did not dispute, that if the securities were sold as of the date of commencement, the effective tax rate would be 41.74% of the baseline value of $70,848,107. Under the valuation methodology adopted in Dunn, the date-of-commencement value of WCI would be reduced by $29,572,000 (41.74% of $70,848,107). Instead, Supreme Court accepted the approach of the wife's expert and reduced the baseline value of WCI by 11% of $70,848,107 ($7,793,292). That percentage approximated what Supreme Court and the wife's expert denominated the "historical" rate of the annual taxes paid by WCI, a rate determined by comparing the average annual taxes paid by WCI to its average annual gross revenue, i.e., its revenue before all applicable deductions for its various costs of doing business (including the salaries of its employees). The Supreme Court adopted a baseline value of the assets as of the commencement date and reduced that value by an "historical" tax rate of the corporation. The Appellate Division rejected this approach because, among other things, it did not accord with common sense, conflicted with the reasoned testimony of both the neutral expert and the husband's expert and was without precedential support. It held that Supreme Court overvalued WCI by $21,778,708 (the difference between the $7,793,292 reduction in value based on the "historical" tax rate methodology and the $29,572,000 reduction that would result under the methodology adopted in Dunn ). Supreme Court awarded the wife over $27 million in assets, reflecting approximately 88% of the other marital assets. It awarded conditional, durational maintenance to the wife of $46,666 a month and directed the husband to pay various expenses, including the mortgage and taxes relating to the home awarded to the wife, until the wife received the specific assets awarded to her and the first payment on account of the distributive award. Relying on the decisions in Gad v. Gad (283 A.D.2d 200 [2001] ) and Pickard v. Pickard (33 AD3d 2002 [2006], appeal dismissed 7 NY3d 897 [2006] ), the husband argued that because Supreme Court did not make a permanent maintenance award he was entitled to a credit against the distributive award in the amount of all the temporary maintenance payments he made. The husband contended that he paid a total of $3,000,987 in temporary maintenance. The Appellate Division held that the husband's reliance on Gad and Pickering was misplaced and that he was not entitled to any credit for the temporary maintenance payments he made, regardless of the amount of those payments, because was there was no finding that pendente lite award was excessive. The mere determination by Supreme Court not to award permanent maintenance cannot be equated with a finding that the pendente lite maintenance award was excessive. Supreme Court did not make such a finding either expressly or implicitly. The determination not to award permanent maintenance was based in part on the ground that permanent maintenance was unnecessary given the wife's vastly different economic circumstances as a result of the equal distribution of the marital property. In addition, Supreme Court also based this determination on the consequences of the distribution of the overwhelming preponderance of the liquid marital assets to the wife. (See www.brandeslaw.com for expanded discussion)

October 16, 2008

Strong Pubic Policy Against Recoupment of Pendente Lite and Permanent Maintenance Paid Pursuant Order or Judgment Set Aside on Appeal

In Rader v Rader, --- N.Y.S.2d ----, 2008 WL 4354008 (N.Y.A.D. 2 Dept.) in January 2006 the plaintiff stopped paying the defendant maintenance, contending that the parties' judgment of divorce entered September 18, 1998, required him to pay maintenance only for a period of 10 years, retroactive to the commencement of the divorce action in January 1996. The defendant claimed that she was entitled to maintenance until July 2007--10 years after the date of the decision awarding her maintenance. She thus moved for leave to enter a money judgment for maintenance allegedly accruing after the plaintiff ceased paying maintenance in January 2006. In an order dated July 7, 2006, the Supreme Court granted the defendant's motion, directed the plaintiff to pay the defendant maintenance for a period of 10 years, retroactive to July 1997, when the decision awarding her maintenance was made, and granted the defendant leave to enter a money judgment for maintenance arrears, plus the sum of $1,500 as an attorney's fee. A money judgment was subsequently entered on July 26, 2006. The plaintiff filed a notice of appeal from both the order dated July 7, 2006, and the money judgment, and obtained a statutory stay of enforcement of the money judgment pending appeal by posting an undertaking for the amount of the judgment. Thereafter, the defendant moved to hold the plaintiff in contempt for failing to make maintenance payments that became due, subsequent to entry of the money judgment, as a consequence of the order dated July 7, 2006. In an order dated November 30, 2006, the plaintiff was held in contempt and the defendant was awarded the sum of $2,000 as an attorney's fee. Although the plaintiff filed a notice of appeal from that order, he did not seek a stay of its enforcement. Pursuant to the terms of the order dated November 30, 2006, the plaintiff paid the sum of $54,000 in maintenance for the period from July 2006 until April 2007, plus the sum of $2,000 as an attorney's fee, for a total sum of $56,000. In a decision and order dated April 17, 2007, the Appellate Division reversed the money judgment, and accordingly modified the order dated July 7, 2006, upon finding that the plaintiff's obligation to pay maintenance terminated on January 9, 2006, or 10 years after the divorce action was commenced (see Rader v. Rader, 39 A.D.3d 734, 835 N.Y.S.2d 289). In a decision and order on motion dated August 13, 2007, the Court dismissed the plaintiff's appeal from the order dated November 30, 2006, for lack of prosecution. By notice of motion dated June 20, 2007, the plaintiff moved for reimbursement of the sums of $54,000 in maintenance and $2,000 in attorneys' fees he paid pursuant to the order dated November 30, 2006. In opposition, the defendant noted, inter alia, that the plaintiff never perfected his appeal from the order dated November 30, 2006, and that she already spent the disputed $56,000 on her living expenses and attorneys' fees. The Supreme Court, in an order entered September 20, 2007, denied the plaintiff's motion. The Appellate Division affirmed. It held that there is a strong pubic policy against recoupment of both pendente lite and permanent maintenance paid pursuant to a court order or judgment which is subsequently set aside on appeal. The reason for this policy is that maintenance and child support payments are "deemed to have been devoted to that purpose, and no funds exist from which one may recoup moneys so expended" if the award is thereafter reversed or modified (Coleman v. Coleman, 61 A.D.2d at 757, 402 N.Y.S.2d 6). Although there are exceptions to this general rule (see Arcabascio v. Arcabascio, 48 A.D.3d 606, 852 N.Y.S.2d 352; Vigliotti v. Vigliotti, 260 A.D.2d 470, 688 N.Y.S.2d 198; Samu v. Samu, 257 A.D.2d 656, 684 N.Y.S.2d 295; Stimmel v. Stimmel, 163 A.D.2d 381, 558 N.Y.S.2d 112; Jacobs v. Patterson, 143 A.D.2d 397, 398, 532 N.Y.S.2d 429), such exceptions were not applicable. The Court noted that if there are unpaid arrears of other obligations, such as carrying charges for the marital residence, the payor spouse may be granted a credit against those arrears for maintenance paid pursuant to an order which was reversed on appeal (see Samu v. Samu, 257 A.D.2d 656, 684 N.Y.S.2d 295). The appeal from the order dated November 30, 2006, was dismissed for lack of prosecution, and the court declined to exercise it’s discretion to consider any issue which could have been raised on appeal therefrom.

Facts That Mother Earned Substantial Income, Parties Never Married, and Father Had Additional Support Obligations Required Court to Reduce Combined Parental Income

In Matter of Gartmond v Conway, --- N.Y.S.2d ----, 2008 WL 4355410 (N.Y.A.D. 2 Dept.) the father appealed from an order of the Family Court which granted his objections to so much of an order of the same court as, after a hearing, directed him to pay $2,373 in monthly child support, only to the extent of remitting the matter to the Support Magistrate, in effect, to articulate the

manner in which the Support Magistrate calculated the amount of child support, and otherwise denied his objections. The Appellate Division found that on review of the father's objections to the Support Magistrate's order the Family Court remitted the matter to the Support Magistrate, in effect, to articulate the manner in which the Support Magistrate calculated that sum. At the same time, the Family Court indicated that, on the merits, the father's objections to $2,373 in child support, as fixed by the Support Magistrate, did "not appear to be something that would change the amount of his obligation" once the Support Magistrate articulated her reasons for setting that amount. The Appellate Division agreed that the Support Magistrate should have articulated the manner in which she calculated the amount of the father's child support obligation, and should have explained the application of the "precisely articulated, three-step method for determining child support" pursuant to the Child Support Standards Act (Matter of Cassano v. Cassano, 85 N.Y.2d 649, 652). However, in light of the fact that the record had been sufficiently developed, it deemed it appropriate in the interest of efficiency and judicial economy to avert a remittal to the Support Magistrate, and granted leave to appeal from that part of the Family Court's order which remitted the matter to the Support Magistrate (see Family Ct Act s 1112[a]; Matter of Schmitt v. Berwitz, 228 A.D.2d 604), and conducted its our own review of the record. The court recalculated child support. Using the parties' respective gross incomes for the year 2006, as the Support Magistrate it found that the mother earned $182,390 and the father earned $176,333. After making the appropriate deductions for FICA taxes paid by the parties the combined parental income was $341,881. Noting that the Support Magistrate applied the child support percentage to the entire combined parental income in excess of $80,000. While it was a provident exercise of discretion to apply the child support percentage to some of the combined parental income in excess of $80,000, it concluded that under the circumstances presented, which included, inter alia, the facts that the mother earned substantial income, the parties never were married, and the father had additional support obligations, including support obligations for a daughter from a prior marriage, $145,000 represented a more appropriate total combined parental income upon which to apply the child support percentage. Using that total, the father's child support obligation was $1,006 per month, and it modified the order entered September 10, 2007, to sustain the father's objections to that extent. It concluded that, under the circumstances, the father should pay the mother 49% of the expenses for child care, including but not limited to nursery

school, day camp, and home child care.

Post Commencement Severance Payments Husbands Separate Property

In Bink v Bink, --- N.Y.S.2d ----, 2008 WL 4447614 (N.Y.A.D. 4 Dept.) the Appellate Division held that held that Supreme Court erred in determining that the husbands severance payments were marital property. Inasmuch as defendant's right to receive those payments did not exist either during the marriage or prior to the commencement of this action, nor did the severance payments constitute compensation for past services, the severance payments were defendant's separate property.

Absent Evidence That Valuation Was Unreasonable or Other Credible Evidence Showing a Different Value, it Should Not Be Disturbed.

In Reed v Reed, --- N.Y.S.2d ----, 2008 WL 4447646 (N.Y.A.D. 4 Dept.) the parties were married in 1987 and had three minor children. The Appellate Division held that Supreme Court properly concluded that the trust created by defendant in 1986 prior to the parties' marriage (Quercus Trust) constituted marital property. Defendant "failed to trace the source of the funds in the Quercus Trust with sufficient particularity to rebut the presumption that they were marital property" and, plaintiff established that the entirety of the Quercus Trust was transmuted into marital property as a result of commingling. Nevertheless, the court erred in determining in the alternative that plaintiff was entitled to a portion of the Quercus Trust based on her contributions to its appreciation inasmuch as the alleged contributions of plaintiff to the appreciation of that trust consisted solely of her presence at annual meetings concerning investments. It also held that the court properly determined the value of defendant's business interest in the company in which defendant was a 50% owner. Absent some evidence that the valuation was unreasonable or other credible evidence showing a different value, it should not be disturbed. (Harmon v. Harmon, 173 A.D.2d 98, 107). Supreme Court erred in awarding plaintiff lifetime maintenance, in light of plaintiff's age and work experience. Based on the statutory factors, including plaintiff's education and employment history, as well as the various distributive awards the Appellate Division concluded that plaintiff was capable of future self-support, and thus was entitled only to durational maintenance for 13 years from the date of the amended judgment. It agreed with defendant that the court erred in failing to provide for a reduction in the amount of his life insurance policy as his child support and maintenance obligations decreased and remitted the matter to Supreme Court to determine the amount of life insurance defendant must maintain to secure his child support and maintenance obligations.

October 1, 2008

DRL 240 (1-b) Applies Only to Basic Child Support, Which Does Not Include College Expenses

In Colucci v Colucci, --- N.Y.S.2d ----, 2008 WL 4170019 (N.Y.A.D. 2 Dept.) the plaintiff mother and the defendant father, who had two children were divorced in 1997. In their stipulation of settlement, which was incorporated but not merged into the judgment of divorce they agreed to be bound by, and for the stipulation to comply with, the provisions of the Child Support Standards Act. The stipulation provided, under the section entitled "CHILD SUPPORT," that the father must pay the mother a set amount per month in basic child support, which amount was determined in accordance with the CSSA. It further provided, in the child support section, that the parties are to share on a pro rata basis any child care expenses incurred by the mother that are necessary for her work or for school leading to work, as well as the costs associated with the children's extracurricular activities. It also provided, in the child support section, that the parties are to exchange their federal income tax returns annually in order to make any necessary adjustments to the father's basic child support obligation and to the parties' pro rata basis underlying the amount of child support that would be due under the CSSA. Under a separate section entitled "COLLEGE EXPENSES," the father agreed to be solely responsible for the children's college education expenses. In June 2007, 10 years after the stipulation was executed and 2 months before the older child was to start college, the father moved, inter alia, for a downward modification of his obligation to pay for the children's college education expenses. Claiming that his income had decreased and the mother's had increased since the divorce, the father asked the Supreme Court to "reallocate" the parties' respective obligations with respect to the children's college education expenses, based on the parties' current incomes, so that he would pay 62% of the expenses, and the mother would pay the remainder. The mother contended that, in accordance with the stipulation of settlement, the parties agreed that the father would pay 100% of the children's college education expenses regardless of any change in the parties' income. Supreme Court granted the father's motion to the extent of directing the father to pay 75% of college expenses. The Appellate Division reversed. The parties' stipulation of settlement expressly obligated the father to pay 100% of the children's college education expenses, in addition to, and separate and apart from, his obligation to pay child support. Notably, the provision in the stipulation requiring the father to pay 100% of the children's college education expenses was set forth in a section of the stipulation separate from the section containing his obligation to pay child support, and the two sections did not reference each other in any manner. Only the section pertaining to child support contained provisions regarding reallocation of the parties' respective obligations should there be any change in the income of either one. Under the circumstances, it was apparent that the parties agreed that college education expenses would not constitute a component of their obligation to pay basic child support. It was also apparent from the stipulation of settlement that the parties intended that the father's obligation to pay 100% of the children's college education expenses was not subject to modification based on any change in the parties' respective incomes. While Domestic Relations Law 240(1- b)(h) requires stipulations and agreements to contain a provision that the parties were advised of the CSSA and knowingly "opted-out" of its provisions that provision specifically applies only to "[b]asic child support," which generally does not include college education expenses. Under such circumstances, there was no basis for the court to interfere with the parties' contractual agreement requiring the father to pay 100% of the children's college expenses.

No Authority to Order Sale of Separate Property Marital Residence

In Kilkenny v Kilkenny, --- N.Y.S.2d ----, 2008 WL 4260834 (N.Y.A.D. 2 Dept.) Supreme Court awarded maintenance to terminate on September 1, 2007. The Appellate Division extended the duration of the award of maintenance to provide the wife with sufficient time to become self-supporting. Considering the wife's education and age, the number of years she had been out of the work force raising the parties' two minor children, the standard of living of the parties during the marriage, and the present and future earning capacities of both parties, the duration of the award of maintenance was extended to the earlier of February 1, 2012, the death of either party, or the wife's remarriage. The parties' younger child would be 14 years old on that date and no longer in need of child care. The Supreme Court also erred in determining that the $200-per week maintenance payment should commence as of January 1, 2007. The award of maintenance should have been retroactive to May 2, 2005, the date of the commencement of the action. The husband was given an appropriate credit against the retroactive obligation created by this modification (see Grasso v. Grasso, 47 AD3d 762). The Appellate Division found that the amount of the unpaid balance of a loan that the husband obtained in connection with the college education of the second of his two daughters from his prior marriage, in the sum of $32,000, should not have been included in the calculation of marital debt. The Appellate

Division held that the marital residence was the separate property of the wife, and remained her separate property. Since it found that it was the wife's separate property, and not subject to the imposition of a constructive trust, there was no authority to order its sale for the purpose of equitably distributing the proceeds. However, the husband was entitled to an equitable share in the increase in the value of the marital residence during the marriage, where the appreciation in the value of the marital residence was attributable to the joint efforts of the parties. Supreme Court providently exercised its discretion in awarding the parties equal shares in the increase in the value of the marital residence. Supreme Court also determined the husband was entitled to an award of $30,269.50, representing his 50% share of the reduction in the principal of the mortgage obligation referable to the residence, until May 2, 2005, the date of the commencement of the action. Supreme Court also determined that the husband was entitled to 50% of the reduction in the principal remaining on the mortgage debt, in order to account for the mortgage and real property tax payments he made from the commencement of the action on May 2, 2005, until the termination date of the pendente lite order on December 31, 2006. Those payments were not made with marital funds. In light of the further modification made to the award of maintenance, he was also entitled to a credit for all of the mortgage and real property tax payments he made pursuant to the pendente lite order (see Grasso v. Grasso, 47 AD3d 762). However, the credit was limited to the principal portion of the mortgage payments plus the real property tax payments, since the husband's mortgage interest payments was taken into consideration in determining that aspect of the appeal related to arrears for "utility" payments. The husband came into the marriage possessed of certain funds maintained in 401k, Individual Retirement, and Cash Management accounts . The value of those accounts at the commencement of the marriage was $147,139. During the marriage, the husband expended approximately $40,800 from those accounts for the education of one of his daughters from a prior marriage. At the time of the commencement of the action, there was $209,647 in the financial accounts. The husband's separate property interest in the financial accounts was $106,339. There was a significant reduction in the balance of those accounts by the time of trial. It was appropriate to value the accounts as of the time of the commencement of the action The marital portion of the accounts was $103,308. The wife was thus entitled to, and should have been is awarded, a 50% share of that sum, or $51,654.

Children Not Parties To Stipulation of Settlement

In Baranek v Baranek, --- N.Y.S.2d ----, 2008 WL 4260896 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court erred in awarding the defendant summary judgment dismissing the complaint on the ground that the parties' minor children were necessary or indispensable parties who should have been joined in the action. In this plenary action to set aside the stipulation of settlement between the plaintiff and the defendant, the children were not parties to the contract whose rights may be prejudiced by the rescission thereof. It also held that Supreme Court improperly searched the record and awarded the defendant summary judgment dismissing the other causes of action in the complaint, since the viability of those causes of action was not an issue presented in the plaintiff's motion papers. The parties' stipulation of settlement, set forth on the record in open court on October 7, 2004, stated that the parties had been made aware of the Child Support Standards Act and stated the amount of basic child support pursuant to the CSSA was $861 per month, which was less than the $900 per month awarded. However, the stipulation did not recite that the parties were aware that the application of the CSSA guidelines would result in the calculation of the presumptively correct amount of support and the parties' reasons for their departure from the guidelines. Domestic Relations Law s 240(1-b)(h) requires these specific recitals, which were not in the parties' stipulation. The recitals in the findings of fact and conclusions of law and the judgment of divorce cannot rectify these defects since those documents were prepared and submitted by the attorney for the defendant approximately 11 months after the stipulation was entered into. The provision of the stipulation of settlement which awarded basic child support of $900 per month was not enforceable and was vacated. Similarly, the provision of the parties' stipulation which provided that "[t]he parties will split all future unreimbursed medical expenses for the children" was set aside on the ground that that obligation is "directly connected with the basic child support calculation" (Cimons v. Cimons, 53 AD3d 125). However, it did not appear that the basic child support provision was intertwined with other provisions of the stipulation, which included custody and visitation, equitable distribution of property, and a waiver of maintenance based upon equitable distribution of property. Accordingly, only the provisions awarding the defendant basic child support of $900 per month, and the provision which stated that "[t]he parties will split all future unreimbursed medical expenses for the children," was set aside.

Order Directing Counsel Fee Hearing Not Appealable As of Right

In Akerman v Akerman, 53 A.D.3d 633, 862 N.Y.S.2d 383 (2 Dept 2008) the Second Department held that an order which directs a judicial hearing to aid in the disposition of a motion is not appealable as of right because it does not decide the motion, and does not affect a substantial right. Therefore, it dismissed the appeal from the order which directed a counsel fee hearing.

September 15, 2008

Evidence of False Allegations of Physical Abuse Which Interfere with Parental Rights, Is So Inconsistent with the Best Interests of the Child That it Raises, by Itself, a Strong Probability That the Offending Party Is Unfit to Act as a Custodial Parent

In Mohen v Mohen, --- N.Y.S.2d ----, 2008 WL 2609358 (N.Y.A.D. 2 Dept.) the Appellate Division found that Supreme Court's award of custody to the mother lacked a sound and substantial basis and had to be set aside. Supreme Court gave insufficient attention to facts and evidence that were of such significant collective magnitude as to warrant a custody determination in favor of the father. The Supreme Court found, with support in the record, that the mother, on at least one occasion, had filed false charges of physical abuse against the father. The mother made numerous false charges against the father. There were four incidents of physical abuse accusations by the mother against the father, in August 2004, December 2004, January 2005, and December 2005. All of the Family Court petitions, when filed, apparently were withdrawn or dismissed. All of the mother's reports to child protective authorities were investigated and determined to be "unfounded." Moreover, expert medical testimony in the record strongly suggested that, regarding the January 2005 alleged incident, the mother manufactured proof of physical injury to herself. She admitted to the forensic examiner, and confirmed at trial, that the January 2005 incident of alleged physical abuse "might have been an accident." As a result of the January 2005 accusations, a temporary order of protection was issued against the father that prevented contact between the father and the child for approximately one month.

The mother accused the father of having physically abused the child in December 2005 after a visitation exchange, and made a report to Child Protective Services. Records from Maimonides Hospital, where the child was examined the day after the

exchange, found the child to be physically normal. The mother's manipulative conduct demonstrated a purposeful placement of her self-interest above the interests of others. Evidence of false allegations of physical abuse which interfere with parental rights, is so inconsistent with the best interests of the child that it raises, by itself, a strong probability that the offending party is unfit to act as a custodial parent. By contrast, there was no evidence that any calls the father made to the police against the mother were baseless. Supreme Court failed to attribute adequate significance to the determination that the mother had made at least one false claim, though the record evidences more than one such claim, and improperly equated that evidence with markedly less egregious conduct of the father. The trial court erred in finding that the mother, rather than the father, would better foster the child's relationship with the noncustodial parent. While the parenting skills of both the mother and the father are subject to criticism, there was sufficient evidence from which to conclude that the father demonstrated an ability to foster post-divorce parent-child relationships, having done so with regard to his two older children from an earlier marriage. Moreover, a conclusion that the mother would more successfully foster a child/noncustodial parent relationship was insupportable, in light of her false allegations of physical abuse against the father. The child's best interests were fostered by awarding custody to the father. The father worked from a home office and would be more readily available than the mother to meet the child's daily and immediate needs. The judicial preference of keeping siblings together, where possible, in order to encourage close familial relationships, is firmly established. While there was clearly an age difference between the parties' child and his two half-siblings, the numerous benefits the child could derive from the development of a relationship with the older siblings should not have been summarily disregarded. Supreme Court providently exercised its discretion in granting the mother maintenance of $3,500 per month for five years. However, it erred in failing to include a provision that the award of maintenance shall terminate upon the death of either party or the mother's remarriage, whichever shall occur sooner.

Where There Is an Inconsistency Between a Judgment and the Decision Upon Which it Is Based, the Decision Controls, and The Inconsistency May Be Corrected on Appeal.

In Charles v Charles, --- N.Y.S.2d ----, 2008 WL 2609384 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court's award of lifetime maintenance to the wife was an improvident exercise of discretion. In view of the wife's age, the sizable

distributive award she received, and her equal share of the husband's retirement benefits, the award of lifetime maintenance was inappropriate. It found that an award of $12,500 per month in maintenance for a period of 15 years was appropriate under the circumstances. It agreed with the plaintiff's contention that the Supreme Court should have directed the defendant to maintain life insurance in her favor to secure his maintenance obligation and the distribution of the plaintiff's share of the value of the defendant's partnership interest. It noted that the judgment appealed from did not contain a provision directing the husband to pay for the college expenses of the children. In the decision upon which the judgment was based, the Supreme Court stated that "the [husband's] income is more than adequate to pay for [the childrens'] college educations." The Supreme Court also found that the husband should receive a credit against his child support obligation during any period the children attended school away from home. The husband conceded at oral argument that where there is an inconsistency between a judgment and the decision upon which it is based, the decision controls, and such an inconsistency may be corrected on appeal. The Appellate Division, inter alia, modified the judgment by adding provisions directing the defendant to pay the college expenses for each of the parties' children until each child reaches the age of 21, and directing that the defendant shall receive a credit toward his child support obligation during any period the children attend school away from home and by adding a provision directing the defendant to maintain a life insurance policy for the benefit of the plaintiff in an amount not less than $1,500,000 during years 1 through 5 of his maintenance obligation, and during years 6 through 10, in the amount of not less than $750,000, and during years 11 through 15 in an amount not less than $500,000.

An Award of an Attorney's Fee Is Not Authorized in a Proceeding for Grandparent Visitation.

In Gold v Gold, --- N.Y.S.2d ----, 2008 WL 2609350 (N.Y.A.D. 2 Dept.) the appellant Florence Gold (grandmother) filed a petition seeking modification of the visitation provisions of a settlement agreement which allowed her supervised visitation with her grandchildren in Dutchess County. Family Court denied her petition without conducting a hearing. Upon the grandmother's appeal the Appellate Division affirmed that order, holding that the grandmother had failed to make a sufficient evidentiary showing of a material change in circumstances which would entitle her to a hearing (see Matter of Gold v. Gold, 47 AD3d 714). While that appeal was pending, the grandmother filed a motion for leave to renew her petition in the Family Court, contending that her health had deteriorated, making it impossible for her to travel from her home in Bronx County for visitation in Dutchess County. The respondents Gene Gold and Leslie Gold (parents) opposed that motion and cross-moved, inter alia, for an award of an attorney's fee pursuant to 22 NYCRR 130-1.1, on the ground that the grandmother had engaged in "frivolous conduct" in pursuing litigation meant to harass or maliciously injure them. Family Court denied the grandmother's motion for leave to renew, finding that she had failed to submit new evidence of a deterioration in her health, and granted the cross motion for the award of an attorney's fee of $2,430.34. The Appellate Division reversed. It held that a motion for leave to renew is addressed to the sound discretion of the motion court, and the requirement that a motion for renewal be based upon newly-discovered facts is a flexible one. A court, in its discretion, may thus, in certain situations, grant renewal upon facts known to the moving party at the time of the original motion. Under the circumstances of this case, the Family Court should have exercised its discretion and granted the grandmother's motion for leave to renew. The 93- year-old grandmother averred that she was physically unable to travel to Dutchess County due to a deterioration in her health. She submitted medical test results and unsworn letters from her doctor, stating that the amount of travel required for visitation was not recommended due to her ailments, which included a severe form of arthritis and numerous past orthopedic surgeries. In her reply papers, the grandmother averred that, on June 22, 2007, she fell, fractured her pelvis and reinjured the ligaments in her knee. She submitted another letter from her doctor stating that travel was not recommended. Because the fall occurred after the grandmother filed her initial motion papers, her inclusion of this additional evidence in her reply papers did not preclude its consideration by the court. To establish entitlement to an evidentiary hearing on her petition for modification of the visitation provisions of the settlement agreement, the grandmother was required to make an evidentiary showing of a material change in circumstances sufficient to warrant a hearing. Taken together, the grandmother's submissions met this standard, and her motion to renew should have been granted to the extent of remitting the matter for an evidentiary hearing on her petition solely to determine whether a material change in circumstances warrants modification of the visitation provisions of the settlement agreement so as to provide for supervised visitation with the grandmother at an agency facility in Bronx County. Upon

remittal for hearing, the standard to be applied in determining whether a change in location of the visitation is warranted remains the best interests of the children. In light of this determination and the history of the proceedings between the

parties, the Family Court improvidently exercised its discretion in awarding an attorney's fee to the parents. An award of an attorney's fee is not authorized in a proceeding for grandparent visitation. Here, although the visitation agreement was included within an order of protection on consent, the grandmother sought modification of the terms of visitation only. Contrary to the parents' contention, the grandmother's conduct was not "frivolous," as that term is defined in 22 NYCRR 130-1.1.

September 1, 2008

Contribution of Separate Property in Order to Reduce Mortgage on Marital Residence and to Pay off Second Mortgage Retains its Separate Character and Thus Is Not Subject to Equitable Distribution

In Mirand v Mirand, --- N.Y.S.2d ----, 2008 WL 2714085 (N.Y.A.D. 4 Dept.) The Appellate Division held that Supreme Court properly confirmed that part of the Referee's report "recommending" that plaintiff shall have a credit in the sum of $54,770.58, representing his contribution of separate property in order to reduce the mortgage on the marital residence and to pay off a second mortgage in its entirety on the marital residence. That contribution retains its separate character and thus is not subject to equitable distribution. However the court erred in confirming that part of the Referee's report "recommending" a credit to plaintiff in the amount of $220, based on his payment for an appraisal of the marital residence. That amount was merely payment for a service, rather than a contribution to the value of the marital residence that plaintiff was entitled to recover. The court erred in confirming that part of the Referee's report "recommending" that plaintiff be awarded possession of the parties' 2004 Buick as his separate property. That asset was purchased during the marriage and, although plaintiff contributed the majority of its purchase price, defendant transferred title to another vehicle to plaintiff and paid him an

additional $2,000. It concluded that the Buick constituted marital property subject to equitable distribution. The value of the Buick was $20,425 at the time of trial, and that amount was distributed equally between them. Inasmuch as possession of the vehicle was awarded to plaintiff, it reduced the amount of his credit by $8,212.50, i.e., one half of the value of the Buick less the $2,000 that the Referee properly determined was contributed by defendant as a down payment for the Buick.

A Credit Against Child Support for College Expenses Is Not Mandatory but Depends upon the Facts and Circumstances in the Particular Case, Taking into Account the Needs of the Custodial Parent to Maintain a Household and Provide Certain Necessaries

In Pistilli v Pistilli, --- N.Y.S.2d ----, 2008 WL 2713989 (N.Y.A.D. 4 Dept.) following the entry of a judgment that, inter alia, granted plaintiff a divorce, plaintiff moved to modify the judgment by "[d]istributing the actual and anticipated college education costs associated with the parties' children," specifically the parties' daughter, between the parties. Defendant cross-moved for an order directing that he pay 60% of the college education expenses of the parties' daughter and reducing his child support obligation accordingly. Defendant appealed from an order requiring him to pay 80% of the daughter's college expenses based on Supreme Court's determination that defendant "shall contribute to college costs 'in accordance with his percentage' " of the parties' combined parental income and denying his cross motion seeking a reduction in his child support obligation. Pursuant to an oral stipulation of the parties that was incorporated but not merged into the judgment of divorce, the parties "agreed to contribute to [their children's college expenses] as they are then financially able." The Appellate Division held that the court erred in failing to consider defendant's maintenance obligation in calculating the percentage of defendant's contribution to the daughter's college expenses. After subtracting from defendant's income the amount of taxable maintenance paid to plaintiff as indicated on the parties' respective 2005 tax returns, which were used by the court in determining the parties' respective incomes, it concluded that defendant's percentage of the combined parental income was 64% rather than 80%, and thus defendant's pro rata share of the daughter's college expenses was reduced from 80% to 64%. It rejected defendant’s contention that the court erred in determining that he was entitled to a credit against his child support obligation only in the amount of his pro rata share of the daughter's college meal plan. It held that a credit against child support for college expenses is not mandatory but depends upon the facts and circumstances in the particular case, taking into account the needs of the custodial parent to maintain a household and provide certain necessaries. Because plaintiff had to maintain a household for the daughter during the daughter's school breaks and weekend visits, it could not be said that defendant was entitled to a credit for the daughter's rooming expenses. Nevertheless, inasmuch as we it reduced defendant's pro rata share of the daughter's college expenses from 80% to 64%, defendant's child support credit based on the college meal plan had to reflect that reduction and it modified the order accordingly.

Proper to Grant Cruelty Divorce in Long Marriage Where Continuous Course of Misconduct. Error Not to Award Custodial Parent Exclusive Occupancy of Home.

In Stacey v Stacey, 52 A.D.3d 1219, 860 N.Y.S.2d 350 (4 Dept 2008) the Appellate Division affirmed a judgment that granted defendant wife a divorce on the ground of cruel and inhuman treatment. The Court held that defendant was required to establish that the parties suffered from more than strained, unpleasant relations and incompatibility and, in this marriage of long duration, a higher degree of proof was required to establish cruel and inhuman treatment because what could be viewed as substantial misconduct in a marriage of short duration might be only 'transient discord' in a marriage of many years. It noted however, the statement of the Court of Appeals that, "even in [a long-term] marriage 'substantial misconduct' might consist of one violent episode such as a severe beating" (Brady, 64 N.Y.2d at 345, 486 N.Y.S.2d 891, 476 N.E.2d 290). Defendant testified on direct examination concerning an incident that occurred approximately five months before the commencement of the action, during which plaintiff called defendant vulgar names and repeatedly struck her on the side and back of her head. The incident caused defendant to seek medical treatment, and she obtained an order of protection against plaintiff. Defendant also testified that plaintiff verbally abused her before she left for work concerning her appearance and the clothes that she was wearing. On cross-examination, defendant further testified that, throughout the course of the marriage she was hit or slapped by plaintiff "every time the dishes weren't done or the laundry wasn't done. According to defendant, plaintiff's conduct was continuous and not an " 'isolated act of mistreatment'. Thus, the court properly granted defendant a divorce on the ground of cruel and inhuman treatment. The Appellate Division agreed with plaintiff that the court erred in directing the immediate sale of the marital residence and in failing to award him exclusive use and occupancy of the marital residence until the parties' youngest child attains the age of 18, and modified the judgment accordingly. Plaintiff was awarded custody of the parties' children and thus, under the circumstances of this case, he was entitled to such exclusive use and occupancy. It stated: "Courts now express a preference for allowing a custodial parent to remain in the marital residence until the youngest child becomes 18 unless such parent can obtain comparable housing at a lower cost or is financially incapable of maintaining the marital residence, or either spouse is in immediate need of his or her share of the sale proceeds". Here, there was no evidence in the record that plaintiff, the custodial parent, could have obtained comparable, less expensive housing in the same area or that he was financially incapable of maintaining the residence, nor was there evidence that defendant was in immediate need of her share of the proceeds from the sale of the marital residence.

Maintenance Payments Mother Received from Father That Year Improperly Excluded from Her Income for Purpose of Calculating Her Child Support Obligation in Modification Proceeding

In the Matter of Kruenkamp v. Kruenkamp, --- N.Y.S.2d ----, 2008 WL 3063675 (N.Y.A.D. 2 Dept.) the father, joint custodial parent of the child, filed a petition seeking child support from the mother after the child, who had resided with the mother

since the parties' divorce in 1997, began residing with him in January 2005. The mother's child support obligation was initially set, after a hearing, at $325 per week. Upon the mother's objection to this support order, the Family Court vacated

the order, determining, inter alia, that the Support Magistrate erred in including in the mother's income the maintenance payments made to her by the father, and reported on the mother's most recent tax return. Upon remittitur, the Support

Magistrate rendered a second support order, dated June 1, 2007, this time excluding from the calculation of the mother's income for purposes of awarding child support, the maintenance payments she received, and upon considering the factors set forth in Family Court Act 413(1)(f), set the mother's child support obligation at $100 per week. The Appellate Division held that the Family Court's determination that, for purposes of awarding child support, the Support Magistrate erred in including, as income to the mother, the maintenance payments she received from the father, was incorrect. The Child Support Standards Act requires the court to establish the parties' basic child support obligation as a function of the "gross (total) income" that is, or should have been, reflected on the party's most recently filed income tax return (Family Ct Act 413[1][b][5][i]). Since the total income reported on the mother's most recently filed tax return included the maintenance payments she had received from the father that year, in the amount of $100,000, that sum was improperly excluded from her income for the purpose of calculating her child support obligation. The cases relied upon by the Family Court were inapposite because the maintenance award, in those cases, was made concurrently with the child support award, and thus, the prospective maintenance payments, when viewed at the time of the decision, did not fall within the definition of 'gross (total) income as should have been or should be reported in the most recent federal income tax return. The Appellate Division concluded that in light of the factors set forth in Family Court Act 413(1)(f)(1) through (10), and particularly the ample financial resources of the father, the fact that the gross income of the mother was substantially less than that of the father, and the mother's provision of support for other family members, that it would be inappropriate to apply the statutory percentage to the parents' combined income in excess of $80,000. It thus calculated the mother's child support obligation to be $338 per week.

August 18, 2008

Use of Marital Assets to Pay for "Basic Living Expenses" Did Not Constitute "Wasteful Dissipation

In Damas v Damas, 51 A.D.3d 709, 858 N.Y.S.2d 716 (2 Dept 2008) the Appellate Division affirmed a judgment of divorce which equitably distributed the martial assets, awarded the defendant maintenance of $100 per month for 36 months, and awarded an attorney's fee of $2,500. Given the disparity between the parties' incomes, and the fact that the defendant still needed credits to obtain her nursing degree, the court providently exercised its discretion in awarding her maintenance. The defendant's use of marital assets to pay for "basic living expenses" did not constitute "wasteful dissipation".

Not a Dissipation of Assets for Plaintiff to Decide Not to Try to Make Payments on the Marital Home, or Any Other Home, by Using That Home's Line of Credit to Avoid Foreclosure

In Cooper v Cooper, --- N.Y.S.2d ----, 2008 WL 2521260 (N.Y.A.D. 1 Dept.) the Appellate Division held that the Special Referee properly credited the neutral forensic accountant to the extent he found that the parties lived a lavish lifestyle based on the mortgaging of most of their assets, and that plaintiff had not improperly dissipated marital assets, with one exception. It was uncontested that at the time plaintiff transferred the couple's Guardian Annuity to his father, it had a cash value of $273,000, and there was no evidence of any consideration for this transfer. Therefore, defendant was entitled to half the value of this marital asset. However, it was not a dissipation of assets for plaintiff to decide not to try to make payments on the marital home, or any other home, by using that home's line of credit to avoid foreclosure. These assets were already burdened with debt, and taking on further debt to pay the mortgages would only have put off the inevitable. While the forensic accountant was not able to account for every expenditure, the record supported his conclusion that the parties' expenditures reasonably approximated the consumption of capital assets. Thus, the Special Referee properly concluded that there was no reason to believe plaintiff secreted marital funds or further dissipated marital assets. The Special Referee also properly found that the property at 1200 Broadway in Manhattan was plaintiff's separate property. It is uncontested that this apartment was purchased prior to the marriage. While a mortgage was taken out on the property during the marriage and was repaid with marital assets, there was no evidence that any of the mortgage proceeds were used to enhance the value of the apartment or that defendant contributed to its value in any way. The record supported the conclusion that the proceeds of this mortgage were used to maintain the couple's extravagant lifestyle, and was tantamount to a loan from this separate property to the marriage. It did not convert the property into a marital asset. The Special Referee also properly found that the property at 222 East 80th Street was defendant's separate property. While defendant testified that this property belonged to her parents, her former lawyer testified that defendant had admitted to him the property was, in fact, hers, but kept in her parents' names.

Proper to Impute $ 1 Million Income to Husband Based upon Payment of Personal Expenses from Business Accounts

In Bean v Bean, --- N.Y.S.2d ----, 2008 WL 2609149 (N.Y.A.D. 3 Dept.) the parties were married in 1991 and had one child born in 1992. Plaintiff commenced the action for divorce in December 2004. Throughout the course of the litigation, defendant continually disobeyed court mandates and failed to appear on multiple occasions. As a result, the court granted his counsel's motion to withdraw, struck his answer and counterclaims and found him to be in default pursuant to 22 NYCRR 202.27.

On the eve of trial, defendant made an oral motion to change the valuation date of the parties' corporation, The Bean Agency, from the date of commencement of the action to the date of trial and requested permission to present an expert as to

valuation. Supreme Court denied the motion in its entirety and clarified that, as a result of the prior order finding defendant to be in default, defendant would be permitted to cross-examine plaintiff's witnesses, but would not be allowed to present evidence himself. After trial the court directed an equal distribution of the marital assets, and awarded nondurational maintenance of $25,000 per month and child support of $9,811 per month. On appeal defendant contended that Supreme Court erred in valuating The Bean Agency as of the date of commencement of the action instead of the date of trial.

The Appellate Division noted that as a general matter, courts have tended to value "active" assets-such as a business-as of the date of commencement, while valuating "passive" assets-which may change in value suddenly due to market forces-as of the date of trial. It found that Supreme Court did not abuse its discretion in valuing The Bean Agency as of the date of commencement and properly determined that fixing the valuation date as of the date of trial, especially at such a late stage in the proceedings, would be prejudicial to plaintiff, as her retained expert had already valued the business as of the date of commencement. It noted that, as a result of defendant's unilateral abandonment of the business, consistent with his threats to deprive plaintiff of the value thereof, and of his failure to comply with discovery, a date of trial valuation would have been negligible and, therefore, inequitable to plaintiff. The Appellate Division found a sound and substantial support in the record for the court's determination of defendant's income. It noted that a trial court may impute income based upon past employment experience, future earning capacity, and/or the payment of personal expenses from business accounts. It declined to disturb Supreme Court's determination that defendant's annual income for purposes of calculating spousal maintenance and child support was $1 million based upon, among other things, the parties' joint income tax returns, defendant's loan application, demonstrated earning potential (including consideration of his apparent decision to relinquish a lucrative position with Time, Inc.), personal expenditures and income imputed from payments of his personal expenses by and through The Bean Agency. It stated that a spouses ability to become self-supporting with respect to some standard of living in no way obviates the need for the court to consider the predivorce standard of living; and does not create a per se bar to lifetime maintenance. The fact that a spouse will receive assets by way of equitable distribution will not bar a nondurational maintenance award. The parties were accustomed to an extremely affluent lifestyle in that they had substantial real property holdings, enjoyed a country club membership, employed domestic help, traveled extensively and resided in a multimillion dollar mansion. In 2004, the parties' adjusted gross income for federal income tax purposes was $3,266,348. Following the commencement of this action, defendant unilaterally terminated plaintiff's employment with The Bean Agency and evinced an intent to financially strangle plaintiff and to harm her reputation, thus inhibiting her ability to be self-supporting at a level commensurate with the lavish lifestyle that she enjoyed during the marriage and that defendant had continued to enjoy. Moreover, while there was evidence of plaintiff's educational background and employment experience which would suggest an ability to become self-supporting at some level, there was no proof of the extent of her current earning ability, let alone the possibility that her income could approach the couple's multimillion dollar annual income during the marriage, or the time that would be necessary for her to become reasonably gainfully employed. Supreme Court properly exercised its discretion in awarding plaintiff nondurational maintenance. However, based upon the substantial award of equitable distribution to plaintiff, much of which would be received in cash capable of generating income, the amount of maintenance awarded was excessive. It noted that the expenses claimed by plaintiff included $4,000 per month in educational expenses for plaintiff's two older children and $5,000 per month in legal fees. Even assuming that these expenses are accurate, they would not be on-going. Inasmuch as the parties' child would turn 16 in a few months, he would presumably require less parenting, which should enable plaintiff to devote more of her energies to finding employment. It found that plaintiff was entitled to receive sufficient support to enable her to afford such expenses as a country club membership and gym membership that she and the child enjoyed during the marriage, but which they were forced to forgo doing the pendency of the action. It reduced plaintiff's maintenance award to $20,000 per month until her receipt of her share of the marital assets as set forth in the judgment of divorce and, thereafter, to $15,000 per month until her death or remarriage. Considering the child support award, it found no error in Supreme Court's determination that plaintiff had no income for child support purposes. Of particular relevance was defendant's unilateral termination of plaintiff from

her employment with The Bean Agency, together with the lack of evidence of plaintiff's present earning ability. In determining the amount of child support, Supreme Court properly considered the high standard of living that the child would have enjoyed had the parties remained married, the continued high standard of living afforded the child by defendant during the pendency of the action, the income potential and earning capacity of the parties and the considerable disparity between the parties' incomes. These factors all warranted the consideration of defendant's income over the $80,000 "cap" in determining the amount of child support to be awarded. Nevertheless, there was insufficient support in the record to justify application of the statutory child support percentage of 17% to the entire parental income over $80,000. Aside from general living expenses, there was limited evidence of the child's specific "needs," such as expenses related to his sporting activities, hobbies and education. It found that the application of the statutory child support percentage should be limited to the first $500,000 of parental income and, that the child support award should be reduced to $7,083.33 per month. Plaintiff conceded that Supreme Court erred in failing to direct that the life insurance policy to be maintained by defendant be a declining term policy and the judgment was modified accordingly.

Proper to Award Nondurational Maintenance Where it Was Not Likely That Wife Would Become Self-supporting

In Marino v Marino, 52 A.D.3d 585, 860 N.Y.S.2d 170 (2 Dept 2008) Supreme Court, awarded wife nondurational maintenance of $246.15 per week, and awarded wife an attorney's fee of $7,350. The Appellate Division affirmed. It held that in light of the defendant's history of low earnings, her age and her health, as well as the length of the marriage, the Supreme Court properly found that it was not likely that she would become self-supporting, and consequently properly awarded her nondurational maintenance .

August 1, 2008

Divorce or Annulment Now Revokes Any Revocable Disposition or Appointment of Property to a Former Spouse

Under former a divorce did not revoke many revocable dispositions ( "testamentary substitutes"), such as lifetime revocable trusts (including Totten Trusts), life insurance policies, or joint tenancies (including joint bank accounts). A divorce did not revoke a power of attorney given to a former Spouse under provisions of the General Obligations Law. Existing EPTL 5-1.4 has been repealed and a new EPTL 5-1.4 is added which provides that a divorce or annulment will revoke any revocable disposition or appointment of property to a former Spouse, including a disposition or appointment by will, by beneficiary designation, or by revocable trust (including a bank account in trust form). It also revokes any revocable provision conferring a power of appointment on the former spouse and any revocable nomination of the former Spouse to serve in a fiduciary or representative capacity, such as nomination of the former Spouse as a personal representative, executor, trustee, guardian, agent, or attorney-in-fact. A divorce would sever joint tenancies between former Spouses (including joint bank accounts) and transform them into tenancies in common. According to the Sponsor’s Memorandum the new statute does not change the New York case law concerning the effect of divorce on tenancies by the entirety. (See Kahn v Kahn, 43 NY2d 203 (1977); Anello v Anello, 22 AD2d 694 (1964)). Laws of 2008, Chapter 173, § 2, effective July 7, 2008.

Family Court Act 812 Amended to Allow Granting of Order of Protection to Persons Former Spouses, "Regardless of Whether They Still Reside in the Same Household” and Persons Who Have Been in an “Intimate Relationship”

Family Court Act 812 (1) (c) was amended to include in the list of persons who the court has jurisdiction to grant an order of protection, persons formerly married to one another, "regardless of whether they still reside in the same household” and persons who are not related by consanguinity or affinity. Subdivision (e) was added to Family Court Act 812 include in the list of persons who the court has jurisdiction to grant an order of protection, “persons who are or have been in an intimate relationship regardless of whether such persons have lived together at any time”. For purposes of subdivision (e), neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship". Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Laws of 2008,, Ch 325, § 10, effective July 21, 2008).

DRL 111-c Added to Grant Foreign Adoptions Full Faith and Credit in New York State

Section 111-c was added to the Domestic Relations Law. It provides the same rights to foreign adoptions as adoptions in New York State, provided that either adopting parent is a resident of this state and the validity of the foreign adoption has been verified by the granting of an IR-3 immigrant visa, or a successor immigrant visa, for the child by the United States Citizenship and Immigration Services. It grants foreign adoptions full faith and credit by the courts of New York State and provides that they shall be enforced as if the order were rendered by a court within New York, unless the foreign country violates the fundamental principles of human rights. No action is required. An adoption is considered "final" under the laws of New York state upon either adopting parent being a resident of this state and the granting of an IR-3 immigrant visa, or a successor immigrant visa. However, either adoptive parent or a guardian or a guardian ad litem may register the order in this state with the judge or surrogate of the county in which the adoptive parent or parents reside. It appears that a petition must be filed to register the foreign adoption order. If the court finds that the foreign adoption order meets complies with this section, the court must issue an order of adoption to the party who has petitioned for such an order and upon registration a birth certificate shall be issued. Laws of 2008, Ch 329, §1, effective October 19, 2008.

CSSA Not Complied With Where No indication Mother knew Social Security Not Intended to Displace Father’ s Child Support Obligation

In Matter of Dorosky v Herald --- N.Y.S.2d ----, 2008 WL 2521959 (N.Y.A.D. 2 Dept.) pursuant to judgment dated May 17, 1999, which incorporated but did not merge an earlier stipulation, "[t]he parties ... voluntarily agreed to child support for the minor issue of the marriage payable ... through [the father's] Social Security Disability to each child in the amount of $172.00 per month, per child." In 2006 the mother filed petitions to enforce the father's child support obligation and for an upward modification of child support. After a hearing, Family Court sustained the father's objections and vacated the Support Magistrate's order. The Appellate Division held that although parties are permitted to "opt out" of the requirements of the Child Support Standards Act that decision must be made "knowingly" . Compliance with the CSSA guidelines requires "that the parties have been fully informed of the provisions of the statute, and of how the guidelines would operate in their individual circumstances". Here, there was no indication that the mother knew, inter alia, that "[a] dependent child's Social Security benefits are ... not intended to displace the obligation" of the father to support his children (Matter of Graby v. Graby, 87 N.Y.2d 605, 611) or that Social Security benefits would be payable only until the dependent children reached the age of 18. Accordingly, under the facts of this case, the Support Magistrate properly granted the mother's petitions, and the Support Magistrate's order had to be reinstated.

In High-income Cases Child Support with Respect to Parental Income in Excess of $80,000 Should Be Based on the Child's Actual Needs

In Vladlena B., v Mathias G., --- N.Y.S.2d ----, 2008 WL 2521283 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which denied petitioner mother's objections to the Support Magistrate's order directing that the child support obligation be shared equally by the parties and that respondent father pay the monthly sum of $1,566.67 to petitioner for child support as well as half of the child's unreimbursed medical expenses. It held that the court's imputation of equal income to both parties was amply supported by the record. The testimony supported the magistrate's findings that petitioner maintained a high standard of living and received regular, consistent and recurring financial support from her ex-husband and family. In high-income cases, the proper determination for an award of child support with respect to parental income in excess of $80,000 should be based on the child's actual needs and the amount required for a lifestyle appropriate for the child, not the wealth of one or both parties (see Matter of Brim v. Combs, 25 AD3d 691, 693 [2006], lv denied 6 NY3d 713 [2006] ). Petitioner failed to provide evidence of the child's actual expenses, other than testimony found to be incredible. The court set a fair sum of child support ($3,133.34 per month), of which respondent was ordered to pay half.

Not a Dissipation of Assets for Plaintiff to Decide Not to Try to Make Payments on the Marital Home, or Any Other Home, by Using That Home's Line of Credit to Avoid Foreclosure

In Cooper v Cooper, --- N.Y.S.2d ----, 2008 WL 2521260 (N.Y.A.D. 1 Dept.) the Appellate Division held that the Special Referee properly credited the neutral forensic accountant to the extent he found that the parties lived a lavish lifestyle based on the mortgaging of most of their assets, and that plaintiff had not improperly dissipated marital assets, with one exception. It was uncontested that at the time plaintiff transferred the couple's Guardian Annuity to his father, it had a cash value of $273,000, and there was no evidence of any consideration for this transfer. Therefore, defendant was entitled to half the value of this marital asset. However, it was not a dissipation of assets for plaintiff to decide not to try to make payments on the marital home, or any other home, by using that home's line of credit to avoid foreclosure. These assets were already burdened with debt, and taking on further debt to pay the mortgages would only have put off the inevitable. While the forensic accountant was not able to account for every expenditure, the record supported his conclusion that the parties' expenditures reasonably approximated the consumption of capital assets. Thus, the Special Referee properly concluded that there was no reason to believe plaintiff secreted marital funds or further dissipated marital assets. The Special Referee also properly found that the property at 1200 Broadway in Manhattan was plaintiff's separate property. It is uncontested that this apartment was purchased prior to the marriage. While a mortgage was taken out on the property during the marriage and was repaid with marital assets, there was no evidence that any of the mortgage proceeds were used to enhance the value of the apartment or that defendant contributed to its value in any way. The record supported the conclusion that the proceeds of this mortgage were used to maintain the couple's extravagant lifestyle, and was tantamount to a loan from this separate property to the marriage. It did not convert the property into a marital asset. The Special Referee also properly found that the property at 222 East 80th Street was defendant's separate property. While defendant testified that this property belonged to her parents, her former lawyer testified that defendant had admitted to him the property was, in fact, hers, but kept in her parents' names.

July 16, 2008

EQUITABLE DISTRIBUTION

Court of Appeals Holds That Commencement Date of Prior Discontinued Divorce Action May Not Serve as Valuation Date for Marital Property in Later Divorce Action.

In Mesholam v Mesholam, 6/27/2008 NYLJ 30, (col. 1) the Court of Appeals, in an Opinion by Judge Pigott, held that the commencement of a prior, discontinued divorce action may not serve as the valuation date for marital property for purposes of equitable distribution in a later divorce action. Courts must use the commencement date of the later, successful action as the earliest valuation date for marital property. However, the circumstances surrounding the commencement of the earlier action can and should be considered as a factor by the trial court, among other relevant factors, as it attempts to calibrate the ultimate equitable distribution of marital economic partnership property acquired after the start of such an action by either spouse.

The parties were married in 1969. The wife commenced an action for divorce in 1994. The husband answered, but did not counterclaim for divorce. Five years later the Supreme Court granted the wife's motion to discontinue the action. Almost immediately, the husband commenced this action for divorce. After finding that the husband was entitled to a divorce Supreme Court held that the husband's pension must be valued as of the commencement date of the present action, rather than the commencement date of the wife's 1994 action, relying on Domestic Relations Law §236(B)(4)(b). Supreme Court determined that the marital property, including the marital portion of the pension, should be divided equally between the parties. The Appellate Division held Supreme Court improvidently exercised its discretion in valuing the pension as of the commencement date of the present action. It concluded that the 'appropriate valuation date was the commencement date of the 1994 action' because there was 'no evidence that the parties reconciled and continued to receive the benefits of the marital relationship after the prior action was commenced' (25 AD3d 670, 671 [2006]).

The Court of Appeals modified the order of the Appellate Division and remitted the matter to Supreme Court for further proceedings. It pointed out that Domestic Relations Law 236(B)(1)(c) defines marital property as all property acquired 'during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action.' Thus, in the absence of a separation agreement, the commencement date of a matrimonial action demarcates 'the termination point for the further accrual of marital property ' (citing Anglin v. Anglin, 80 NY2d 553, 556 [1992]). The Court held that the valuation date must be between 'the date of commencement of the action and the date of trial ' (Domestic Relations Law 236 [B][4][b]). In determining whether the commencement of a particular 'matrimonial action' terminates the accrual of marital property, it looked to 'the overall legislative intent of the Domestic Relations Law and the particular application of the equitable distribution regime. In Anglin, the Court held that the commencement of a separation action does not cut off the accrual of marital property because such an action does not, ipso facto, terminate the marital economic partnership. Rather, the economic partnership should be considered dissolved when a matrimonial action is commenced which seeks divorce, or the dissolution, annulment or declaration of the nullity of a marriage, i.e., an action in which equitable distribution is available. It observed that this rule provides internal consistency and compatibility and objective verification, as opposed to uneven, ephemeral, personal interpretations as to when economic marital partnerships end. For similar reasons, it concluded that the value of marital property generally should not be determined by the commencement of an action for divorce that does not ultimately culminate in divorce. Equitable distribution is available 'in an action wherein all or part of the relief granted is divorce. Where there is no divorce, there can be no equitable distribution. Consequently, permitting the commencement date of the prior, unsuccessful divorce action to govern the valuation date of marital property for the purposes of a later, successful action in which equitable distribution is available would be inconsistent with the statutory scheme. The Court found that, as Supreme Court concluded, the pension benefits were marital property to the extent that they were earned prior to the commencement of the present divorce action. As a result, the marital portion of the pension could not be valued at any time earlier than the commencement date.

Because Marital Residence Is Generally Considered a Passive Asset, a Valuation Date as Close to the Trial Date as Practicable Should Be Employed

In Donovan v Szlepcsik, --- N.Y.S.2d ----, 2008 WL 2390337 (N.Y.A.D. 2 Dept.) Supreme Court, inter alia, awarded the defendant a 10% interest in the former marital residence and credited him the sum of $2,600, representing 10% of the net equity in the

former marital residence as of May 2002, awarded the plaintiff child support of $300 a week, and directed that any unreimbursed or uncovered medical expenses incurred on behalf of the parties' unemancipated child be shared equally between the parties. The Appellate Division held that because a marital residence is generally considered a passive asset, a valuation date as close to the trial date as practicable should be employed. This is especially true where the dramatic increase in the value of real property is attributable to market forces rather than the contributions of either party . Here, the trial court erred in employing a May 2002 valuation for the former marital residence since it had before it a valuation made in August 2005, only three months before the trial, and uncontradicted evidence that the residence's increased market value resulted solely from market forces. Inasmuch as the amount of the outstanding existing mortgage as of August 2005 was not clearly set forth in the record, it remitted the matter to the Supreme Court for a recalculation of the net equity in the marital home as of August 2005 and the 10% interest therein to which the defendant was entitled. In awarding the plaintiff child support in the sum of $300 a week, the court did not adhere to the "precisely articulated, three-step method for determining child support" set forth in the Child Support Standards Act. It remitted to the Supreme Court for a recalculation of the child care expenses, child support, child support arrears, and unreimbursed or uncovered medical expenses incurred on behalf of the parties' unemancipated child which the defendant is obligated to pay in accordance with the CSSA.

Supreme Court Properly Declined to Consider Tax Consequences in Light of Plaintiff's Failure to Submit Evidence of Tax Consequences.

In Cameron v Cameron, 857 N.Y.S.2d 793 (3 Dept 2008) the parties divorced in 2004 after nearly 50 years of marriage. Upon plaintiff's appeal, the Appellate Division reversed so much of the judgment of divorce as ordered equitable distribution of, among other things, his pension (22 A.D.3d 911, 802 N.Y.S.2d 542 [2005] ) and remitted the matter to Supreme Court for distribution of the marital portion of plaintiff's pension, directing the court to give appropriate consideration to any tax consequences, and for redetermination of his maintenance obligation. Upon remittal, Supreme Court noted that an amended qualified domestic relations order had been entered subsequent to the judgment of divorce, which properly recalculated the marital portion of plaintiff's pension in accordance with the formula set forth in Majauskas v. Majauskas, 61 N.Y.2d 481, 490, 494, 474 N.Y.S.2d 699, 463 N.E.2d 15 [1984]. The court directed the parties to submit a proposed distribution of the pension with complete analysis of potential tax consequences. After both parties failed to submit any evidence regarding tax consequences, Supreme Court deemed the argument waived, redistributed the parties' property, and redetermined maintenance accordingly. Plaintiff appealed, arguing that Supreme Court improperly failed to take into account the appropriate tax implications in redistributing his pension, and abused its discretion in awarding defendant permanent maintenance. The Appellate Division affirmed. It held that in light of plaintiff's failure to submit a proposed distribution and any evidence of associated tax consequences, Supreme Court properly declined to consider the tax consequences. Inasmuch as Supreme Court gave appropriate consideration to the pertinent factors set forth in Domestic Relations Law 236(B)(6)(a) and the redistribution of property upon remittal, it rejected plaintiff's argument that the court abused its discretion in awarding defendant nondurational maintenance of $300 per month.

Consent to Divorce Based on Counterclaim Precludes Review on Appeal

In Dudla v Dudla, 50 A.D.3d 1255, 857 N.Y.S.2d 254 (3 Dept. 2008) the parties were married in October 1987 and had no children. Following a brief separation, they entered into a postnuptial agreement in July 1997 concerning the distribution of certain property, including the marital residence. The parties separated again in 2002. In 2004, plaintiff commenced ans action for divorce on the ground of cruel and inhuman treatment. Defendant served a pro se answer in which he asserted a counterclaim for divorce on the ground of cruel and inhuman treatment and sought vacatur of the postnuptial agreement. During the course of the proceedings, the parties indicated that they wished to dissolve the marriage. To this end, plaintiff agreed not to pursue her complaint for divorce, but to allow the divorce to proceed on the ground alleged in defendant's counterclaim. Defendant consented to this proposed disposition and a trial was thereafter held on the distribution of the parties' marital property. The defendant appealed from the judgment of divorce and the award. The Appellate Division found that defendant consented to the divorce based on his counterclaim. In view of this, he was not aggrieved by that part of the judgment granting him such relief and, therefore, this issue was not subject to review. It also noted that Supreme Court determined that the marital residence was a marital asset, the value of which was to be distributed equally between the parties. The court valued this asset at $184,500 based upon information contained in plaintiff's testimony, interrogatories and statement of net worth. Defendant contended that a higher value was warranted and that plaintiff fraudulently misrepresented the value. Yet, at trial, he provided no proof regarding the value of the residence, nor did he dispute the value proffered by plaintiff. His statement of net worth, also admitted into evidence, left the section concerning real property blank. He failed to submit a written appraisal of the marital residence at trial even though Supreme Court specifically advised him of his right to do so. He also failed to provide proof that plaintiff engaged in fraud. Defendant neglected to adduce proof of the value of personal property and furnishings acquired after the execution of the postnuptial agreement, which he also claimed should have been part of the distributive award. Based upon the limited proof on the value of the residence and personalty, the court did not err in its valuation and distribution of these assets. Given the parties' respective financial positions and the fact that plaintiff was not awarded any portion of defendant's business, but was partially responsible for the payment of defendant's business debt through the refinancing of the mortgage on the marital residence, there was no abuse of discretion in Supreme Court's exclusion of plaintiff's pension from the distributive award.

Plaintiff Wife Not Entitled To Permanent Maintenance Simply by Reason of Defendant’s Imputed High Earnings

In Santana v Santana, --- N.Y.S.2d ----, 2008 WL 2130315 (N.Y.A.D. 1 Dept.) Supreme Court, inter alia, awarded plaintiff child support of $1,666.67 per month, maintenance of $2,000 per month for three years, and $80,000 representing 50% of the appraised value of defendant's business. The Appellate Division modified to vacate the award of child support and extend the duration of maintenance to five years, and remanded for a recalculation of the parties' child support obligations. It found that several errors were made in determining child support. First, the court applied the statutory 25% percentage applicable to two children despite unrebutted testimony that the parties' younger daughter (born July 23, 1990) had been living with defendant. Defendant should not have to pay plaintiff basic child support for this child as of the time the child began living with him. Second, the court incorrectly calculated the parties' total combined income. Plaintiff's annual income was correctly found to be $26,200 based on recent income tax returns, and defendant's annual income could not be ascertained because of his evasive and conflicting testimony and failure to produce appropriate documentation. The court therefore properly imputed income of $118,843.60 to defendant based on the average of his annual deposits into his personal checking account; however, the court apparently overlooked an additional $18,250 per year that the neutral court evaluator found defendant earned from a wire transfer business located in his store. Third, where, as here, the combined parental income exceeds $80,000, the court is required to either apply the statutory percentage to the amount in excess of $80,000 or articulate reasons for not doing so. The court, however, capped defendant's income at $80,000, and then apparently took a straight 25% of $80,000 in arriving at defendant's monthly basic child support obligation of $1,666.67, rather than multiplying combined parental income by the appropriate child support percentage and then prorating the product in the same proportion as each parent's income is to the combined parental income. The only reasons the court gave for deviating from the statutory method were the parties' "modest" marital lifestyle and the fact that the younger child resided with defendant. The latter fact, while a reason for not awarding plaintiff child support for the younger child, was not a reason for capping defendant's income, and, the record was insufficient to support a finding that the parties' marital lifestyle was modest. Fourth, the court failed to award the children's future reasonable health care expenses not covered by insurance, which award should be made in the same proportion as each parent's income is to the combined parental income (Domestic Relations Law s 240[1-b][c][5] ). Fifth, given the great disparity in the parties' incomes, the court should have directed defendant to pay his pro rata share of the younger child's college tuition and expenses based on the proportion of his income to the total combined parental income, rather than directing defendant to pay only 50% of those expenses. It also held that Plaintiff was not entitled to permanent maintenance, as she claimed, simply by reason of defendant's imputed high earnings. The purpose of maintenance is to give the recipient spouse a sufficient period of time to become self-supporting. However, given the length of the parties' marriage, over 20 years, and the fact that plaintiff needed 12 more credits to complete her master's degree, attainment of which should enable her to earn more income, it modified the maintenance award to extend its duration from three to five years.

Error Not to Credit Wife with 50% of Husband’s Pre-marital Debts Paid with Marital Funds During the Marriage

In Mahoney-Buntzman v Buntzman, --- N.Y.S.2d ----, 2008 WL 2066586 (N.Y.A.D. 2 Dept.) Supreme Court, among other things, fixed the wife’s her distributive award at $2,467,151.43, awarded her 35% of the value of certain shares of stock and stock options issued to the defendant by his employer, and awarded her durational maintenance of $2,500 a month for 15 months. During the parties' marriage, the defendant took out a student loan in the amount of $48,162.90 to pay for a doctoral degree in education, which was satisfied with marital funds. The plaintiff contended on appeal that the trial court erred in failing to award her a 50% credit with respect to the student loan. The Appellate Division agreed. The defendant's expert testified that the doctoral degree earned by the defendant during the marriage did not enhance his earnings, and thus, provided no benefit to the marriage, and there was no distributive award of the value of the doctorate degree to the plaintiff in light of its zero enhanced earning capacity value. The student loan debt was incurred to satisfy the defendant's separate interest and therefore was his own separate obligation. Accordingly, the trial court erred in failing to award the plaintiff a 50% credit, or $24,081.45, for the student loan debt incurred by the defendant during the marriage to attain this degree. The Appellate Division agreed with plaintiff’s contention that the trial court erred in not crediting her with 50% of the defendant's pre-marital debts paid with marital funds during the marriage: maintenance paid to the defendant's first wife in the total amount of $58,545, and $7,000 paid in 1998 as a settlement of a loan for a boat purchased by the defendant before the marriage but surrendered to the bank in 1993 prior to the marriage for nonpayment of the boat loan. The defendant's maintenance obligation to his first wife and the boat loan constituted debts incurred by him prior to the parties' marriage and were solely his responsibility. Accordingly, the trial court erred in failing to award the plaintiff additional credits of $29,272.50 as to the maintenance payments to the defendant's first wife and $3,500 as to the boat loan. It also agreed with the plaintiff's contention that the trial court improvidently exercised its discretion in declining to direct that the defendant pay the parties' children's college tuition and expenses until they reach the age of 21 upon finding that the children had sufficient resources of their own to pay for their college education from trust funds given to them by their paternal grandfather. In view of the defendant's own significant financial resources in contrast to the plaintiff's limited financial resources, and the defendant's own testimony that the parties agreed not to use the children's trust funds to pay for their college tuition and expenses, as well as giving due consideration to the factors listed in Domestic Relations Law s 240(1-b)(c)(7), the defendant should pay for the childrens' college tuition and expenses until they reach the age of 21.

Court May Award Maintenance upon Annulling the Marriage on the Ground of Fraud

In Lemieux v Lemieux, --- N.Y.S.2d ----, 2008 WL 458497 (N.Y.A.D. 2 Dept.) an action to annul a marriage on the ground of fraud, Supreme Court awarded the defendant maintenance of $300 per week commencing on October 4, 2006, and continuing until the defendant reached the age of 66, died, remarried, or cohabitates, whichever is sooner. The Appellate Division affirmed rejecting the plaintiff’s argument that Supreme Court was not authorized to make a maintenance award in an annulment action because DRL 141, which provides that maintenance may be awarded in a matter where an annulment has been granted on the ground of the mental illness of one of the parties, limits the court's authority. He contended that since the parties' annulment was based on fraud, the court erred in making an award of maintenance. Pursuant to Domestic Relations Law 236(B)(2), the court has discretion to make a maintenance award in any matrimonial action. DRL 141 simply

provides additional procedural and substantive detail with respect to an action to annul a marriage based upon five years' incurable mental illness of one of the parties, to ensure that the disabled spouse is cared for and does not become a

public charge. It does not limit the class of annulments in which the court can award maintenance.

Error to Award Share of Enhanced Earning Capacity

In Higgins v Higgins, --- N.Y.S.2d ----, 2008 WL 1748310 (N.Y.A.D. 2 Dept.) the Appellate Division held that although the enhanced earnings from academic degrees and professional licenses attained during the marriage are subject to equitable distribution, it is incumbent upon the nontitled party seeking a distributive share of such assets to demonstrate that they made a substantial contribution to the titled party's acquisition of that marital asset. Moreover, where only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree or professional license, and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit the distributed amount of that enhanced earning capacity. It found that the defendant did not demonstrate that his contributions were substantial. Despite making some efforts to help, there was no evidence that he made career sacrifices or assumed a disproportionate share of household work as a consequence of the plaintiff's education. The record revealed that the defendant made only minor contributions. Moreover, the plaintiff worked full time while attending school, funded some of her own educational costs, and was still the primary caregiver for the parties' children. Consequently, the trial court improvidently exercised its discretion in awarding the defendant a share of the plaintiff's enhanced earning capacity. With respect to child support it held that Supreme Court should not have determined the defendant's obligations by relying upon his posttrial affidavit alleging a change in circumstances and that his earnings for child support purposes should be based on a lower income of approximately $500 per week. The consideration of that material, posttrial, prejudiced the plaintiff (cf. Man Choi Chiu v. Chiu, 38 AD3d 619). Nor should the court have directed counsel for the parties to resolve the issue of the accuracy and authenticity of receipts for child care expenses. The Appellate Division held that defendant should not have been credited for his payments of the carrying costs of the marital residence, as they were not shelter costs for the children. Traditionally, shelter costs, like food and clothing, inhere in the basic child support obligation and, thus, the statute does not contemplate the cost of providing the child's shelter as an extraordinary expense to be added to the support obligation. This determination is based upon the prohibition against a double shelter allowance. The defendant's payment of the carrying costs on the marital residence was not for the benefit of the children, as they lived in their grandparents' home with the mother and not in the marital residence. The court held it would not be unjust or a double shelter allowance to require him to pay both child support and the carrying costs of the marital residence in which he resided.

Responsibility of Both Parties to Maintain Marital Residence During Pendency of Matrimonial Action.

In Judge v Judge, --- N.Y.S.2d ----, 2008 WL 331477 (N.Y.A.D. 2 Dept.) the parties were married in 1983 and had two children. In 1989, the defendant stopped working outside the home in order to take care of the parties' first child. She primarily stayed home and took care of the parties' children until the fall of 1993, when she enrolled in a program for a Masters of Business Administration degree at a college where the plaintiff was employed as a professor. In the spring of 1994, the defendant was hired by the Federal Reserve Bank, through the college placement office, and she received her MBA degree in February 1997. The defendant's first job with the FRB was as a Management Information Analyst, and at the time of trial she was an officer at the FRB and vice-president of the FRB's Cash and Custody Division. The defendant moved out of the marital home in 2000 and the plaintiff commenced this action on July 30, 2002. The Appellate Division held that under the circumstances of this case, the Supreme Court improperly determined that the defendant's MBA degree did not enhance her future earnings capacity. An academic degree may constitute a marital asset subject to equitable distribution, even though the degree may not necessarily confer the legal right to engage in a particular profession. While the MBA degree might not actually be a prerequisite to the defendant's employment, the record demonstrated that the degree substantially increased her future earnings, and therefore the plaintiff was entitled to an equitable share of its value, with the proper valuation date being the commencement of the action. Based upon the testimony of the parties' experts, it found that the value of the defendants' MBA degree as of that date was $565,000 and that the plaintiff was entitled to 25% thereof, for an award in the sum of $141,250. It also held that the Supreme Court improvidently exercised its discretion in awarding the plaintiff a credit in the sum of only $6,941 towards the amount he expended on carrying charges related to the marital home after the commencement of the action. "Generally, it is the responsibility of both parties to maintain the marital residence and keep it in good repair during the pendency of a matrimonial action". After the defendant's voluntary departure from the marital residence, the plaintiff resided there and made all payments towards the mortgage and taxes. The plaintiff's undisputed testimony showed that, since the commencement of this action, he paid a total sum of $35,350 in mortgage and tax expenses. Under the circumstances of this case, he was entitled to recover half that amount, or $17,675. The Appellate Division held that Supreme Court providently exercised its discretion in determining that the plaintiff was entitled to an award of an attorney's fee but that given the equities and circumstances of this case, the relative merits of the parties' positions, and their respective financial circumstances, an award of an attorney's fee to the plaintiff in the total sum of $50,000, rather than $20,000 was appropriate.

Provident to Award Wife Title to Marital Residence While Directing That Husband Retain Business Worth less than Home

In Groesbeck v Groesbeck, --- N.Y.S.2d ----, 2008 WL 2066613 (N.Y.A.D. 2 Dept.) Supreme Court awarded the plaintiff title to the marital premises, directed him to pay the plaintiff maintenance of $1,000 per month for a period commencing on March 1, 2007, and concluding on December 1, 2008, awarded the wife child support of $312 per week. The Appellate Division held that Supreme Court providently exercised its discretion in distributing marital property by awarding the plaintiff former wife title to the marital residence where she was residing at the time of trial with the parties' young children, while directing that the defendant former husband retain his interest in his home improvement contracting business. Although the net equity in the marital residence exceeded the appraised value of the defendant's interest in his business, equitable distribution does not necessarily mean equal. There was no merit to the defendant's contention that the court's maintenance award was improper because it "double counted" the value of his business in violation of the rule articulated in Grunfeld v. Grunfeld (94 N.Y.2d 696). That rule was inapplicable here because the husband's business was a tangible, income-producing asset (see Keane v. Keane, 8 NY3d 115). It rejected the plaintiff's contention that the amount and duration of the maintenance award was inadequate. The overriding purpose of a maintenance award is to give the spouse economic independence, and it should be awarded for a duration that would provide the recipient with enough time to become self-supporting. The plaintiff, who was studying for a position in the medical field at the time of trial, testified that she anticipated completing her educational program and a required externship by the summer of 2007. The court's award of maintenance of $1,000 per month for 1 1/2 years after the plaintiff completed her studies was adequate in amount and duration to allow her to become self-supporting. The court properly calculated the child support obligation based upon a finding that the defendant earned $83,253 in 2004. The court's income determination was supported by the valuation report of a neutral accountant who examined the 2004 income tax return filed on behalf of the defendant's business, and the plaintiff failed to offer sufficient evidence to establish that the defendant's income was greater than reported. As a party's child support and maintenance obligations are retroactive to the date an application for such support was made the court should have awarded child support and maintenance retroactive to October 13, 2004, when the summons with notice requesting such relief was filed.

Not Error to Award Wife Portions of Real Estate Originally Owned by Plaintiff and His Brother Where Partnership Dissolved and New Business Structure Created as Sham to Deprive Defendant of Her Interest in Marital Assets.

In Blay v Blay, --- N.Y.S.2d ----, 2008 WL 1969734 (N.Y.A.D. 3 Dept.) the parties were married in June 1992 and had three children. In 1978, plaintiff and his brother established a partnership which performed landscaping and snow removal services. The brothers each held a 50% interest in the partnership. In 1989, plaintiff and his brother purchased a 16-acre parcel of real estate. Plaintiff renovated the house on the property. This house, which later became the marital residence, was further improved during the marriage. Also during the marriage, a karate studio was built on the property, from which the parties taught karate classes. Shortly after defendant informed plaintiff that she was unhappy with their relationship, plaintiff and his brother dissolved the partnership, formed a corporation in which the brother was the sole shareholder, formed a limited partnership and transferred most of the partnership's assets to the limited partnership, including the land, marital residence and karate studio. The corporation was the general partner in the limited partnership with a 1% interest, plaintiff was a limited partner with a 12.75% interest and his brother was a limited partner with an 86.25% interest. According to plaintiff and his brother, the reorganization was undertaken to protect the partnership's assets and to provide the brother with his fair share of the partnership's value, as he had allegedly contributed all of the initial capital and drew only $50 per week from the business while plaintiff drew $350 per week. Plaintiff never informed defendant of this reorganization, or that he transferred the real property out of his own name. In May 2005, plaintiff commenced this divorce action. The Appellate Division held that Supreme Court did not err in awarding defendant portions of the real estate originally owned by plaintiff and his brother. The court found, under the circumstances, that the partnership dissolution and creation of the new business structure was invalid for purposes of equitable distribution, concocted as a sham to deprive defendant of her interest in marital assets. The court further found that the mortgage payments on the property, and money to improve the house and build the karate studio, came from partnership funds earned during the marriage, not from plaintiff's brother individually. As plaintiff was a half owner of the partnership, the mortgage was deemed paid with marital funds. Additionally, the marital residence was improved during the marriage through the addition of a basement bedroom and laundry room, new flooring and remodeling in the kitchen, installation of a hot tub and erection of an outdoor deck, presumably with marital funds .Thus, the court properly awarded defendant half the value of plaintiff's one-half interest in the property, after deducting the nonmarital percentage attributable to mortgage payments made prior to the marriage.

Similarly, based upon Supreme Court's finding that the corporate reorganization was invalid as to equitable distribution and considering plaintiff's one-half ownership of the business, the court did not err in awarding defendant half of plaintiff's interest in the corporation's bank accounts.

Defendant was entitled to distribution of the value of the GMC Jimmy vehicle that plaintiff purchased during the marriage. Despite plaintiff's testimony that he purchased the vehicle as a gift for defendant's daughter who resided with him, he purchased it with marital funds and maintained title to it. Although plaintiff testified and provided documentary proof that a 1994 Ford Taurus was titled to his brother, partnership documents listed that vehicle as a partnership asset and plaintiff apparently used the vehicle regularly. Considering the way that plaintiff and his brother loosely adhered to the corporate form, there was no error in Supreme Court's determination to deem this vehicle marital property in plaintiff's possession.

The Appellate Division held that Supreme Court incorrectly distributed plaintiff's retirement assets. There was no proof that plaintiff or the partnership contributed to plaintiff's IRA account after the marriage. Any passive increase in value to this separate property was also separate property.. The court found that the partnership contributed to a Keogh retirement plan during the marriage, making part of the accrued value in that plan marital property. The court also held that the plan was established to benefit both plaintiff and his brother, yet awarded defendant half of the accrued value as if the entire plan was established to benefit plaintiff alone. Accordingly, it reduced defendant's portion of the Keogh plan to $7,196.72 and award her no portion of plaintiff's IRA account.

The award of $300 weekly maintenance to defendant for seven years was excessive. The court appropriately exercised its discretion in imputing income to plaintiff as a result of his failure to disclose all of the business's tax documents, which failure made it impossible to determine whether claimed expenses were legitimate or whether any additional business income existed. The court also imputed income to plaintiff based upon money he received from family members, free rent for the home and karate studio, the numerous personal bills paid by the partnership or corporation and year-end business distributions made to family members. While imputation of income was appropriate, the amount imputed was incorrect. One-time gifts or alleged loans from family members should not have been calculated as part of plaintiff's annual income. The court's figures also contained a mathematical error and double counted some items. Thus, it reduced the amount of imputed income to $65,000, giving plaintiff a total annual income of $83,200 when including his $350 weekly draw. The parties were married for 13 years at the time of commencement of the action and were in good health. During the marriage, plaintiff, who has a 10th grade education, worked in the family business. Defendant stayed home with the children during their formative years and did not begin working outside the home until the children were all in school. At the time of trial, defendant, who is a high school graduate, earned an annual salary of approximately $25,000. She had been working at least part time since 1998 and did not present any proof that she intended to pursue training to increase her skills, or that she lost out on any particular employment opportunities. The parties never lived an extravagant lifestyle, and both lived modestly after separating. While plaintiff's income was considerably higher than defendant's, he is supporting their three children and defendant's daughter without receiving any child support. Under the circumstances, a maintenance award of $200 per week for two years from the date of judgment was appropriate. A retroactive award was required because maintenance shall be awarded from the date of application. That award was also to be in the amount of $200 per week. The Appellate Division held that Supreme Court should not have ordered plaintiff to maintain a $100,000 life insurance policy and at the same time distribute the marital portion of the cash surrender value of that policy. The court was authorized, in its discretion, to direct plaintiff to pay the premiums and keep the life insurance policy in effect for defendant's benefit until his maintenance obligation is satisfied. The proof supported a determination that a portion of the policy, paid for during the marriage by the business that plaintiff half owned, was marital property subject to equitable distribution. By ordering immediate distribution of the cash surrender value, however, the court was essentially requiring liquidation of that asset at the same time it ordered that the asset be maintained in its present form. Based upon the reduction of the length of the maintenance award, plaintiff's current maintenance obligation was substantially satisfied. Accordingly, it removed the requirement that he maintain the life insurance policy for defendant's benefit, but affirm the court's direction to distribute the marital portion of the policy's cash surrender value.

It held that Supreme Court did not abuse its discretion in awarding counsel fees to defendant, but it reduced reduce the amount of the fee awarded. Some factors to consider include the extent of legal services provided, the complexity of the case and the parties' financial circumstances, taking into account any distributive awards. Considering the income imputed to plaintiff, he was in a better financial position than defendant, but he was also supporting the children without assistance from defendant. Distributive awards to defendant totaled approximately $100,000, many of which plaintiff must pay from nonliquid assets. The counsel fees were partially based upon additional work required to sort out the confusing financial arrangements created by plaintiff and his family business, plaintiff's failure to advise defendant of the business restructuring and the failure to turn over complete financial documents in response to demands. The court parsed counsel's billing statements, deleting items deemed excessive, and awarded plaintiff $24,741.50. The complexity of the case due to the confusing financial situationmade an award of counsel fees to defendant appropriate but, when considering the parties' financial circumstances as a whole, it reduced the award to $15,000.

Nondurational Maintenance An Abuse of Discretion in View of Wife’s Work Experience and $ 80,000 Salary

In Kaplan v Kaplan,--- N.Y.S.2d ----, 2008 WL 1990094 (N.Y.A.D. 2 Dept.) the husband appealed from a judgment which, among other things, directed him to pay maintenance of $ 6,000 per month for a continuous period of 60 months, and then, commencing with the 61st month, $3,000 per month continuing for life. The Appellate Division held that Supreme Court's award of lifetime maintenance to the wife was an improvident exercise of discretion. In view of the wife's work experience, the fact that she was gainfully employed and earning approximately $80,000 per year, the sizable distributive award she received, and her equal share of the husband's retirement benefits, the award of permanent maintenance was inappropriate .However, the award of $6,000 per month in maintenance for a period of five years was appropriate under the circumstances of this case. The court providently exercised its discretion in awarding the wife 30% of the husband's dental practice and license. The award took into account the limits of the defendant's involvement with the practice and the attainment of the dental license, while not ignoring the direct and indirect contributions that made. However, Supreme Court erred in directing the separate distribution of both the husband's dental practice and the bank accounts of the dental practice. The value of the dental practice, as determined by a neutral business evaluator, already included the value of these accounts. In accordance with the Court's determination that the award of maintenance should be modified to eliminate the award of lifetime maintenance, the Supreme Court's directive was modified so as to provide that the requirement to provide life insurance as security for the maintenance award was coterminous with such award.

Proper to Calculate Child Support Without Credit for Social Security Benefits Children Receive Due to Father’s Disability

In Luongo v Luongo--- N.Y.S.2d ----, 2008 WL 1748303 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed a judgment which awarded the plaintiff a divorce, awarded the plaintiff child support of $1,057.15 per month, awarded the plaintiff a share of defendants pension and variable supplement fund benefits, and awarded the plaintiff an attorney's fee of $6,000. It found that plaintiff satisfied her burden of demonstrating that defendant engaged in conduct, including two physical assaults, which was harmful to her physical and mental well-being and made it unsafe or improper for her to cohabit with him. The court properly calculated the defendant's monthly child support obligation without crediting him for Social Security benefits which the children receive due to his disability. "[A]lthough a dependent child's Social Security benefits are derived from the disabled parent's past employment, they are designed to supplement existing resources and are not intended to displace the obligation of the parent to support his or her children" (Matter of Graby v. Graby, 87 N.Y.2d 605, 611). The court did not err in directing distribution of the defendant's pension and variable supplement fund benefits in accordance with the equitable distribution formula set forth in Majauskas v. Majauskas (61 N.Y.2d 481). Pensions represent a form of deferred compensation paid after retirement in lieu of greater compensation during the period of employment (see Olivo v. Olivo, 82 N.Y.2d 202, 207; Majauskas v. Majauskas, 61 N.Y.2d at 491-492), and the nonemployee spouse is entitled to share in the pension of the employee spouse as well as supplements to existing pension benefits, such as variable supplement fund benefits. In light of the defendant's greater financial resources, the court providently exercised its discretion in awarding the plaintiff an attorney's fee in the sum of $6,000.

Supreme Court's Reliance on Plaintiff's Vocational Expert Improper Where Expert's Report Contained Critical Flaws.

In Schwalb v Schwalb, 854 N.Y.S.2d 802, (3 Dept 2008) the parties were married in 1992 and had no children. Plaintiff was licensed to practice medicine in 1990 and certified to practice internal medicine in 1991. Defendant obtained a Master's

degree in fine arts in 1991. After living together in New York City, the parties purchased a home in Sullivan County in 1991 because plaintiff was raised there and wished to return. Plaintiff was already employed by Liberty Medical Group, a

medical practice owned by his father and Donald Roth. From 1992 to 1995, defendant worked in New York City three days a week and from the parties' Sullivan County home two days a week. In 1995, defendant left her position in New York City so that she could pursue her fine arts career and so that she and plaintiff could start a family. From 1995 on, defendant worked intermittently as an independent contractor, charging $50 per hour for her services. In 2005, defendant earned a degree in landscape design and started her own landscaping business. Plaintiff became an employee of Mary Imogene Bassett Hospital in 1995, when Liberty Medical Group was sold to that entity. In 2001, plaintiff and Roth purchased the practice from the hospital and immediately resold it to Catskill Regional Medical Center. Plaintiff's portion of the proceeds of sale were placed in the parties' joint A.G. Edwards & Sons, Inc. account. Shortly thereafter, plaintiff and Roth formed Addenbrook, LLC, with equal ownership, for the purpose of purchasing the building in which they were practicing. Addenbrook purchased the building in August 2001 for $125,000 using a bridge loan. Addenbrook then took out a $450,000 mortgage in order to pay off the bridge loan and make repairs to the building. When interest rates declined, Addenbrook refinanced the property with a $500,000 mortgage, which was used, in part, to pay off the $450,000 mortgage. After completion of the repairs, $260,000 remained from the mortgage proceeds; plaintiff deposited his half ($130,000) in the parties' joint A.G. Edwards account, which was valued at approximately $179,000 at the time of trial. Plaintiff commenced this action for divorce in September 2004. At or about that time, each party removed $20,000 from the A.G. Edwards account, apparently in order to provide funds for the payment of counsel fees, among other things. By agreement, plaintiff paid maintenance to defendant in the amount of $3,250 per month from October 2004 through March 2005. He also paid the tuition for defendant's studies in landscape design and the rent on the New York City apartment, which the parties had maintained. From April 2005 through July 2006, plaintiff paid maintenance to defendant in the reduced amount of $2,250 per month.

After a trial in January 2006, Supreme Court rendered a judgment of divorce which, among other things, awarded defendant exclusive use and occupancy of the New York City apartment and terminated plaintiff's obligation to pay maintenance.

Supreme Court also awarded ownership of all of the parties' jointly owned real property to plaintiff and awarded defendant a distributive award of $224,250 for her half of the value of that property, in addition to approximately $95,000,

representing one half of the value of certain deferred compensation accounts. Defendant was awarded only 10% of the value of plaintiff's interest in Addenbrook and nothing for the value of the A.G. Edwards account.

The Appellate Division held that Supreme Court did not abuse its discretion with regard to the distribution of the value of Addenbrook. Equitable distribution does not necessarily require an equal division of marital property. The testimony demonstrated that defendant had little to do with the acquisition, maintenance or increase in value of the property owned by Addenbrook. Moreover, Supreme Court properly valued Addenbrook as of the date of commencement of the matrimonial action based on its classification as an active asset, rather than a passive one. While there was no proof in the record of any specific benefit to plaintiff in his retaining ownership of the Livingston Manor property, whereas there was some evidence of a possible economic benefit to defendant if she were to retain ownership, Supreme Court's distribution of such property was not a clear abuse of discretion. The Appellate Division held that Supreme Court erred in its failure to distribute any of the A.G. Edwards account to her. It is well settled that the transfer of separate property into a joint account raises a presumption that the funds are marital property. Plaintiff "failed to overcome this presumption by demonstrating that the joint account was established for convenience only. Plaintiff testified that marital expenses were paid from the joint account and that both parties deposited their earnings into the account. Thus, the commingling of the $40,000, representing the proceeds from the sale of plaintiff's premarital stock, into the joint A.G. Edwards account transmuted those funds into marital property. Insofar as the funds in the A.G. Edwards account represented proceeds from the purchase and sale of the medical practice, those funds were clearly marital. Therefore, it was not necessary for defendant to specifically demonstrate her involvement in those transactions in order to support an entitlement to equitable distribution of the account in which those proceeds were deposited.

The determination of whether to award maintenance rests in the sound discretion of the trial court. However, there must be some evidence in the record from which a proper evaluation of employability can be assessed. Supreme Court's reliance on plaintiff's vocational expert was improper, as the expert's report contained critical flaws, such as an assumption that defendant had experience in graphic design, rather than accurately reflecting her experience in graphic art. In addition, the report proposed work in management positions in the New York metropolitan area requiring numerous years of experience which defendant did not have. Defendant already obtained further education, for which plaintiff paid, to improve her financial prospects. She elected to start her own business which, once developed, she anticipated would allow her to become self-supporting. Meanwhile, plaintiff continued to earn a substantial salary. The Court found, based upon the duration of the marriage, the age and health of both parties, the income and property of the respective parties, the present and future earning capacity of both parties, defendant's ability to become self-supporting, the training she has already received and the duration of maintenance already paid during the pendency of the matrimonial action and the contributions made by defendant to plaintiff's career or career potential, plaintiff should pay maintenance to defendant of $2,000 per month for a period of two years. Such an award will better serve the primary goal of maintenance, which is to encourage rehabilitation and self-sufficiency to the extent possible, while still accounting for a large discrepancy in earning power between the parties. Likewise, it found that Supreme Court's failure to award any counsel fees to defendant was an abuse of discretion. There was no evidence presented that the services rendered were unnecessary or unreasonable. Those services included negotiation for temporary maintenance, financial discovery and preparation for trial, among other things, and no time was charged for travel from New York City. Considering the parties' respective financial circumstances, including the award of maintenance made herein, as well as the distribution of marital property, it held that an award of $15,000 to be paid by plaintiff to defendant's counsel was appropriate.

Provident Exercise of Discretion in Crediting Defendant for Payments Made to Support Parties Children Who Reached Majority During Pendency of Action

In Milnes v Milnes, --- N.Y.S.2d ----, 2008 WL 1123469 (N.Y.A.D. 2 Dept.) Supreme Court determined that the net proceeds of the sale of the marital residence should be distributed equally. The Appellate Division found that Supreme Court properly declined to treat as marital debt a loan allegedly made by the plaintiff's father to the parties in light of the plaintiff's failure to provide any documentary evidence of the alleged loan to substantiate her own testimony regarding the alleged indebtedness. The Supreme Court also providently exercised its discretion in crediting the defendant for payments he made to support the parties' two children who reached their majority during the pendency of this action, and in declining to award child support arrears in the absence of any proof that the payments made were less than those required under the Child Support Standards Act.

Court Must Consider Prospective Financial Circumstances and Work Life Expectancy of the Payor Spouse

In J.S. v J.S. --- N.Y.S.2d ----, 2008 WL 747901 (N.Y.Sup.)) the parties were married in 1967. At the time of the commencement of the action, they had been married for almost 38 years. Both parties were 59 years old. They had three emancipated children. The wife was a high school graduate. The husband reported that he did not anticipate working beyond his 65th birthday. The wife was seeking non-durational maintenance based upon her claim of total disability, the duration of the marriage and an inability to meet her reasonable needs due to her deteriorating health. She alleged that she suffered with chronic fatigue syndrome, shingles, sciatica, irritable bowel syndrome, colitis, gastroesophageal reflux disease, depression and also had spinal disc herniation. She received social security disability benefits of either $592.00 or $692.00 a month and Medicare benefits. The husband had been employed by five different Jaguar dealerships in the past two years. According to his Social Security Earning Statement, the husband earned $281,239 in 2000, $297,039 in 2001, $226,712 in 2002, $140,795 in 2003, $137,376 in 2004, $121,724 in 2005 and $101,250 in 2006. Supreme Court held that the wife had the burden of proving that she was permanently disabled from pursuing gainful employment. The receipt by the wife of disability benefits from the Social Security Administration is not binding on this Court, nor dispositive of the issue of her claimed disability and need for an award of maintenance. Other than her own testimony as to the physical limitations she professed to suffer, no medical or other relevant testimony or evidence was offered to support her position that she was currently unable to work and will be so disabled for the foreseeable future. The court found that her contention that she was totally disabled from engaging in gainful employment was not supported by the proof. It noted that for purpose of qualifying for Social Security Disability benefits, the term "disability" is defined as: "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment (or combination of impairments) which can be expected to last for a continuous period of not less than 12 consecutive months ... taking into account the individual's age, education and work history" (42 USC 423[d], 1382c[a][3][B]; 20 C.F.R. s 404, 416, 905 and 1505). The definition does not engender a determination that a disability is permanent. Further, pursuant to applicable regulations, recipients are permitted to earn restricted amounts of income for limited periods without forfeiting social security disability benefits (see, 20 C.F. R. 404.1574[b]; 416.974[b] ). The Court recognized that the wife was a 59 year old high school graduate, with few skills, who had not been gainfully employed for several years. Her historic earnings were modest and it was not likely she can become self supporting through education or training. The Court imputed income to the wife based on her ability to earn of $20,800.00 a year ($400.00 a week). It found that the husband had the ability to earn an annual income of $110,000.00. The Supreme Court held, as a matter of first impression, that a court must consider, not only the aforesaid factors, but also the prospective financial circumstances and work life expectancy of the payor spouse. It found that the husband had the ability to work until his 70th birthday. Additionally, and for the same reasons, the wife would have to engage in at least part time employment through her 70th birthday. The Court found that the husband lacked the ability to pay non-durational maintenance and directed that he pay maintenance of $3000.00 a month to terminate upon the re-marriage of the wife,the death of either party, or ten years from the date of the order. It directed the husband to maintain life insurance naming the wife as irrevocable beneficiary in a face amount sufficient to secure his obligation to pay maintenance and maintain existing health insurance for the wife until her 65th birthday. The wife was awarded counsel fees of $20,000.00.

Husband Awarded 50% Of Appreciation of Value of Marital Residence

In Michelini v. Michelini, 47 A.D.3d 902, 850 N.Y.S.2d 592 (2d Dept.2008) the Supreme Court awarded the husband 50% of the appreciation of the value of the marital residence and the Appellate Division affirmed. It held that the trial court properly awarded the defendant 50% of the appreciation of the value of the marital residence. Although the residence was the separate property of the plaintiff, the defendant established that the subsequent appreciation of the value of the marital residence was attributable to their joint efforts and, therefore, he was entitled to the award by the trial court.

Credit Card Debt Not Properly Divided Equally

In Preisner v Preisner, 47 A.D.3d 695, 850 N.Y.S.2d 492, (2d Dept. 2008) the parties were married in 1975 and had two children, born in 1981 and 1985, respectively. During most of the marriage, the plaintiff worked as a prop master in the film industry to support the family and the defendant stayed at home with the children. The defendant eventually began working part-time as a substitute teacher and, upon the parties' separation, became a full-time teacher. The parties separated in September 1999 and the plaintiff commenced the action in October 2004. At trial, the plaintiff sought reimbursement from the defendant for one-half of the outstanding credit card debt totaling $80,803.00, which he testified he incurred from September 1999 through 2005 for expenses for the marital home and the parties' children. Although the Supreme Court noted that certain expenses were subject to disallowance, it directed the defendant to pay one-half of the outstanding credit card debt. The Appellate Division held that the court improvidently exercised its discretion in directing the defendant to pay one-half of the full outstanding credit card debt, as it failed to make the necessary findings as to the amount of the debt which was incurred to meet the plaintiff's personal, rather than marital obligations. Moreover, a portion of that debt consisted of payments made by the plaintiff on behalf of one of the parties' children after she reached the age of 21 without the prior agreement of the defendant. Under the circumstances of this case, it found it appropriate to reduce the amount of the defendant's liability as to the outstanding credit card debt to $20,000.

Overriding Purpose of Maintenance Is to Give Spouse Economic Independence. It Should Be Awarded for Duration That Would Provide Recipient with Enough Time to Become Self-supporting.

In DiBlasi v DiBlasi, --- N.Y.S.2d ----, 2008 WL 331693 (N.Y.A.D. 2 Dept.), Supreme Court, inter alia, awarded the plaintiff $1,822 per week in child support, directed defendant to pay for the college tuition and room and board for the parties' children "up to a 'SUNY cap,' " awarded the plaintiff a distributive award of $43,537 from his 401k, directed defendant to maintain a term life insurance policy upon his own life in the amount of $2,000,000, and awarded the plaintiff an attorney's fee of $133,101.17. The Appellate Division held that: "The overriding purpose of a maintenance award is to give the spouse economic independence, and it should be awarded for a duration that would provide the recipient with enough time to become self-supporting”. Supreme Court providently exercised its discretion in determining the monthly amount of maintenance, but improvidently exercised its discretion in limiting the duration of the maintenance award to two years. Taking into consideration all the relevant factors, including the plaintiff's age, education, extended absence from the work force while raising the parties' five children, who were still minors, and the present and future earning capacities of both parties, the duration of the award of maintenance was extended until March 14, 2013. The extension of the defendant's maintenance obligation, until the two youngest boys were college age, was intended to afford the plaintiff a sufficient opportunity to become self-supporting. Given all the circumstances of this case, the attorney's fee was reduced to $100,000.

Property Distributed in Accordance With Prenuptual Agreement

In Kessler v Kessler, --- N.Y.S.2d ----, 2008 WL 257460 (N.Y.A.D. 2 Dept.) Supreme Court, inter alia, directed defendant to pay child support of $3,520 per month and awarded the plaintiff one-half of $492,610, representing income and distributions from his solely-owned corporation, directed that he pay 67.6% of (a) all child care expenses of the plaintiff, retroactive to March 29, 2006, (b) the cost of the health insurance of the parties' children, (c) unreimbursed medical, dental, and related expenses of the parties' children, and (d) the children's extracurricular activities, awarded the plaintiff $278,002.08 as her distributive share (one-half of $556,004.15) of certain real estate accounts, directed him to pay $8,785.03 directly to the plaintiff for certain unpaid child support "add-ons," directed that the defendant pay the plaintiff at a rate of not less than $8,000 per month until $328,877.11 is paid in full. The parties were married in 1996. Four days before their marriage, the parties entered into a prenuptial agreement that essentially left the plaintiff with little or nothing in the event that the parties divorced. Supreme Court refused to void the entire agreement and found that the defendant had not breached the agreement, but voided, as unconscionable, that part of the agreement waiving the right to an attorney's fee. The Appellate Divison in an opinion by Justice Ritter (Kessler v. Kessler, 33 AD3d 42), affirmed. In pertinent part, the parties' prenuptial agreement provides that "[a]ny property acquired during the course of the marriage ... with [the defendant's] sole and separate funds and which is owned in his sole name or with other person or persons other than [the plaintiff]" will be deemed the defendant's separate property. Further, in the event of a termination of the marriage other than by death, "[w]hatever property the parties have accumulated during the course of their marriage, excluding separate property as defined herein ... shall be divided between the parties, in equal shares, when practicable." Further, paragraph 6 of the prenuptial agreement obligated the parties, during the marriage, to "pool certain of their income for the benefit of each other and for the maintenance of the household, by making regular deposits to a checking or similar account (hereinafter Household Account). Both parties will make regular and equal deposits to the Household Account." The evidence adduced at trial established that both parties complied with paragraph 6. The Supreme Court categorized, as marital property, the $492,610, representing income and distributions from the defendant's solely-owned corporation, Indoor Courts of America, Inc., that the defendant deposited into his separate so-called "real estate accounts." The Appellate Division held that this was erroneous, as there was no evidence that the defendant deposited those funds into his separate real estate accounts to evade the requirement set forth in the prenuptial agreement that he make "regular and equal deposits" into the joint household account. Instead, the evidence demonstrates that he used this "excess" income to maintain the marital home and to purchase and maintain real property solely owned by him or his closely-held corporations. Accordingly, no ground existed to deem those funds marital property. Supreme Court's calculation of the defendant's adjusted annual gross income was erroneous. It erred in not reducing the defendant's gross rental income by the amount of his expenses for those rental properties (i.e., real estate taxes, out-of-pocket expenses, insurance, etc.

Creation of Joint Account Vests in Each Tenant a Present Unconditional Property Interest in an Undivided One Half of the Money Deposited.

In Bailey v Bailey, --- N.Y.S.2d ----, 2008 WL 275056 (N.Y.A.D. 4 Dept.) the Appellate Division held that although the court properly determined that plaintiff was entitled to retain the amount of $43,000 she had removed from the parties' joint HSBC checking accounts containing $66,000, the court erred in allocating the entire amount as separate property. "The creation of a joint account vests in each tenant a present unconditional property interest in an undivided one half of the money deposited, regardless of who puts the funds on deposit The creation of a joint account vests in each tenant a present unconditional property interest in an undivided one half of the money deposited, regardless of who puts the funds on deposit" (Parry v. Parry, 93 A.D.2d 989, 990; see Nasca v. Nasca, 302 A.D.2d 906). Thus, each party was entitled to a distributive award of $33,000 from that account. The Appellate Division held that the court properly distributed the various retirement accounts. The appreciation to defendant's Vanguard Money Market Reserves Account was marital property because plaintiff indirectly contributed to the appreciation of this asset by handling the household matters, thereby permitting [defendant] the freedom to devote energy to his financial endeavors. The remaining accounts in question contained commingled marital property and separate property, and defendant failed to trace the source of the funds [that he contended were separate property] with sufficient particularity to rebut the presumption that they were marital property.

Decision Resettled

In Schwartz v Schwartz, --- N.Y.S.2d ----, 2008 WL 191906 (N.Y.A.D. 2 Dept.) the Appellate Division granted the Motion by the appellant-respondent, to resettle the decision and order of the Court. The decision and order of the Court dated December 4, 2007, was recalled and vacated, and an identical decision and order was substituted therefor except that the first decretal paragraph was deleted. It had provided: ” ORDERED that the judgment is modified, on the law and the facts, by deleting from the third decretal paragraph thereof the words "the then outstanding principal of the mortgage" and substituting therefor the words "one half of the carrying charges". The following was substituted in its place: “ORDERED that the judgment is modified, on the law and the facts, by deleting from the third decretal paragraph thereof the words "all carrying charges " and substituting therefor the words "one half of the carrying charges".

Improper to Fail to Award Credit for Marital Debts Paid By One Spouse

In Grasso v Grasso, --- N.Y.S.2d ----, 2008 WL 193262 (N.Y.A.D. 2 Dept.) Supreme Court, awarded the defendant nondurational maintenance, directed him to pay the defendant retroactive maintenance and child support arrears without a credit to him for mortgage and real estate tax payments he made with respect to the marital residence, pursuant to a pendente lite support order, directed him to pay, in full, the principal and interest on all marital debts bearing the defendant's name, awarded him the sum of $103,000 from the net proceeds of the sale of the marital residence as reimbursement of his contribution of separate property, directed that, after the parties each received reimbursement of their contributions of separate property from the net proceeds of the sale of the marital residence, the remainder of those net proceeds be divided equally between them, refused to award him a credit of $1,700 for expenditures he incurred for the benefit of the defendant's daughter from a prior marriage and, refused to to award him a credit of $2,500 for legal fees he expended on behalf of the defendant's son from a prior marriage. The Appellate Division found that that while the husband correctly contended that the court improperly admitted into evidence and relied upon a determination of the Social Security Administration as to the wife's disability, there was other sufficient admissible evidence which supported the finding that the wife was totally disabled. It found that the husband correctly contended that, in directing him to pay maintenance and child support arrears, the Supreme Court erred in failing to credit him for the mortgage and real estate tax payments on the marital residence which he made pursuant to a pendente lite support order. The amounts for which the husband should have been credited, were more than sufficient to offset the maintenance and child support arrears calculated by the Supreme Court. The husband also correctly contended that the Supreme Court improvidently exercised its discretion by, in effect, holding him responsible for 100% of the credit card obligations that constituted the parties' marital debt as well as all the marital debt that was solely in the wife's name. The parties' marital debt would have been more appropriately distributed by allocating it equally between them, and offsetting it against the net proceeds of the sale of the marital residence after deduction of their contributions of separate property. The Supreme Court erred in failing to award the husband a credit for the sum of $1,700 in expenses he incurred on behalf of the wife's daughter from a prior marriage and the sum of $2,500 in fees expended from marital funds on behalf of the wife's son from a prior marriage. Since, at this juncture, the marital residence may already have been sold and the proceeds distributed, the matter was remitted to the Supreme Court, for a hearing and determination of the amount of the parties' marital debt, including accrued interest as of the commencement of the action, and the entry thereafter of an amended judgment directing the wife to pay 50% of the entire marital debt, including 50% of that portion of the marital debt previously satisfied by distribution of the parties' properties in this action. The Court noted that at the trial Supreme Court erred in precluding the husband from offering evidence in support of his contention that a loan taken out against his 401(k) account was used to satisfy the marital debt obligation and directed Supreme Court tol permit the husband to offer proof as to this at the hearing, and to credit him with the wife's portion of any marital debt which he proves was paid from the proceeds of this loan.

Award of College Expenses Not Premature as One of Children Was 15 Years Old and Approaching College Age

In Costa v Costa, --- N.Y.S.2d ----, 2007 WL 4531821 (N.Y.A.D. 1 Dept.) the Appellate Division held that the award to the wife of title to the marital residence and its furnishings was appropriate given her need for a home as the custodial parent of the parties' two children, the availability to the husband of other residences and his use of marital assets to purchase a Park condominium. However, the husband should have been awarded a 100% interest in that condominium. Also, there was no reason for the trial court to depart from the stipulated value for the marital residence or from the husband's claimed value for the condominium. It also directed redistributions of the remaining assets, with the exceptions of the UTMA accounts to be continued to be held and used for each child's college education. The wife was entitled to a total of $515,381.57 from the remaining non-residence assets, which included the individual retirement accounts of both spouses. This 55-45 distribution was equitable under the circumstances, taking into consideration the wife's contributions to the success of the husband's career and her limited earnings prospects. The Appellate Division also held that the maintenance award should be reduced in duration to seven years, granting the wife $5,000 per month for the first five years and $4,000 per month for the next two, taxable to her. This was appropriate for a 16-year marriage in which the wife had the primary homemaking and child-raising responsibilities and had been absent from the workforce since 1990. It properly reflected the parties' respective educational backgrounds and financial positions and was appropriately structured to encourage the wife to become self-supporting. It also took into consideration the parties' marital standard of living. The Court also held that the child support award was appropriate and that the court considered the relevant circumstances and providently exercised its discretion in awarding college expenses . This award was not premature, since one of the children was 15 years old at the time of trial and approaching college age, and it would have been unfair to the wife and would contravene principles of judicial economy to require her to seek an upward modification in only two years. The award of counsel fees was a proper exercise of discretion.

Disparity in Parties' Incomes and Educations Warranted Maintenance Award for Time Necessary for Wife to Complete Education and Receive Teaching Certificate

In Fosdick v Fosdick, --- N.Y.S.2d ----, 2007 WL 4440912 (N.Y.A.D. 3 Dept.) the parties were married in December 1999 and had two children. Prior to marriage, defendant earned a Bachelor's degree and a Master's degree. During the marriage, defendant acquired a Certificate of Administration and became employed full time as a school counselor. Defendant also served as a reservist in the U.S. Army. Plaintiff, who prior to marriage was employed and attending business college part time, worked on a part-time basis intermittently during the marriage but essentially deferred her employment and education, apparently at defendant's request, to be the primary caregiver for the parties' minor children. In November 2004, defendant was deployed to Iraq, where he remained stationed until October 2005. Plaintiff commenced this action for divorce in September 2005. Supreme Court awarded the parties joint legal custody with physical custody to plaintiff and visitation to defendant. The court also awarded plaintiff maintenance of $900 per month for 30 months and directed defendant to pay plaintiff's counsel fees of $3,000. The Appellate Division affirmed. It held that given the disparity in the parties' respective incomes and educations, the latter of which plaintiff deferred in order to raise the parties' children, and the contributions plaintiff made to the marriage, the amount and duration of the maintenance awarded (the latter of which representing the approximate length of time necessary in order for plaintiff to complete her education and receive a teaching certificate) seemed entirely appropriate. It reached a similar conclusion as to the issue of counsel fees.

Plaintiff's Separate Funds Used for Improvement of Marital Residence or Commingled with Marital Accounts Became Marital Property. Mortgages and Debts Incurred During the Marriage Constitute Joint Obligations Which Are the Responsibility of Both Parties

In Loria v Loria, --- N.Y.S.2d ----, 2007 WL 4465272 (N.Y.A.D. 2 Dept.) the parties were married for four years when the action was commenced in 2003. At the time of the marriage, the plaintiff, a widower, was the father of four unemancipated children from his previous marriage. The parties did not have children together. Four months after the marriage, the parties purchased the marital residence for $240,000, using $100,000 from the proceeds of the sale of the plaintiff's previous residence, and financing the balance. During the marriage, the defendant was a full-time homemaker and caregiver for the plaintiff's four children, handling all household duties, and supervising extensive renovations of the marital residence. In 2003 the plaintiff heavily refinanced the marital residence, which was worth $450,000 at the time of trial, and used the proceeds to purchase a rent-producing property worth $316,000 at the time of trial. Supreme Court equitably distributed both the marital residence and the rental property, subtracted the plaintiff's separate property contributions and certain mortgage indebtedness, awarded the defendant 40% of the value of the real property, and directed the plaintiff to pay a distributive award to the defendant in the sum of $161,200 in 60 monthly payments of $2,686.67 each. In an order dated August 31, 2006, the Supreme Court directed the plaintiff to pay arrears due under the judgment and awarded an attorney's fee to the defendant. The Appellate Division held that in light of the defendant's significant and undisputed contributions to the marriage, the Supreme Court properly exercised its discretion in awarding her 40% of the marital assets after giving certain separate property credits to the plaintiff. The plaintiff's separate funds used for the improvement of the marital residence or commingled with marital accounts lost their character of separateness and became marital property subject to equitable distribution. However, mortgages and debts incurred during the marriage constitute joint obligations which are the responsibility of both parties. It agreed with the plaintiff's contention that the Supreme Court failed to hold the defendant fully accountable for the mortgage liability in determining her distributive share. Accordingly, after adding the market value of the marital property ($766,000) and deducting therefrom the sum of $436,000 ($350,000 indebtedness on the marital residence plus $86,000 from a line of credit used by the plaintiff to renovate the rental property), and taking into account the plaintiff's separate property credits as found by the trial court ($160,000), the defendant's 40% distributive share with respect to the realty amounted to $68,000, and it modified the judgment accordingly. The Court also held that in light of the plaintiff's admission that he failed to comply with the terms of the judgment until after the motion for enforcement was served, and the evidence that such failure was willful, the Supreme Court properly found that the defendant was entitled to an award of an attorney's fee.

Award of 35% of Value Husband's Interest in Law Firm Proper Where Wife's Conduct Toward Husband Harmed His Status and Reduced His Salary and Profits at Firm

In Schwartz v Schwartz, --- N.Y.S.2d ----, 2007 WL 4246028 (N.Y.A.D. 2 Dept.) the parties were married in August 1973 and plaintiff commenced the action in February 2003. The husband had been a partner in a law firm, while the wife had not been employed since 1977, following the birth of the parties' son. In April 2005, the parties entered into a stipulation equally dividing the proceeds of the sale of the marital home, savings accounts, investment accounts, and retirement accounts. Pursuant to this stipulation, each of the parties would receive the sum of approximately $800,000 in liquid assets and retirement accounts. The decision after trial provided that the husband would receive credit, against his retroactive maintenance obligation, for payments he made for "all carrying charges" with respect to the parties' vacation home in Florida. However, because the parties each had a one-half ownership interest in the vacation home in Florida, the Appellate Division reduced the credit awarded to the husband to one-half of the carrying charges he paid, from the commencement of the action to the commencement of the trial in January 2005. Because the wife did not dispute, at trial, the husband's testimony that he had paid $75,140.03 in carrying charges for the vacation home in Florida from the time he commenced the action until the commencement of the trial, the court rejected the wife's contention that a hearing was required on the amount of carrying charges expended by the husband. Given the parties' long marriage and the wife's role during the early years of the marriage as the primary caretaker of the parties' son, which allowed the husband, at one time, to earn the third-highest share of profits at his law firm, and in light of evidence that the wife's conduct toward the husband in the latter years of their marriage harmed the husband's status at the law firm and reduced his salary and profits at the law firm, the Supreme Court providently exercised its discretion in awarding the wife 35% of the value of the husband's interest in his law practice. It was not an improvident exercise of discretion for Supreme Court not to award her prejudgment interest on her share of the husband's interest in his law practice, as there was no evidence of misconduct by the husband that deprived her of her use or share of marital property. Moreover, the expert's use of "excess earning methodology" was an acceptable means of valuing a professional partnership. The award of durational maintenance for 10 years, and the $33,838.75 as an attorney's fee was affirmed.

Where Spouse fails to offer evidence that Appreciation in separate property resulted solely from passive market forces, and it occurs during marriage, it is presumptively marital property.

In Ponzi v Ponzi, 845 N.Y.S.2d 605 (4th Dept.2007) defendant appealed from a judgment and plaintiff cross-appealed from a previously entered "decision and order." The latter document did not actually order anything despite Supreme Court's statement that it "shall constitute the Order of the Court," and no appeal lies from a mere decision. Nevertheless the Appellate Division exercised its discretion to treat the notice of cross appeal as valid and deem the cross appeal as taken from the judgment. It concluded that the court properly determined that the balance of defendant's U.S. Government Thrift Savings Plan (Savings Plan), with the exception of the amount in the Savings Plan at the time of the marriage, was marital property subject to equitable distribution. Here, the parties agreed that the amount in the Savings Plan at the time of the marriage was $9,156.87 and was defendant's separate property. Defendant failed, however, to offer evidence that the appreciation in that separate property resulted solely from passive market forces. Thus, because the appreciation occurred during the marriage, it was presumptively marital property, and defendant failed to overcome the presumption by establishing that the property was separate. The record supported the court's distribution of the pension. It was within the court's discretion to direct defendant to select a 50% survivor pay-out option for her pension and to direct that plaintiff's share of each periodic payment be calculated as though defendant has selected an option providing for the highest periodic payment during her lifetime so that plaintiff's share of that asset would not be impaired. The contention of defendant that plaintiff's share of her pension should be reduced because she was a federal employee and thus ineligible to receive Social Security benefits was not properly before the court because that contention was improperly raised for the first time in defendant's reply brief. The court's award of maintenance to plaintiff of $325 per week for five years, which was determined following a thorough analysis of the parties' finances, was not an abuse of discretion. The record established that defendant was the primary earner throughout the 10-year marriage, that plaintiff was presently unemployed and receiving a disability pension, that there was a large disparity in the parties' incomes, and that the total amount of plaintiff's pension income and the maintenance award was more than adequate to meet the reasonable needs of plaintiff, in view of his predivorce standard of living.

Abuse of Discretion to Award Life Insurance Policies to Wife Where Husband Uninsurable

In Howard v Howard, 845 N.Y.S.2d 503 (3d Dept., 2007) the parties identified and valued their marital assets by stipulation. Supreme Court, in making essentially an equal division of assets, ordered that defendant receive the cash surrender value ($104,565.25) of plaintiff's five whole life insurance policies, making no direction concerning the payment of this sum but apparently awarding ownership of these policies to defendant. Supreme Court directed plaintiff to maintain two term policies, with face amounts of $125,000 and $700,000, for the benefit of defendant until all maintenance and distributive award sums were paid. Plaintiff was also ordered to pay defendant maintenance of $6,000 per month until, absent the death of either party or defendant's remarriage, December 1, 2008, retroactive to January 9, 2004, and $37,294.19 toward defendant's counsel fees of $48,787.31. The Appellate Division found that its review of plaintiff's testimony that he was now uninsurable and wanted to retain ownership of the policies, coupled with the proposal in defendant's statement of proposed disposition that plaintiff retain ownership of these policies, clearly indicated that the parties intended that plaintiff would retain ownership. Further, as the cash surrender value of these policies was listed in the parties' stipulation of marital assets, it is these values which were subject to equitable distribution. The abuse of discretion in awarding ownership of the policies to defendant was evident if plaintiff were to suddenly die, in which event defendant would receive over $961,000 more than her insurable interest (see Insurance Law s 3205[a][1]; [b][2]). While it was possible to resolve this issue by surrendering the policies and paying the cash received to defendant, the more equitable solution under these circumstances was to increase the distributive award by $104,565.25 and direct additional payments to defendant, thus allowing plaintiff to retain ownership of the policies. When this sum is added to the approximate sums owed defendant with respect to the unpaid distributive award and maintenance at the time judgment was entered, there was no abuse of discretion in Supreme Court directing that plaintiff maintain both term policies in full force and effect for defendant's benefit. Nevertheless, defendant's interest should be limited to the amount necessary to pay any unpaid maintenance or distributive award in the event of plaintiff's death. In view of the amount of equitable distribution, the separate property of defendant and her work experience and education, Supreme Court properly acted within its discretion in awarding durational maintenance.

Denial of Counsel Fees Proper Exercise of Discretion

In Cerami v Cerami, 44 A.D.3d 815, 845 N.Y.S.2d 67 (2d Dept. 2007) Supreme Court, Westchester County (Tolbert, J.) declined to award the wife counsel fees, awarded her $3,300 per month for suitable housing for herself and the parties' child, awarded her $2,134.35 per month for child support, and awarded her durational maintenance in the sum of $1,500 per month until the earlier of the closing of the sale of the martial residence or November 30, 2006. The Appellate Divison affirmed. It found that the husband's retirement accounts constituted voluntarily-deferred income with respect to pension and retirement benefits, pursuant to Domestic Relations Law 240(1-b)(b)(5)(iii)(F), for purposes of calculating child support. However, since the court properly considered the factors set forth in Domestic Relations Law s 240(1-b)(f), in deciding to cap the combined parental income at $225,000, the court declined to disturb the child support determination. Considering, inter alia, that this was a relatively short marriage, and that the wife is capable of re-entering the work force and becoming self-sufficient, the court's limitation on the duration of the husband's maintenance obligation was proper. The denial of the wife's application for counsel fees was a provident exercise of the trial court's discretion. The wife received a $300,000 lump sum payment, as per the prenuptial agreement, as well as an award of $3,300 per month as a tax-free housing allowance to last until the emancipation of the child of the marriage, age four at the time of the judgment.

Maintenance Award Denied

In Zwickel v Szajer, --- N.Y.S.2d ----, 2007 WL 4197482 (N.Y.A.D. 3 Dept.) the parties were married in 1989. At the time of their marriage, plaintiff was 28 years old, had earned a Bachelor's degree in aviation management and flight technology and was employed as a pilot; defendant was 43 years old and also was employed in the aviation field as a first officer (copilot). The parties' first child was born in 1991. Plaintiff was furloughed from her employment from 1993 to 1994, and the parties apparently lived separate and apart in 1995, 1996 and 1997. Following a reconciliation, their second child was born in 1998, and the parties resided together until they separated again in 2001. In the interim, plaintiff was out on disability from 1997 until some point in late 2001 or early 2002, at which time she returned to work as a copilot for American Airlines. Plaintiff commenced this action for divorce in September 2003. The Appellate Division held that Supreme Court gave appropriate consideration to each of the enumerated factors in awarding maintenance. It noted that at the time the underlying action was commenced, plaintiff was 42 years old and, thus, was eligible to continue flying as a pilot for another 18 years. Defendant, on the other hand, was then 57 years old and, hence, only three years away from being ineligible to fly. Defendant testified that he had taken a job as a flight training manager in order to avoid mandatory retirement once he turned 60 years old in June 2006. Supreme Court further noted that although the parties married in 1989, their extended periods of separation resulted in them actually residing together as spouses for only roughly 10 years, thereby negating plaintiff's claim that this was a marriage of long duration. As to the issue of predivorce standard of living, the court noted that due to plaintiff's extended absences from work, during which time defendant's income was the parties' sole means of support, their predivorce standard of living was, for a substantial portion of their marriage, based upon only one income. In short, Supreme Court concluded that given the parties' respective educations, training and future employment prospects, as well as the history of their marriage and the remaining statutory factors, an award of maintenance to plaintiff was not warranted. The Appellate Division also held that the approximately $18,000 that plaintiff spent on the parties' daughter's Bat Mitzvah, was expended after the commencement of the matrimonial action and, did not qualify as a marital debt. In any event, given that defendant was neither consulted on nor invited to the celebration, and in the absence of any testimony as to the reasonableness of the sums expended, it could not say that Supreme Court erred in denying plaintiff's request for reimbursement.

Income Properly Imputed to Husband

In Calciano v Calciano, --- N.Y.S.2d ----, 2007 WL 3318042 (N.Y.A.D. 2 Dept.) the Appellate Divison affirmed a judgment which awarded the plaintiff $175,000, representing one-half of the previously-satisfied mortgage on the marital residence, and imputed an annual income to him of $90,000 for the purpose of its child support calculation. It held that the court providently exercised its discretion in awarding the wife one-half of the value of the satisfied mortgage on the marital residence based upon the wife's contributions as a spouse and homemaker and that the court providently exercised its discretion in imputing $90,000 a year in income to the husband based upon his past income and earning potential.

Marital Fault Not Relevant under EDL Except in Rare Instances in Which Misconduct Is Egregious and Shocking

In Kaur v Singh, 843 N.Y.S.2d 350 (2d Dept, 2007) the Appellate Division held that Supreme Court improvidently exercised its discretion in taking marital fault into account in awarding the plaintiff 75% of the marital assets. Marital fault is not a relevant consideration under the equitable distribution provisions of the Domestic Relations Law, except in those rare instances in which the misconduct is so egregious and shocking that the court is compelled to invoke its equitable power so that justice may be done between the parties. No such egregious misconduct was established at trial. Nevertheless, upon its independent review of the full trial record, the Appellate Division found that that there was ample evidence of economic fault on the part of the defendant to justify the distribution of assets made here (citing Blickstein v. Blickstein, 99 A.D.2d at 293, 472 N.Y.S.2d 110; see also K. v. B., 13 A.D.3d 12, 18-19, 784 N.Y.S.2d 76) and on that basis, it affirmed the equitable distribution award.

Impermissible Double Recovery Reversed on Appeal

In Bozman v Bozman, 43 A.D.3d 1345, 843 N.Y.S.2d 481 (4th Dept.2007) the Appellate Division held that Supreme Court erred in awarding a credit of $5,000 to defendant from the proceeds from the sale of a business started up during the marriage in addition to awarding him 50% of the value of that marital property, and modified the judgment accordingly. Defendant testified at the hearing that he received a $5,000 gift from his mother to start up the business, and it concluded that the $5,000 was a "voluntary contribution of [defendant's] separate property to the marital economic partnership which resulted in the creation of a marital asset" (citing Garvey v. Garvey, 223 A.D.2d 968, 971, 636 N.Y.S.2d 893). The court therefore erred in awarding a $5,000 credit to defendant in addition to an equal division of the proceeds derived from the sale of the business inasmuch as defendant thereby received an impermissible double recovery.

Courts Imputing Income must Provide a Clear Record of the Source of the Imputed Income, the Reasons for Such Imputation, and the Resultant Calculations

In Rosenberg v Rosenberg, --- N.Y.S.2d ----, 2007 WL 3197021 (N.Y.A.D. 2 Dept.) the parties were married in 1994 and had one child born in 2000. In May 2003 the plaintiff husband commenced this action for a divorce and ancillary relief. On October 16, 2003, the parties stipulated that the husband would have visitation with the child from Sunday mornings through Tuesday evenings and on Thursday evenings. This schedule was subsequently extended and remained in effect throughout the trial. After a nonjury trial, the Supreme Court awarded custody of the parties' child to the wife and directed, inter alia, that the husband shall have only supervised visitation for a minimum of three years. The Appellate Division reversed this provision noting that supervised visitation with a child is required only where it is shown that unsupervised visitation would be detrimental to the child". The flaws in the husband's character and judgment cited by the Supreme Court as necessitating supervised visitation were known by the professionals involved in the case, yet not one witness or professional report mentioned concerns with the appropriateness of unsupervised visitation. The forensic evaluator recommended that the unsupervised schedule be continued and the Law Guardian took a similar position. Recommendations of court-appointed evaluators and the position of the Law Guardian are factors to be considered and are entitled to some weight, but are not determinative. The child's therapist of two years recommended one overnight visitation and two daytime visitations per week, with a possibility of increasing visitation as the child aged. Even the wife, who had opposed overnight visitation, did not seek supervised visitation. Under these circumstances, the Supreme Court's determination to limit the husband's visitation with the child to supervised visitation in a therapeutic program selected by the wife for a minimum of three years was unsupported by the record and an improvident exercise of discretion. The matter was remitted to the Supreme Court for a new trial on the issue of visitation. The Supreme Court also erred in imputing income in its computation of the husband's child support obligation. In determining a parent's child support obligation, a court need not rely upon the parent's own account of his or her finances, but may impute income based upon the parent's past income or demonstrated earning potential. Trial courts are afforded considerable discretion in determining whether to impute income to a parent. However, they must provide a clear record of the source of the imputed income, the reasons for such imputation, and the resultant calculations. The Supreme Court imputed income of $100,000 to the husband based on its finding that the husband lacked credibility regarding his finances and the earnings of his Web site business, his lifestyle, and the implication that he maintained some connection to his formerly owned bakery, which had been foreclosed upon and sold in 2004. The imputation of income for an ongoing connection with his former bakery was unsupported by the record and wholly speculative. Since the Supreme Court failed to "specify the sources of income imputed, the actual dollar amount assigned to each category, and the resultant calculations" the Court was unable to determine what portion of the imputed income resulted from this error and the issue of child support was remitted for a new determination.

Lifetime Maintenance Award Inequitable in View Sizable Distributive Award.

In Genatowski v Genatowski 842 N.Y.S.2d 550 (2d Dept.,2007) Supreme Court awarded the wife, in effect, the sum of $962,421 as a distributive award, awarded her maintenance for a period of five years, and declined to award

her an equitable share in certain stock options. The Appellate Division increased the distributive award to $1,043,923 because of an error in computation. It held that contrary to the defendant's contention, despite the disparity in the parties' incomes, a lifetime award of maintenance would be inequitable in view of her sizable distributive award, and her equal share of the retirement assets.

Husbands Share of Enhanced Earning Capacity Reduced Where No Evidence That He Sacrificed Career Opportunities During Time Wife Was Pursuing Her Degree.

In Midy v Midy ,--- N.Y.S.2d ----, 2007 WL 3317656 (N.Y.A.D. 2 Dept.) the wife contended on Appeal that the Supreme Court erred in awarding the husband 50% of her enhanced earning capacity as a result of her attainment of a master's degree in speech pathology during the course of the marriage. The wife testified that the husband did not ever look after their child while she was studying for her master's degree, nor did he ever assist her in any way in her attainment of her master's degree. While both parties agreed that they hired a babysitter to care for the child while the wife was in school, the husband testified that, although he continued to work full time while the wife was in school, he cared for the parties' child during the time when he was not working, relieved the wife of her household chores so that she could study, maintained the household, took the child to school and activities, and assisted the wife with her studies, as he had a similar background in special education. There was no evidence that the husband sacrificed any career opportunities during the time the wife was pursuing her degree. The Appellate Division found that the husband's contributions did not warrant an award of 50% of the wife's enhanced earning capacity and that an award of 25% of the wife's enhanced earning capacity was appropriate. The Appellate court also found that property located in Coral Springs, Florida, was purchased by the parties in 1997 for $270,000 subject to a mortgage in the approximate sum of $243,000, which both parties executed. In 1998 the wife received t $500,000 as a gift from her family, which the husband conceded was her separate property. It was deposited in a joint bank account of the parties in January of 1998. On February 2, 1998, $216,238.58 was withdrawn from that account and utilized to pay off the then remaining balance of the mortgage on the Coral Springs property. Since the wife acknowledged that she deposited the funds into this joint account with the specific intention that the funds should belong to the husband in the event of her death, the Supreme Court did not err in concluding that the wife evinced an intent to change the character of such funds from separate to marital property. Since the husband conceded that the monies for the mortgage payoff originally derived from the wife's separate property, and the funds remained in the joint account for an exceedingly brief period of time (i.e., excluding the possibility of significant enhancement due to the economic partnership of the parties), it was an improvident exercise of discretion for the Supreme Court to, in essence, deny the wife a credit of $216,238.58 for her financial contribution to this asset. The Appellate Division modified the judgment of divorce to reflect this credit to the wife, after which the division of the remainder of the net proceeds of the sale was to be divided equally between the parties.

Equitable does not mean equal

In Faello v Faello, --- N.Y.S.2d ----, 2007 WL 2782997 (N.Y.A.D. 2 Dept.) Supreme Court directed that the plaintiff husband receive $200,000 from the net proceeds of the sale of the parties' residence in Florida, with 85% of the remaining balance distributed to the husband and 15% distributed to her, and awarded her maintenance of $600 per month for a period of 54 months. The Appellate Division affirmed. It held that contrary to the wife's contention, the court's distribution of the proceeds of the sale of the parties' Florida residence was proper. Equitable does not mean equal. While the Florida residence, purchased in the parties' joint names, was marital property, the husband used proceeds from the sale of his separate property to purchase the residence as well as its furnishings and incidentals. Therefore, there was no basis upon which to disturb the court's finding that the husband was entitled to the sum of $200,000 for the purchase price of the house and its furnishings and incidentals, which were derived from his separate property.

Marital Residence Generally considered Passive Asset Valued as of Date of Trial

In Newman v Newman, 825 N.Y.S.2d 714 (2d Dept, 2007) the Appellate Division pointed out that a marital residence is generally considered a passive asset which is valued as of the date of the trial. This is especially the case where the dramatic increase in the value of real property is attributable to market forces rather than the contributions of either party. It held that in calculating the distributive award, in light of the fact that the defendant was given a credit for the value of his separate property, the plaintiff was entitled to a credit for the defendant's pre-existing debt on that property, which became the marital residence.

Error to Award Retroactive Maintenance Where Not Requested Until Statement of Proposed Disposition

In Jalowiec v Jalowiec, — NYS 2d ---838 N.Y.S.2d 323 (4th Dept, 2007) the defendant contended that, because plaintiff did not request maintenance until she served a "Statement of Proposed Disposition," Supreme Court erred in making the award of maintenance retroactive to the date of commencement of the action. The Appellate Division agreed and modified the judgment accordingly.

Failure to Award Distribution of Marital Residence Remedied By Appellate Division

In O’Donnell v O’Donnell, --- N.Y.S.2d ----, 2007 WL 1631270 (N.Y.A.D. 2 Dept.) Supreme Court, after a nonjury trial, failed to award equitable distribution of the marital residence, awarded the wife exclusive ownership of the marital residence, directed the husband to pay child support of $2,083 per month, directed him to pay 60% of the children's tuition, school fees, and "extraneous sporting/recreational expenses," and directed him to pay 60% of the wife's attorneys fees. The Appellate Division held that where, as here, both spouses equally contribute to a marriage of long duration, the division of marital property shall be distributed equitably between the parties. The husband was entitled to a 50% share of the value of the marital residence. It directed that upon remittal, the court should also determine the net value of the marital residence, as of the date of trial, crediting the wife for her payments of principal on the mortgage for the property, and that the court should also determine how the marital residence shall be distributed. The Appellate Divison held that the trial court improperly found, in effect, that the husband’s law degree and license had no value for purposes of equitable distribution. Based on the record, the law degree and license together should have been valued in the amount of $150,000 and the wife should have been awarded 30% of that value to be credited from the husbands share of the proceeds from the equitable distribution of the marital residence. The wife’s limited notice of cross appeal precluded review of the issue of the timing of the distribution of her share of the husband's retirement plans and the court's failure to award her 100% of her attorneys' fees. (see Boyle v.. Taylor, 255 A.D.2d 411).

Clear and Unambiguous French PreNuptual Agreement Upheld to Deny Wife Equitable Distribution

In Van Kipnis v Van Kipnis, --- N.Y.S.2d ----, 2007 WL 2003419 (N.Y.A.D. 1 Dept.), the Plaintiff wife and defendant husband were married in Paris, France, in 1965. Prior to the ceremony, and at the request of the wife, the parties agreed to execute a "Contrat de Mariage" (Contract), which is a form of prenuptial agreement under the French Civil Code. The expressly stated purpose of the Contract was to opt out of the "community property regime," which is the custom in France, in favor of a "separation of estates" property regime. The first article of the Contract, which is titled "MARITAL PROPERTY SYSTEM," provided: "The future spouses declare that they are adopting the marital property system of separation of estates, as established by the French Civil Code. Consequently, each spouse shall retain ownership and possession of the chattels and real property that he/she may own at this time or may come to own subsequently by any means whatsoever. They shall not be liable for each other's debts established before or during the marriage or encumbering the inheritances and gifts that they receive. The wife shall have all the rights and powers over her assets accorded by law to women married under the separate-estates system without any restriction." Shortly after the marriage the parties moved to New York, where they resided throughout their 38-year marriage. The husband acquired liquid assets of approximately $7 million and the wife of approximately $700,000-$800,000 The parties kept their assets completely separate throughout the course of their marriage. However, the parties jointly owned a country home in Lenox, Massachusetts, valued at $625,000, and a cooperative apartment at 860 Fifth Avenue, in Manhattan valued at $1.8 million. At the hearing, the wife testified that the Contract was executed for the sole purpose of opting out of the community property system of France, and instead adopting a complete separation of estates, whereby each party could not be held liable for the other's debts. She also admitted, however, that the husband executed the Contract at her insistence, that he had no money at the time of the marriage and that she had never moved to set the Contract aside during the marriage. The husband offered a similar understanding of the Contract. Expert testimony established that article 1536 of the French Civil Code provides different choices of matrimonial regimes; that by signing the Contract the parties opted out of France's community property regime and chose a regime of separate property; that the legal effect of this selection was that each

spouse retained the unfettered right to administer, enjoy and freely dispose of his or her separate property throughout the marriage and continuing through its dissolution; and that divorce is never mentioned in a marriage contract. The Referee upheld the Contract., finding that "it is clear that these parties entered into a prenuptial agreement ... whichg overned the economics of their 38 year marriage, and is likewise applicable in the circumstances of their divorce." Thus, the Referee determined that the parties were to retain ownership of the assets held in their respective names. With respect to the jointly held properties, the Referee recommended that wife be awarded the co-op apartment and reimbursed $75,000 for repairs and furnishings therein, and that the husband be awarded the Massachusetts country home. The Referee also ruled that the Contract did not constitute a waiver by the wife of the right to receive maintenance. In determining the amount and duration of maintenance, the Referee considered, inter alia, the marital standard of living, which it described as "relatively modest," in arriving at a sum of $7,500 per month, payable until either the husband or wife dies or the wife remarries. In addition, after subtracting the amount of fees allegedly attributable to the wife's challenge to the Contract, which it found were not compensable, the Referee awarded the wife an additional $92,779 in attorneys' fees. On appeal, the wife argued that the enforceability of the Contract was irrelevant since, even if enforceable, it was not applicable to this divorce proceeding, since the intent was to shield each spouse's assets from the other's creditors during the marriage, and not to govern the distribution of property upon divorce. She noted that although the Contract specifically provides that each spouse "shall not be liable for each other's debts established before or during the marriage," it makes no mention of the disposition or distribution of property in the event of divorce, and contains no express waiver of property rights if the parties decided to divorce. She also noted that both parties testified that neither of them understood the Contract as having any relevance to divorce. The First Department held that because the Contract unambiguously provides for separate ownership of property and extrinsic evidence should not have been considered to create an ambiguity or vary its terms, it would affirm that portion of the order which found the contract to be enforceable and applicable. It rejected the wife's argument that the Contract should not be enforced

because it is not "an agreement for the disposition of ... property" within the meaning of Domestic Relations Law [DRL] 236(B)(5). Although the wife was correct that the Contract was not an agreement for the disposition of property, DRL

236(B)(3) authorizes enforcement of agreements that include "(2) provision for the ownership, division or distribution of separate and marital property" (emphasis added). Moreover, DRL 236(B)(1)(d)(4) defines "separate property" as including

"property described as separate property by written agreement of the parties." Thus, the DRL specifically authorizes agreements to treat what might otherwise be marital property as separate property for purposes of equitable distribution. This

is precisely what occurred in this case, where the Contract described each spouse's property held at the time of marriage or acquired thereafter as separate property. The court's award of $7,500 per month in maintenance, which would result in an approximate annual pre-tax incomes of $126,000 for the wife and $335,000 for the husband, was a proper exercise of discretion as was the $92,779.57 in attorneys' fees to the wife. Although the wife requested an additional $177,000 in fees (the husband had already paid $160,000), the Referee correctly ruled that under DRL 237 the wife was not entitled to fees incurred in challenging the enforceability of a prenuptial agreement. Moreover, because the legal bills submitted by the wife's attorney failed to clearly delineate those legal services that were unrelated to the wife's challenge to the agreement, and thus compensable under DRL 237, the court properly exercised its discretion in awarding the amount that it did.

No Basis To Disturb Award Based on Credibility and Conduct in Litigation.

In Saleh v Saleh, 836 N.Y.S.2d 201 (2d Dept., 2007) the Appellate Divison held that the trial court "is vested with broad discretion in making an equitable distribution of marital property" and unless it can be shown that the court improvidently exercised that discretion, its determination should not be disturbed. Based upon consideration of each party's credibility and the particular facts presented in this case, including the defendant's failure to comply with court-ordered demands for discovery regarding the subject businesses, his failure to pay for a court-appointed neutral appraiser to appraise the businesses, as directed by the court, and his invocation of his Fifth Amendment privilege against self-incrimination on several occasions in response to questions regarding unreported income and the finances of the businesses, the Appellate Division perceived no basis for disturbing the trial court's equitable distribution.

Spouse Not Entitled to Portion of Equity in Separate Marital Residence Gained Through Reduction in Mortgage Where Rental Income Paid Mortgage. Income Imputed Improperly.

In Burtchaell v Burtchaell,--- N.Y.S.2d ----, 2007 WL 2050797 (N.Y.A.D. 3 Dept.) the parties were married in 1994 and had one child (born in 1997). Plaintiff commenced the action in 2004. The Appellate Division held that Supreme Court did not abuse its discretion in determining the amount of maintenance and awarding it for two years. The parties were in their early 40s, plaintiff had prior back problems, defendant was disabled due to seizures, anxiety and depression and their son had multiple disabilities. Plaintiff was employed and also received minimal income from his self-run business, although the court did not quantify the exact amount of such income. Defendant received Social Security disability benefits and rental income from apartments in the marital residence, which the court found to be separate property. Although defendant has been disabled since 1997 and took care of the parties' son, she previously worked full time and she acted as a bookkeeper for plaintiff's business during the marriage notwithstanding her disability and the child's disability. The record did not reveal the extent of her disability, but did demonstrate her ability to work at home as a bookkeeper.

Because it was impossible to determine how much income plaintiff reaped from his business, the court found that the amount was minimal and could be adequately absorbed by simply declining to deduct plaintiff's $200 per week maintenance obligation from his gross income prior to determining the child support award. That maintenance obligation should have been deducted to determine plaintiff's child support income (see Domestic Relations Law s 240[1-b][b][5] [vii][C] ). Although the trial court has considerable discretion in fashioning a support award, including the imputation of income to a party for support purposes the court erred in the method of calculating support. While both approaches may appear to result in the same amount of child support, the proper method is to add in $200 per week as income imputed to plaintiff from his business, then subtract his $200 per week maintenance obligation. Plaintiff's 17% basic child support obligation considering his 60% contribution to the combined parental income gave rise to a monthly award of $525.

The Appellate Division held that Plaintiff was not entitled to a portion of the equity in the marital residence gained through a reduction in the mortgage balance. The residence was defendant's separate property, having been acquired prior to the marriage. If marital assets are used to reduce one party's separate indebtedness, the other spouse can recoup his or her equitable share of the expended marital funds. Both parties testified that rental income from apartments on the property produced nearly enough money to pay the mortgage, and there was no proof that any mortgage payments were made using marital funds. Under these circumstances, Supreme Court appropriately refused to allow plaintiff to recoup any portion of the reduction of the mortgage debt.

Supreme Court found that plaintiff's business was marital property. The court found that the business had minimal income, so it awarded the business to plaintiff to offset a $12,000 credit from the marital residence. Neither party submitted an appraisal or valuation of the business. Tax returns showed that the income from the business in the year prior to commencement of the action was basically cancelled out by debts, expenses and depreciation, resulting in no taxable income. The business owned some assets, such as a truck and trailer, but the proof regarding the equity in those assets was slim. Granting deference to the court's analysis of the weight of the evidence, as the trier of fact, the Appellate Division would not disturb its finding that defendant is entitled to $12,000 as her equitable portion of the business.

OTHER DECISIONS OF INTEREST

Obligation to Provide for Future College Expenses Not Subject to Deviation Rules

In Cimons v Cimons, --- N.Y.S.2d ----, 2008 WL 2457243 (N.Y.A.D. 2 Dept.) the Second Department in an opinion by Justice Angiolillo, held that, under the circumstances presented here, the obligation to provide for the future college expenses of the children was not part of the parties' basic child support obligation and therefore was not subject to the CSSA requirement that any deviation from statutorily-mandated child support obligations must be recited and explained in a stipulation of settlement. Even though the parties violated the CSSA by failing to recite and explain in their stipulation why they deviated from CSSA standards in providing basic child support, and the basic child support provisions were properly vacated as a consequence, the provision concerning future college expenses survived the vacatur, and was enforceable.

The parties entered into a stipulation of settlement, which was incorporated but not merged in a judgment of separation. Subsequent to the entry of the judgment, the father moved to vacate the child support and related provisions of the stipulation, alleging that the stipulation failed to comply with the "opt-out/deviation" provisions of the CSSA contained in Domestic Relations Law 240(1-b)(h). The Supreme Court determined, in effect, that the parties' agreement deviated from the provisions of the CSSA with regard to the calculation of "basic child support." Since the parties failed to comply with the provisions of Domestic Relations Law 240(1-b)(h), those basic child support provisions were not enforceable, and the Supreme Court vacated those provisions of the parties' stipulation relating to their basic child support obligation for their three children, ultimately scheduling a hearing for a calculation of basic child support pursuant to the CSSA. However, Supreme Court denied the father's motion to vacate the separate provisions of the stipulation that related to the parties' agreement to

provide for their children's future college expenses.

The Appellate Division affirmed. It noted that a parent has an obligation to provide support for his or her child's basic needs, an obligation which is addressed in Domestic Relations Law s 240(1- b)(c)(1), (2). Unlike that basic obligation, support for a child's college education is not mandatory. Absent a voluntary agreement, a parent might be required to provide support for his or her child's attendance at college, but the determination of that obligation is dependent upon the exercise of the court's discretion in accordance with Domestic Relations Law s 240(1- b)(c)(7).

Domestic Relations Law 240(1-b)(h) requires that any agreement or stipulation voluntarily entered into between the parties, and presented to the court for incorporation in an order or judgment, must include provisions: (1) stating that the parties have been advised of the provisions of the CSSA; (2) stating that the basic child support provisions of the CSSA would presumptively result in the determination of the correct amount of child support to be awarded; (3) stating what the amount of basic child support would have been if calculated pursuant to the CSSA, if the parties' stipulation or agreement deviates from the basic child support obligation; and (4) setting forth the parties' reason or reasons for deviating from the CSSA calculation, if they have chosen to deviate. The requirements of Domestic Relations Law s 240(1- b)(h) may not be waived by

either party or by counsel.

The Appellate Division noted that in contrast to the add-ons for child care expenses and future reasonable health care expenses, which must be awarded and prorated in the same proportion or percentage as each parent's income bears to the combined parental income, the add-on for educational expenses is within the court's discretion, both as to whether an award of such expenses is to be made in the first instance, and the parties' share of any amount awarded. Domestic Relations Law 240(1-b)(c)(7).

Where the parties' stipulation or agreement fails to comply with the requirements of Domestic Relations Law s 240(1-b)(h), it is fundamental that the basic child support provisions of the agreement are invalid and cannot be enforced. That

portion of the agreement must be set aside and the parties' basic child support obligation must be recalculated through the application of the CSSA. Nonetheless, the invalidity of the basic child support obligation, due to a deviation from the CSSA standards without full compliance with Domestic Relations Law 240(1-b)(h), does not necessarily require that the entire stipulation be vacated. That a portion of an agreement may be invalid and unenforceable does not necessarily preclude the enforcement of other portions of an agreement. (Ferro v. Bologna, 31 N.Y.2d 30).

The Court held that the determination as to which additional aspects, if any, of the parties' stipulation must be vacated along with the basic child support provision depends on the circumstances of the particular case and the nature of the obligations addressed in the other provisions of a stipulation. Some provisions may be so directly connected or intertwined with the basic child support obligation that they necessarily must be recalculated along with the basic support obligation. Unlike child care expenses and unreimbursed health care expenses, education expenses are not directly connected to the basic child support calculation. Initially, education expenses differ from these other expenses in that, in the absence of an agreement to pay education expenses, the determination as to whether or not such expenses will be paid is within the court's discretion (see Domestic Relations Law 240[1-b][c][7] ), while child care and unreimbursed health expenses are mandatory. Also, education expenses differ in that such expenses are not necessarily prorated in the same proportion or percentage as each parent's income bears to the combined parental income.

The Court held that the entirety of the stipulation should be considered in determining whether the parties' agreement evinces that trade-offs were made which involved the basic child support figure. In such a situation, expenses that are not directly connected to the CSSA calculation, or even to child support, may be so closely intertwined with the basic child support provision as to require vacatur. This case fell within the ambit of cases that have clearly stated that the tuition expense aspect of a college education is distinct from basic child support.

The parties' stipulation, insofar as it pertained to their support for their children's attendance at college, recited as follows: "The parties further acknowledge, each to the other, that it is their anticipation that each of their children attends college. And in this regard, the parties agree to contribute pro rata to income to the minimum of a SUNY education. That is State of New York education for a New York State resident for each child and shall contribute more than that minimum, if possible, based upon their respective financial circumstances at the time each child makes application to college. College expenses with respect to the parties' obligation, to pay for same pro rata to income is defined as including but not limited to tuition, room and board, mandatory books, supplies and fees, pre-college testing classes and actual testing, such as the SATs, scholastic aptitude tests and reasonable number of applications to colleges for purposes of the child or children reviewing campuses for purposes of making a final decision with respect to the selection of college."

The court held that to the extent that the commitment to meet future college expenses addressed room and board, the agreement did not deviate from the CSSA as it provided that the parties will contribute to such expenses pro rata to income. The stipulation also included extensive provisions as to how the parties are to deal with various custodial funds that had been earmarked for college education expenses, including a recital that such funds would be utilized in the first instance before

triggering the parties' obligation to contribute to college expenses proportionally based on their income.

There was nothing in the record that would support a finding that the father agreed to pay a share of college expenses as a trade-off against some other expense. When the parties agreed to equitable distribution and traded off certain assets, the stipulation directly addressed those trade-offs. Thus, the wife received sole title to the marital residence in exchange for waiving any claim to the husband's pension, IRA, or deferred-compensation account. Similarly, the wife waived any claim to certain stock in exchange for the husband's waiver of any claim to a joint bank account. Additionally, the provisions of the parties' stipulation regarding college expenses were distinguishable from those provisions of the stipulation based upon the calculation of basic child support. In particular, the stipulation provided: "Mr. Cimons shall pay child support for the benefit of the children and to the age of 21 or 22, if in college." The father's agreement to support his children and contribute to their college education expenses beyond the age of 21 years inured primarily to the benefit of the three children. As it is the intent of the CSSA to protect the children, to the extent possible, from the economic consequences of their parents' divorce or separation, it would seem particularly unjust to allow the father, whose adjusted income, in 2005, after deduction of all mandatory deductions including his maintenance obligation, was reported as $130,000, to wield noncompliance with the CSSA as a sword to eviscerate his commitment to provide his children with support for their college education.

Failure to Raise Defect in Child Support Agreement by Way of a Timely Objection Not Fatal.

In Matter of Usenza v Swift, --- N.Y.S.2d ----, 2008 WL 2278869 (N.Y.A.D. 3 Dept.) by consent order entered in 2001, the parties were awarded joint legal and physical custody of the child. At a support hearing held in March 2005, the parties orally agreed that the father would pay $750 per month in child support to the mother, retroactive to September 2004. A subsequent hearing was held in July 2005 to address an administrative adjustment to the existing support order, which resulted in an amended order of support. In January 2006, the father sought a modification of the July 2005 order on the ground that it failed to comply with the Child Support Standards Act and that a change of circumstances had occurred. A Support Magistrate issued a June 2006 order dismissing the father's modification petition, finding that the father's failure to file written objections from the July 2005 support order precluded his argument that it violated the CSSA and that he failed to establish a change of circumstances. Family Court denied the father’s objections and he appealed. The Appellate Division held that the July 2005 order of support had to be set aside because the parties' agreement to deviate from the CSSA failed to comply with the requirements of Family Ct Act 413(1)(h). This provision requires that all such agreements or stipulations contain an acknowledgment that the parties have been advised of the CSSA, a statement "that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded" and a specification as to what the amount of support would have been under the statute. The requirement that the agreement so provide cannot be waived by either party" and, therefore father's failure to raise this defect by way of a timely objection to the July 2005 order was not fatal. The parties appeared before the Support Magistrate, unrepresented by counsel, and engaged in an oral colloquy whereby the father agreed to pay $750 per month in child support. In so doing, the Support Magistrate advised the father that the amount he would be required to pay under the "[g]uidelines" would be $425 per month. However, in its subsequent findings of fact and order incorporating the oral stipulation, the Support Magistrate correctly found that the father's basic child support obligation under the CSSA was $398 per month. The record of the oral stipulation was devoid of evidence that the parties were advised of the provisions of the CSSA, and the Support Magistrate's mere reference to the "[g]uidelines" was insufficient to satisfy this statutory directive. The stipulation failed to establish that the parties were apprised that the application of the statute "would presumptively result in the correct amount of child support to be awarded". Thus, the omission of these statutory catechisms rendered the stipulation and resulting order unenforceable and the court was required to disregard it and address the support issue de novo. The matter was remitted to Family Court to determine the amount the father must pay in child support pursuant to the provisions of the CSSA. The court noted that while the CSSA prohibits a court from entering a final order of child support unless an unrepresented parent has received a copy of the child support standards chart, the record did not reflect that the father received such chart prior to the entering of the order. Since the July 2005 order of support was invalid since its inception, it vacated Family Court's finding that the father was in willful violation.

Proper to Move to Enforce the Provision of Stipulation Requiring Transfer of IRA Account

In Rawlings v Rawlings, --- N.Y.S.2d ----, 2008 WL 2278869 (N.Y.A.D. 3 Dept.) the plaintiff husband and the defendant wife executed a stipulation of settlement on August 3, 2001, settling all issues in the case. With respect to equitable distribution, the stipulation provided, inter alia, that the plaintiff possessed a First Trust IRA account with a stated value of $75,000, but that the assets held therein were subject to change and were expected to be revalued to approximately $45,000 to $50,000. The stipulation further provided that the plaintiff was obligated to transfer the account to the wife "[w]ithin 30 days of the execution of this agreement." The parties' stipulation of settlement was incorporated but not merged in their subsequent judgment of divorce, entered December 13, 2001, which expressly directed them to comply with its terms. However, notwithstanding repeated requests by the wife and her counsel, the plaintiff failed to transfer the subject account. Indeed, he did not tender it to her until several years following the execution of the stipulation, by which time it had become worthless. The defendant subsequently moved, inter alia, to enforce the IRA transfer provision, to recover the reduction in value of the account between the time it should have been transferred by the plaintiff and the time it actually was transferred, and

for an award of an attorney's fee. The Supreme Court denied those branches of the defendant's motion. The Appellate Division reversed. It found that the defendant properly moved to enforce the provision of the stipulation requiring the transfer of the subject account. Since the account was now worthless she was also entitled to recover the reduction in value, if any, of the account since the time the plaintiff originally was required to transfer it to her.

On Motion to Dismiss at Close of Petitioner's Proof, Court must Accept Petitioner's Evidence as True, Afford Petitioner Every Favorable Inference and Resolve All Credibility Questions in Petitioner's Favor

In Matter of David WW v Laureen QQ, --- N.Y.S.2d ----, 2007 WL 2002451 (N.Y.A.D. 3 Dept.) Petitioner filed a custody modification petition as a result of Jacob's unacceptable academic performance, his desire to live with petitioner, his poor relationship with respondent's husband, and an incident where respondent's husband allegedly assaulted Jacob and respondent had Jacob removed from the home by police and taken to the hospital for a mental health evaluation. Respondent filed a cross petition to modify visitation. At a hearing on the petitions, after petitioner presented eight witnesses and two of respondent's witnesses testified out of order, petitioner rested. Respondent moved for a directed verdict. Family Court disregarded Jacob's testimony and any testimony based on information received from him, determining that Jacob was not a reliable witness. Without this testimony, the court determined that petitioner failed to present a prima facie case and dismissed his petition. Respondent then rested. Family Court granted respondent sole legal custody of both children. The Appellate Division reversed on the law. It held that when deciding a motion to dismiss at the close of a petitioner's proof, the court must accept the petitioner's evidence as true and afford the petitioner every favorable inference that could reasonably be drawn from that evidence, including resolving all credibility questions in the petitioner's favor . At the close of petitioner’s case the court acknowledged that it was resolving credibility questions in a manner that would require it to disregard large portions of testimony offered on petitioner's case. Thus, the court did not adhere to the proper standard when considering the motion. It found that Family Court should have denied respondent's motion to dismiss the petition because petitioner presented sufficient prima facie evidence of a change in circumstances and a need to modify custody to ensure the child’s best interests . It remitted for further proceedings on the custody and visitation petitions before a different judge.

Mother Equitably Estopped From Challenging Surrender in Adoption Proceedings

In Matter of Female Infant B, --- N.Y.S.2d ----, 2008 WL 1902483 (N.Y.A.D. 1 Dept.) then Appellate Division, First Department applied the doctrine of equitable estoppel to prevent the effect of an invalid surrender. Female Infant B., the subject child of this private placement adoption, was born November 9, 2003. The following day, Infant B. was placed in the care of petitioners, the adoptive parents, with whom she has continuously lived since that time. On November 18, 2003, a surrender agreement was executed by respondent, the biological mother, and, on January 30, 2004, petitioners filed a petition for adoption. Respondent was served approximately 26 months later after a search to ascertain her whereabouts. On May 15, 2006, respondent filed a document stating that she was revoking her consent to the adoption, and she subsequently filed a writ of habeas corpus seeking the return of her child, which the court converted into an order to show cause. At a hearing on the order to show cause, respondent and the adoptive mother testified, as did the doctor who delivered Infant B. and the notary public who witnessed the execution of the surrender agreement. A friend of respondent was called as a rebuttal witness. After the hearing, the court credited the adoptive mother's testimony that respondent intended to give up the child for adoption, but found that the surrender agreement was invalid because some of the requirements of Domestic Relations Law 115-b had not been met. These included the absence of 18-point type, which the court deemed insignificant, and, more substantively, the failure to give notice that if petitioners were to contest respondent's revocation, Infant B. would not necessarily be returned to respondent and a hearing could be directed as to the best interests of the child. The court also found a significant defect in the document's failure to advise respondent of her right to an attorney and counseling, as required by Domestic Relations Law 115-b(4)(a)(v). The court concluded, however, that a best interests hearing was not required because there was sufficient credible testimony to make a finding of abandonment pursuant to Domestic Relations Law 111(2)(a). In making that finding the court concluded that respondent's contacts with the child in the months after the delivery were insubstantial and ineffectual, and that she had failed to offer financial support or take timely legal action to oppose the adoption. The Appellate Division affirmed. It found that the surrender agreement did not comply with Domestic Relations Law 115-b. Aside from the improper-sized type, which, if it were the only deficiency, could be overlooked, the document failed to advise respondent of her right to an attorney and to counseling, or to notify her that even if she revoked her consent, and petitioners objected, she would not necessarily regain custody of the child. While not every violation of Domestic Relations Law s 115-b will necessarily invalidate a consent the substantial defects here include ones designed to ensure that respondent was fully informed of the consequences of the consent and it was not clear that she also was aware that even a revocation within 45 days would not guarantee the return of her baby, or that she might first have to prevail at a hearing. Nevertheless, it did not need not determine whether these defects rendered the surrender agreement invalid as it concluded that respondent's inactivity for 30 months estopped her from opposing the adoption. Infant B. was born on November 9, 2003. Respondent refused to sign the surrender agreement at that time because she claimed she wished to consult with an attorney. She signed the agreement nine days later. During the intervening time period, the baby had resided with petitioners, and the child lived with them ever since. Respondent made no attempt to have the child returned to her, either during the nine days before she signed the agreement or during the period prior to the date the petition was served on her on April 6, 2006, 2 1/2 years after she signed the surrender agreement. Although she testified that she conferred with an attorney, she took no subsequent steps to revoke her consent, or even to seek visitation. Respondent also admitted that she knew she had 40 to 45 days from the signing of the surrender agreement to revoke her consent. The Appellate Division stated that "Equitable estoppel is commonly invoked in matters of paternity, child custody, visitation and support ... [but] will be applied only where its use furthers the best interests of the child or children who are the subject of the controversy" (Matter of Charles v. Charles, 296 A.D.2d 547, 549 [2002] ). It is clearly not in the child's best interests to be removed from the only parents she has ever known. As has been observed, "[t]he Legislature enacted Domestic Relations Law 115-b to provide a legal framework within which future adoptions can be undertaken with reasonable guarantees of permanence and with the humane regard for the rights of the child, the biological parents and the adoptive parents" (De Filippis, 217 A.D.2d at 147). Although the surrender agreement is not in compliance with all of the statutory requirements, the same public policy concerns are no less applicable. Permitting respondent, who has not contributed any support for the child, to seek a revocation at such a late date does not further these policy goals. Furthermore, as in De Filippis, the surrender agreement here was executed after the birth of the child, when respondent had sufficient opportunity to reflect on whether she wished to cede her parental rights. As was noted in De Filippis, a prebirth consent is less likely to be the result of a fully deliberative act.” The court held that the 30 month hiatus in seeking a revocation, the failure to provide support and the best interests of the child, compelled the conclusion that respondent was estopped from challenging the surrender agreement.

Provisions in Settlement Agreement Which Govern Award of Attorney's Fees, Rather than Statutory Provisions, Control.

In Berns v Halberstam, --- N.Y.S.2d ----, 2007 WL 4465050 (N.Y.A.D. 2 Dept.) the parties settlement agreement was incorporated but not merged into their judgment of divorce. The judgment of divorce stated that the father would have scheduled visitation with the parties' two daughters pursuant to the agreement. Article XXIV of the agreement provided that each party would pay his or her respective attorney for the rendition of services in connection with the agreement and the representation of him or her in "any lawsuit pending or to be commenced by and between the parties." Article XXVI set forth two specific circumstances where one party must pay for the other party's attorney's fees. The mother commenced proceedings for modification of the visitation provision, seeking to suspend the father's right to alternate weekend visitation. The parties settled these proceedings on the record, whereby the father's visitation rights were modified. The mother moved for an award of an attorney's fee, not pursuant to Article XXVI of the agreement, but rather pursuant to Family Court Act 651 and Domestic Relations Law 237(b). Family Court granted the mother's motion for fees related to legal work performed on two dates where the father caused unnecessary delay in the proceedings. The Appellate Division reversed. It held that where the parties have agreed to provisions in a settlement agreement which govern the award of attorney's fees, the agreement's provisions, rather than statutory provisions, control. Viewing Articles XXIV and XXVI in conjunction with each other, the agreement was clear and unambiguous. Article XXIV was a general waiver of attorney's fees, each party accepting responsibility to pay their respective counsel, and Article XXVI set forth two specific exceptions to the general waiver. The modification petition did not give rise to one of the two specific instances where an award of attorney's fees would be contractually required under Article XXVI. The modification petition was subject to the general waiver provisions of Article XXIV, which precluded an award of attorney's fees.

Court Had Discretion to Admit Expert's Testimony and Consider One-sidedness of Evaluation When Determining Weight to Accord Testimony

In Matter of Stellone v Kelly, --- N.Y.S.2d ----, 2007 WL 4197379 (N.Y.A.D. 3 Dept.), the mother petitioned seeking termination of the grandmother's visitation and, soon thereafter, the grandmother filed a violation petition. The Appellate Division held that Family Court did not err in considering the testimony of the grandmother's expert witness. The grandmother's disclosure responses included the witness, the basic area of her testimony and the general basis for that testimony. Based upon

the failure to disclose the expert's report, the court precluded that document. While opinions and conclusions of a psychologist may be discounted or rendered valueless if all involved parties are not interviewed or evaluated, here, the mother was given an opportunity, but declined, to meet with the psychologist or allow the child to do so. The expert, who acknowledged the limitations of her opinions and recommendations due to her inability to meet with the mother or child, relied not only upon her evaluation of the grandmother, but also a review of voluminous court filings and transcripts, correspondence between the mother and grandmother, and approximately seven hours of taped telephone conversations between the grandmother and child. The court had the discretion to admit the expert's testimony and consider the one-sidedness of the evaluation when determining what weight to accord that testimony. Family Court properly continued the grandmother's visitation, with the addition of counseling. Even in a grandparent visitation case, when a prior order has been entered and a party is seeking to modify it, that party bears the burden of proving a change in circumstances sufficient to warrant a modification of the

visitation order.

Error to Award Joint Custody of Son From Previous Marriage. Equitable Estoppel Not Applicable

In Gulbin v Moss- Gulbin, --- N.Y.S.2d ----, 2007 WL 4197590 (N.Y.A.D. 3 Dept.) the Appellate Division held that Supreme Court erred by awarding plaintiff joint custody of her son from a previous relationship. When the parties married, defendant was already the biological mother of two sons, one of whom was now emancipated. The parties were the biological parents of two more sons. Supreme Court, in reliance upon a long-standing parent/child relationship between plaintiff and defendant's second son, awarded joint custody to the parties with the children's principal residence being with defendant, subject to scheduled visitation rights for plaintiff. Notwithstanding a close and loving relationship, a nonbiological parent does not have standing to request custody or visitation when a biological parent is fit and opposes shared custody or visitation (see Matter of Alison D. v. Virginia M., 77 N.Y.2d 651, 655-657 [1991]; Matter of Multari v.Sorrell, 287 A.D.2d 764 [2001]; Matter of Rose v. Walrad, 278 A.D.2d 537, 538 [2000]; Matter of Cindy P. v. Danny P., 206 A.D.2d 615, 616 [1994], lv denied 84 N.Y.2d 808 [1994] ). Despite these cases, plaintiff, in reliance upon Jean Maby H. v. Joseph H. (246 A.D.2d 282 [1998] ), asserted that defendant was equitably estopped from asserting that he lacked standing to seek custody of and visitation with her second son. The Third Department held that "The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted" (citing Matter of Shondel J. v. Mark D., 7 N.Y.3d 320, 326 [2006] ). Here, the doctrine was inapplicable. The record revealed that shortly after the parties married, and while this son was only three or four years of age, defendant informed him that plaintiff was not his biological father. Moreover, defendant refused to consent to his adoption by plaintiff precisely for the reason that it would impact on the issue of custody and visitation in the event of a divorce. Under these circumstances, it could not be concluded that defendant led plaintiff to form a reasonable belief that her claim to custody of her second son would not be asserted. Because defendant refused to stipulate as to the custody of this child and plaintiff admitted that defendant was a fit parent, Supreme Court erred in reaching this issue.

Failure of Employee of Husband's Attorney's Law Firm to Serve and File Papers Which Were Timely Prepared Constituted Reasonable Excuse for His Default

In De Bartolo v De Bartolo, --- N.Y.S.2d ----, 2007 WL 4465526 (N.Y.A.D. 2 Dept). pursuant to a stipulation the wife submitted her application for an attorney's fee on or about August 14,2005. In her application, she claimed that she had paid her former attorney the sum of $7,770, and her appellate attorney the sum of $3,000, and still owed that attorney the sum of $4,000 and her former attorney an unspecified amount. She provided no records of her alleged payments or dates of her alleged payments. She submitted an affirmation from the former attorney dated November 16, 2000, and no affirmation from her appellate attorney. On August 30, 2005, the parties stipulated to extend the time for the husband to respond to the wife's application until September 14, 2005. In an affidavit sworn to on August 31, 2005, the husband claimed that the wife "failed to provide this Court with credible proof of her legal fees" on the ground that she failed to provide itemized bills from her former attorney or appellate attorney or other credible proof of payment. He noted that the wife had filed for bankruptcy in or about 2003, and that her debts to her former attorney and her appellate attorney therefore may have been discharged. The husband claimed he could not afford to pay the wife's attorneys' fees since he still owed his own attorney the $4,000 and paid the wife $12,000 per year in child support. In an order dated December 8, 2005, the Supreme Court granted the wife's application for an attorney's fee of $19,570, holding that the husband "never submitted opposition to the motion and is in default." The husband moved to vacate the order entered upon his default based upon law office failure, i.e., that a paralegal in the husband's attorney's law firm failed to properly diary the date for submission of the opposition papers completed on August 31, 2005, and thereafter left the firm's employ. In support of his motion the husband submitted the opposition papers that had been completed and notarized on August 31, 2005, and reiterated that "there is reason to believe that the wife discharged all of her debts to her prior attorneys when she filed for bankruptcy several years ago." In opposition to the motion, the wife's attorney stated that the plaintiff's claim of law office failure "strains credulity." The wife's attorney did not address the merits of the husband's contentions or the alleged discharge in bankruptcy. Supreme Court denied the husband's motion. The Appellate Division reversed. It held that the husband's claim of law office failure was detailed and corroborated by the fact that the husband's opposition papers were completed and notarized on August 31, 2005. The failure of an employee of the husband's attorney's law firm to serve and file papers which were timely prepared constituted a reasonable excuse for his default. Further, the default was an isolated instance at the conclusion of a lengthy matrimonial action. Moreover, the husband's claim that the wife's debts to her former attorney and her appellate attorney were discharged in bankruptcy was not denied by her, and her proof was plainly insufficient. The affirmation from the wife's former attorney was dated nearly five years prior to her application for counsel fees, and no affirmation whatsoever was submitted by her appellate attorney. It reversed the order remitted for a new determination of the issue of an award of an attorney's fee.

June 16, 2008

Not Improper to Impute Income Based upon Father's Self-reported Financial Affidavit

In Barnett v Ruotolo, 851 N.Y.S.2d 519 (2d Dept. 2008) the Appellate Division held that in exercising the discretion to impute income to a party, a Support Magistrate is required to provide a clear record of the source from which the income is imputed and the reasons for such imputation. The father did not testify and chose to rely on the financial documentation he had submitted, which contained considerable discrepancies. The father's financial documentation indicated that his monthly income was only approximately one-third of his stated monthly expenses, and no evidence was submitted to show that these monthly expenses were not being paid in a timely manner. Accordingly, the Family Court did not improvidently exercise its discretion in imputing income based upon the father's self-reported financial affidavit for the purpose of calculating his child support obligation.

Proper to Impute Income by Averaging What Was Reported on Most Recent Individual Tax Returns

In re Y.W., v. T-T.J., ---- N.Y.S.2d ----, 2008 WL 222339 (N.Y.A.D. 1 Dept.) the Appellate Division reversed a child support order of $3,288 per month and remanded for recalculation of the basic child support obligation. It held that since each party claimed that the income as reflected on the other's tax return was not accurate, and the parties were unable to produce sufficient evidence to otherwise convince the support magistrate about their respective incomes, the magistrate properly decided to impute income to the parties by averaging what was reported on their most recent (2004 and 2005) individual tax returns. The magistrate used income figures net-of-deductions to calculate petitioner father's average income, but relied on respondent mother's gross income to calculate her average income, without taking into consideration her business deductions. The figure supposedly representing the average of respondent's 2004 and 2005 gross income was actually the gross income from her 2001 income tax return, adjusted upward by 2% to reflect additional cash receipts. Although respondent was unable to substantiate her business deductions at trial, the magistrate specifically found that respondent was able to prove that numerous entries on petitioner's tax returns were unaccounted for, and that his income was also possibly more than reflected on the tax returns. Given these circumstances, the magistrate should have compared gross income to gross income, or net income to net income, and not gross income to net income, in calculating child support. This was a high-income case. The magistrate applied a rate of 5% to the parties combined adjusted gross income over $80,000, without establishing the basis for applying such a rate, and without considering the appropriate level of support in light of the child's actual needs. Petitioner failed to offer any evidentiary support for his claim that his monthly expenses for the child were over $9,000 without add-ons. Without any supporting documentation, petitioner simply allocated 50% of his monthly expenses to the child, and the magistrate erroneously accepted his figures. It held that on remand, the court should consider the actual needs of the child, and rather than using an arbitrary percentage, should consider whether a cap on combined income over $80,000 subject to child support is warranted and apply the statutory percentage of 17% to that capped amount.

Error for Referree to Base Decision on Parties Unsworn Statements During Settlement Negotiations.

In Passalacqua v Passalacqua, --- N.Y.S.2d ----, 2008 WL 1838011 (N.Y.A.D. 4 Dept.) the Appellate Division held that, apart from those parts of the judgment granting the parties mutual divorces, the remainder of the judgment had no evidentiary basis in the record. The matter was referred to a Matrimonial Referee, who attempted to negotiate a settlement. No testimony was presented by either party. The Matrimonial Referee was unable to negotiate a settlement, and he then based his determination of the issues upon the unsworn statements of the parties during the settlement negotiations, which he deemed to be testimony. Although no exhibits were introduced by either party, the Matrimonial Referee relied upon the parties' descriptions of several prior orders in determining the issues before him. The Appellate Division was unable to review the propriety of the judgment with respect to the issues before the Matrimonial Referee inasmuch as the record was confusing and incomplete, and the 'contentions of the parties differed very sharply. It was unclear whether the Matrimonial Referee relied upon documents not admitted in evidence and it noted the well-established principle that, with exceptions not relevant here, unsworn testimony is inadmissible in a civil case . It concluded that the errors of the Matrimonial Referee rendered the matter inherently flawed and remitted to Supreme Court for a new hearing on all issues with the exception of the mutual divorces granted to the parties.

Error to Impose Cost-of-living Adjustment of Basic Child Support. Pendente Lite Support Can Not Be Paid out of Marital Property.

In Azizo v Azizo, --- N.Y.S.2d ----, 2008 WL 1946665 (N.Y.A.D. 1 Dept.) Supreme Court directed, inter alia, that defendant pay basic child support of $4,168 per month (with an annual cost of living adjustment) and 100% of reasonable add-on expenses until emancipation, plus spousal maintenance of $6,125 per month for 84 months (subject to certain limitations), awarded 70% of marital assets to plaintiff, and found that defendant wastefully dissipated $779,000 of marital assets, thus entitling plaintiff to a credit of 70% therefor. The Appellate Division modified to reduce basic child support to $2,834.39 a month once the parties' older child is emancipated, deleted the cost-of-living adjustment to basic child support and modified the distribution of marital assets to 55% for plaintiff and 45% for defendant to be used in adjusting all payments and calculating all credits. It also affirmed an order which awarded plaintiff attorneys' fees of $664,538 and expert fees of $57,142. It held that the trial court erred when it averaged defendant's income for the four years preceding commencement of the divorce action. However, it did not accept defendant's claim that his income was only $63,800 per year and imputed income to him as follows: in fiscal year 2001 (the most recent undistorted year), his income represented 20.7% of the gross revenue of Azizo Imports; in fiscal year 2005, the gross revenue of the business was $1.25 million; 20.7% of $1.25 million amounts to $258,750 per year. Given that defendant's income did decline, he was paying the children's private school tuition and medical costs, all carrying costs on the marital residence, and premiums for life insurance policies on which plaintiff was the beneficiary, some of the expenses on plaintiff's net worth statement (i.e., the statement underlying the pendente lite order) turned out to be exaggerated, and plaintiff's pendente lite award was actually greater than her final award after taking into account the carrying costs of the marital residence, the temporary monthly awards of $4,134 for child support and $5,000 for spousal maintenance were excessive. The Appellate Division held that more reasonable monthly figures would be $1,666.67 for pendente lite child support (25% of $80,000), and $2,500 for pendente lite maintenance. Since defendant paid $9,134 per month for 46 months but should have paid only $4,166.67 per month, he overpaid by $228,497.18. Accordingly, since the pendente lite support was paid out of marital assets, it held that defendant should receive a credit of 45% of his overpayment of $228,497.18, amounting to $102,823.73. Given that plaintiff had only two years of college education and did not work outside the home for most of the parties' marriage, and given their pre-divorce standard of living, the trial court properly awarded plaintiff $6,125 per month in maintenance. In light of the large financial disparity between the parties and the family's preseparation standard of living, the trial court properly went above the $80,000 Child Support Standards Act cap. The Appellate Division held that the trial court should have directed the payment to be reduced to $2,834.39 per month (17%) when the older child becomes emancipated. It also held that the court should not have imposed a cost-of-living adjustment of basic child support on the parties absent their agreement. The Appellate Division held that Defendant's claims that the judgment varied from the court's decision in certain respects were not properly raised on appeal; instead, he should have moved below to correct the judgment. Since defendant was the only wage earner at the time of the judgment, he was properly ordered to pay 100% of add-on expenses. Defendant was guilty of some economic fault. However, his fault was less than in Maharam v. Maharam (245 A.D.2d 94 [1997] ), where the wife was awarded 65% of marital assets, and Davis v. Davis (175 A.D.2d 45 [1991] ), where the wife was awarded 60% of the marital estate. The award of 70% to plaintiff was excessive, and the Appellate Division reduced it to 55%. Since pendente lite payments should not be made from marital property the trial court properly required defendant to reimburse the marital estate for marital assets he liquidated in order to comply with the pendente lite order. In light of the economic disparity between the parties and defendant's conduct during the action, the trial court providently exercised its discretion in awarding plaintiff counsel and expert fees.

June 2, 2008

Where Court Never Indicated it Was Imputing Income to Plaintiff it Was Required to Consider Plaintiff's Latest Income Tax Return in Determining the Child-support Award, Rather than Income-averaging His Reported Income.

In Healy v Healy, --- N.Y.S.2d ----, 2008 WL 2130379 (N.Y.A.D. 1 Dept.) the Appellate Division reversed on the law an order which denied plaintiff husband's motion for a downward modification of his spousal maintenance and child support awards. Following a trial in August of 2005, judgment was entered in February 2007, awarding defendant wife, among other things, a divorce on her counterclaim, custody of the couple's five children, $2,750 in spousal maintenance per month and

$2,631 in child support per month. Plaintiff was represented by counsel at trial, and he promptly moved pro se for a downward modification after entry of judgment. At trial, his 2005 income tax return was admitted into evidence, indicating a substantial decrease in earnings. The court never indicated it was imputing income to plaintiff based on an attempt to avoid obligations or hide income. Accordingly, it was required to consider plaintiff's latest income tax return in determining

the child-support award, rather than income-averaging his reported income from 2001 to 2004. Plaintiff's most recent tax return should also have been considered in determining the appropriate award for spousal maintenance.

Husband Deemed Legal Parent of Child Born to Wife Conceived as Result of AID Where Consent Not Obtained in Writing

In Laura WW v Peter WW, --- N.Y.S.2d ----, 2008 WL 991130 (N.Y.A.D. 3 Dept.) the Third Department held that a husband can be deemed the legal parent of a child born to his wife, where the child was conceived as a result of artificial insemination by donor during the marriage, but where the husband's consent to the AID was not obtained in writing. Plaintiff wife became pregnant again, as a result of AID, with a third child. A few months into the wife's pregnancy, the parties separated pursuant to an agreement which provided, among other things, that the husband would not be financially responsible for the child. In her subsequent complaint for divorce, the wife alleged that the child was born to the marriage. The parties then entered a settlement agreement which reaffirmed the terms of the separation agreement and calculated the husband's support obligation based on two children. Thereafter, Supreme Court found that the provision in the separation agreement absolving the husband of his support obligation for the child was void as against public policy. Following a hearing on the issue of paternity, Supreme Court held that the husband was the child's legal father and modified the parties' stipulation by increasing the husband's child support obligation based upon three children, instead of two. The Appellate Division affirmed. It agreed with Supreme Court that the provision of the settlement agreement absolving the husband of any support obligation with respect to the child was unenforceable. The parties' agreement, which preceded any determination of legal paternity, to leave the child without the husband's support could not stand (Matter of Gravlin v. Ruppert, 98 N.Y.2d 1, 5 [2002]; see Harriman v. Harriman, 227 A.D.2d 839, 841 [1996] ). The Court rejected the husband's attempt to invoke noncompliance with Domestic Relations Law 73 as a bar to a finding that he was, legally, the child's father. Consistent with our state's strong presumption of legitimacy, as well as the compelling public policy of protecting children conceived via AID, the Court followed the lead of other jurisdictions that impose a rebuttable presumption of consent by the husband of a woman who conceives by AID, shifting the burden to the husband to rebut the presumption by clear and convincing evidence. It was not disputed that the husband was fully aware that his wife was utilizing AID to get pregnant. He proffered no evidence that he took any steps before the AID was performed to demonstrate that he was not willing to be the child's father. Under these circumstances, the court found that that the husband failed to rebut the presumption that he consented to bringing a third child into the marriage through AID. The evidence supported Supreme Court's conclusion that the husband consented to his wife's decision to create the child and that he was the child's legal father. Pursuing an alternative avenue, the Court reached the same result, finding that the facts also warranted application of the doctrine of equitable estoppel to preclude the husband from "seeking to disclaim paternity of the parties' child, whose best interest is paramount".

Error to Decide Custody Without Forensic Report Where Conflicting Testimony Regarding Parties Conduct, and Evidence Suggesting Children Exhibiting Behavioral Problems

In Ekstra v Ekstra, --- N.Y.S.2d ----, 2008 WL 669895 (N.Y.A.D. 2 Dept.) Supreme Court appointed psychologist Lobel as a neutral forensic expert to conduct evaluations and submit a written forensic report on the custody issue. The appointment order provided that "[t]he neutral forensic evaluator's final report shall be admitted as evidence-in-chief without the necessity for independent foundation testimony or evidence, pursuant to 22 NYCRR 202.16(g)." The order further provided that "[a]ny party who wishes to cross-examine the neutral [forensic] evaluator, as permitted by the Uniform Rules, shall bear the cost of the neutral [forensic] evaluator's services in preparing such testimony, travel and testifying unless the Court directs otherwise." After Dr. Lobel's report was submitted, the father's counsel expressed an intention to cross-examine him and asked the court whether the father would be required to bear the costs of his appearance. The court responded that the father would not be required to bear that expense, but made no other provision for payment. As a consequence of not receiving his fee, Lobel did not appear, and the court granted the father's application to preclude the forensic report. Relying largely on its evaluation of the credibility of the witnesses, the court awarded sole custody of the parties' two children to the father. The Appellate Division reversed. It held that the in light of the sharply conflicting testimony regarding the conduct of the parties, and evidence suggesting that the children were exhibiting behavioral problems, the court should not have rendered a custody determination without first receiving the report of the neutral forensic expert it had appointed. Moreover, inasmuch as the father had the right to cross-examine the expert (see 22 NYCRR 202.16[g][2] ), and the expert could not have been compelled to testify without appropriate compensation the court should have made provision for payment to Lobel as it indicated that it would in the order appointing him. It reversed and remitted the matter to the Supreme Court, to reopen the custody hearing, at which time Lobel's report should be received in evidence and, should either party wish to cross-examine him, the court should make provision for the payment of his fee and expenses in accordance with the order appointing him.

Father Can Not Avoid Obligation to Pay College Expenses by Ignoring Written Communications

In Heinlein v Kuzemka, --- N.Y.S.2d ----, 2008 WL 660010 (N.Y.A.D. 3 Dept.) the parties agreed to contribute to the children's college expenses, provided that their then-financial circumstances permitted them to do so and that both parents "approve of the educational institution, course of study and living arrangements." The father sought relief from this obligation, asserting that since the mother did not consult him regarding his son's attendance at RPI, he did not approve of that school or any of the child's college-related expenses. The Appellate Division found that his protests were unavailing since, while aware of the child's aspirations to attend RPI, he failed to make any inquiries of the mother and consistently declined to accept registered mail sent by her. Moreover, once the father became aware that his son was attending RPI, he took no action to object to the choice of school or apply to be relieved of his obligations, thus signifying his acquiescence and implicit approval of the decision. The Appellate Division held that the father could not avoid his contractual obligations to pay his son's college expenses, which were imposed by separation agreement that was incorporated, but not merged, into divorce degree, by ignoring the mother's written communications and remaining silent in the face of his admitted knowledge that his son was attending college.

In Absence of Other Evidence Value of Vehicle in Net Worth Statement Should Have be Adopted by Court

In Winter v Winter, --- N.Y.S.2d ----, 2008 WL 1722288 (N.Y.A.D. 1 Dept.) Supreme Court set spousal maintenance, child support and defendant husband's share of add-on child expenses, allocated marital property and assets subject to certain credits including accounting for wasteful dissipation, denied defendant credit for pendente lite mortgage payments on the marital residence, and ordered defendant to pay 40% of plaintiff's legal fees. The Appellate Division modified, to reduce defendant's obligation with respect to plaintiff's legal fees to 30%, and to reduce the value assigned to the parties' Jeep Cherokee from $15,000 to $11,000. The Appellate Division found that in determining the value of the Jeep Cherokee, the court used the vehicle's 2004 purchase price of $15,000. In her September 30, 2005 net worth statement, plaintiff valued that asset at $11,000. In the absence of any other evidence as to the vehicle's worth, plaintiff's valuation should have been adopted by the court.

May 16, 2008

Court of Appeals Holds Family Court Lacked Subject Matter Jurisdiction to Entertain Wife's Application for Increased Spousal Maintenance Despite "De Novo" Provision of Separation Agreement

In Matter of Johna M.S. v Russell E.S., --- N.Y.3d ----, 2008 WL 1860165 (N.Y.) Petitioner wife and respondent husband executed a written separation agreement in 2003. No divorce action was commenced. The agreement provided that the husband would pay the wife $100 per week in spousal maintenance and $250 per week in child support. The section of the agreement pertaining to maintenance stated: "while this agreement will resolve these issues for the present time, the Wife shall not be foreclosed from seeking additional maintenance in negotiation with the Husband, or failing such negotiation, then filing in a court of appropriate jurisdiction for a modification of the present provisions concerning the payment of maintenance. Any application by the Wife shall be treated as a 'de novo' application to the court, since it is not possible to set future maintenance at this time because it is impossible to forecast the Wife's needs or the Husband's income/earning capacity."

The wife commenced a Family Court Act article 4 proceeding seeking an upward modification of maintenance and child support. The Support Magistrate dismissed that portion of the wife's application seeking additional spousal maintenance for lack of jurisdiction. The court noted that no proof was offered that the wife was likely to become a public charge (see Family Court Act 463); thus, the parties were bound by the terms of the separation agreement on the issue of spousal maintenance. Family Court affirmed, as did the Appellate Division. The Court of Appeals affirmed. It held that Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute. It generally has no subject matter jurisdiction to reform, set aside or modify the terms of a valid separation agreement. Nor can an agreement of the parties confer on Family Court the power to modify the terms of a separation agreement. A statutory exception to the rule prohibiting the modification of separation agreements, not applicable here, exists where a spouse "is likely to become in need of public assistance or care" (Family Court Act 463). Family Court lacked subject matter jurisdiction to entertain the wife's application for increased spousal maintenance. Although the parties' separation agreement purported to permit Family Court to treat any application by the wife as "de novo," such language cannot confer jurisdiction upon Family Court. The wife's petition to Family Court for increased maintenance expressly stated that it was "an application to the Court for an upward modification of spousal support," premised on the insufficiency of current maintenance due to a loss of certain Social Security benefits. In practical terms, the wife was not presenting a new, or "de novo," application for maintenance to Family Court. She was seeking increased maintenance from that provided under the separation agreement. Thus, because the wife was seeking a modification of a spousal maintenance award set forth in a separation agreement, Family Court was without jurisdiction to entertain the petition and grant the requested relief. Justice Smith dissented in an opinion

Second Department Holds Counsel Fees to Nonmonied Spouse Generally Warranted Where a Significant Disparity in Parties Financial Circumstances and Should Not Be Denied, or Deferred Absent Good Cause, Articulated in a Written Decision

In Prichep v Prichep, --- N.Y.S.2d ----, 2008 WL 1987254 (N.Y.A.D. 2 Dept.) the Second Department, in an opinion by Justice Prudenti, held that because of the importance of such awards to the fundamental fairness of the proceedings, an award of interim counsel fees to the nonmonied spouse will generally be warranted where there is a significant disparity in the financial circumstances of the parties and should not be denied, or deferred until after the trial, which functions as a denial, without good cause, articulated by the court in a written decision. It cited as examples of good cause, where the requested fees are unsubstantiated or clearly disproportionate to the amount of legal work required in the case. It based this conclusion on the fact that when an action for a divorce is commenced, it is often the case that most of the marital assets available for the payment of legal fees are possessed or controlled by one of the spouses, usually the husband. In order to ensure that the parties will have equal access to skilled legal representation, the Domestic Relations Law authorizes awards of interim counsel fees to the nonmonied spouse during the course of the litigation. The court pointed out that when a party to a divorce action requests an interim award of counsel fees, as opposed to a final award, a detailed inquiry is not warranted. The husband commenced the divorce action in 1998. In June 2005, the wife made a pretrial motion for interim counsel fees of $35,000. The wife's motion papers noted that, although the court previously had awarded her interim counsel fees of $20,000, she currently owed her attorneys $53,009. The wife pointed out that the husband was a "highly successful vascular surgeon," earning $420,100 per year, while she worked part-time as an early intervention therapist, earning $4,015 per year. In opposition to the wife's motion, the husband argued that the wife had "over-litigated" the case, creating and submitting voluminous and unnecessary papers, and thus generating excessive counsel fees. Supreme Court denied the wife's motion "without prejudice to renewal before the trial court to determine the financial circumstances of the parties, the nature and complexity of the case, which includes the valuation of a medical practice, the fees filed and legal services rendered and the expertise of the attorneys." The wife thereafter moved to renew her prior motion and for an additional award of interim counsel fees of $40,000. Her attorney submitted an affidavit asserting that the wife now owed his firm $159,000 in legal fees, as well as invoices and attorney time records documenting billings in that amount. In the alternative, the motion sought leave to withdraw as her counsel. Supreme Court denied the motion for fees but granted the law firm's request to the extent of relieving it as counsel for the wife. An award of interim counsel fees ensures that the nonmonied spouse will be able to litigate the action, and do so on equal footing with the monied spouse. Such an award "is appropriate 'to prevent the more affluent spouse from wearing down or financially punishing the opposition by recalcitrance, or by prolonging the litigation' "(citing Gober v. Gober, 282 A.D.2d 392, 393, quoting O'Shea v. O'Shea, 93 N.Y.2d at 193; see Charpie v. Charpie, 271 A.D.2d 169). If the playing field were not leveled by an award of interim counsel fees, "a wealthy husband could obtain the services of highly paid (and presumably seasoned and superior matrimonial counsel, while the indigent wife, essentially, would be relegated to counsel willing to take her case on a poverty basis".

Third Department Holds That Absent Stipulation No Pendente Lite Counsel Fee Award Without A Hearing

In Bush v Bush, 46 A.D.3d 1140, 848 N.Y.S.2d 721 (3d Dept, 2007) Defendant cross-moved for among other things, interim counsel fees in the amount of $85,172.81. Supreme Court awarded defendant interim counsel fees of $25,000. The Appellate Division reversed. It held that to justify an award of counsel fees, a sufficient evidentiary basis must exist for the court to evaluate the respective financial circumstances of the parties and value of the services rendered' Moreover, Supreme Court cannot award counsel fees based solely upon written submissions, unless so stipulated to by the parties. The proof submitted concerning the financial circumstances of the parties was limited to written submissions by respective counsel. As the record

did not contain evidence of a stipulation agreeing thereto, the proof of the financial circumstances of the parties was inadequate for Supreme Court to properly assess the award of counsel fees. The Appellate Division reversed and remitted to Supreme Court for an evidentiary hearing (citing its 2003 decision in Yarinsky v.Yarinsky, 2 A.D.3d 1108 [3 Dept 2003] ).

Wilful Violation of Support Order Can Be Established Without Testimony by a Formal Judicial Admission

In Matter of Columbia County Support Collection Unit v Interdonato, --- N.Y.S.2d ----, 2008 WL 1969647 (N.Y.A.D. 3 Dept.) the Appellate Division rejected Respondents argument on appeal that Family Court erred in finding a willful violation of the support orders and ordering that he be committed based on unsworn testimony. It held that it is well settled that when there is no admission by a respondent, a determination of a willful violation of a support order must be predicated upon proof adduced at a hearing. A formal judicial admission by a respondent may, however, obviate the need for a hearing inasmuch as the respondent, by his or her admission, waives the production of evidence by the opposing party with regard to the facts admitted and the respondent's admission is deemed conclusive with regard to those facts. Here, respondent's unequivocal admission before the Support Magistrate in open court to the facts giving rise to petitioner's claim of respondent's violation of Family Court's orders, that he failed to make the required child support payments, was made with sufficient formality and conclusiveness to be deemed a formal judicial admission even in the absence of an oath. Furthermore, proof of a failure to make required support payments is prima facie evidence of a willful violation. Accordingly, Family Court's order was not based upon unsworn testimony, but was properly made following respondent's admission and, as such, it was affirmed.

May 1, 2008

Second Department Removes Law Guardian Failure to Comply With Rules of Chief Judge

In Cervera v Bressler, --- N.Y.S.2d ----, 2008 WL 1748331 (N.Y.A.D. 2 Dept.) the parties' entered into a stipulation, later so-ordered by the court, in which they agreed to joint custody, with primary physical custody with the mother, visitation to the father

on alternate weekends and one weekday per week, and the removal of certain restrictions on visitation that had been imposed temporarily. In July 2005, the attorney for the child moved by order to show cause for supervised visitation, based on various allegations by the mother, including one allegation of sexual molestation. The sexual molestation allegation was subsequently determined to be unfounded. Although a hearing on the motion was scheduled at least once, it never took place, and visitation by the father remained supervised since July 28, 2005. The Appellate Division held that supervised visitation was appropriately required only where it is established that unsupervised visitation would be detrimental to the child and because no hearing was ever held on the order to show cause visitation remained supervised, and telephone contact between father and daughter was monitored, for about 2 1/2 years, based solely on the hearsay allegations of the mother. These consisted of the allegations of molestation, which were determined by OCFS to be unfounded, and stories of various incidents, the details of which were disputed by the father and, were insufficient to show that unsupervised visitation would be detrimental to the child's well-being. Under these circumstances, it was unacceptable to the Second Department that the hearing had not been held, although ordered more than 2 1/2 years earlier. This arrangement resulted in the violation of the father's right to reasonable access and visitation.

It also held that the court should not have required the father to pay the cost of supervising his visitation without determining the economic realities, including his ability to pay and the actual cost of each visit. Finally, it held that the court improvidently exercised its discretion in denying the father's motion to remove Joshua D. Siegel as the attorney for the child. It referred to the new rules that had been recently promulgated by the Chief Judge and stated that an attorney for the child should not have a particular position or decision in mind at the outset of the case before the gathering of evidence. On the other hand, attorneys for children are not neutral automatons. After an appropriate inquiry, it is entirely appropriate, indeed expected, that an attorney for the child form an opinion about what action, if any, would be in a child's best interest. An attorney for the child is not an investigative arm of the court. While attorneys for the children, as advocates, may make their positions known to the court orally or in writing (by way of, among other methods, briefs or summations), presenting reports containing facts which are not part of the record or making submissions directly to the court ex parte are inappropriate practices. Here, in the order to show cause , and the affirmation in support, as well as in every affirmation submitted thereafter, the attorney for the child included facts which were not part of the record, but which constituted hearsay gleaned from the mother. This behavior on the part of the attorney for the child, as well as his repeated ad hominum attacks on the father's character, was both unprofessional and improper, as it amounted to the attorney for the child acting as a witness against the father, in violation of the Rules of the Chief Judge (see 22 NYCRR 7.2[b] ).

Law Guardian Rebuked for Failure to Follow Rules of Chief Judge and Wishes of Child

In Matter of Delaney v. Galeano,--- N.Y.S.2d ----, 2008 WL 1823048 (N.Y.A.D. 2 Dept.) the attorney for the child appealed from an order of the Family Court, which, after a hearing, denied his motion to hold the respondent mother in contempt. Upon receipt of a copy of a letter dated June 15, 2007, from the 14-year-old child to the effect that he did not want the appeal to proceed, the Appellate Division issued an order to show cause directing the parties or their attorneys to show cause why an order should not be made dismissing the appeal in the above-entitled proceeding as withdrawn. After argument of the appeal the motion was granted and the appeal was dismissed as withdrawn. The Appellate Division held that where "the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child" (22 NYCRR 7.2[d][2]). Here, the child on numerous occasions has expressed concern that his attorney was not representing his wishes. Additionally, he requested that the appeal be withdrawn, prompting the Court to require the parties or their attorneys to show cause why the appeal should not be dismissed as withdrawn. In response to that order to show cause, the attorney for the child failed to demonstrate any basis upon which the child's preference may properly be disregarded (see 22 NYCRR 7.2[d][3] ).

Wife’s Failure to Disclose Bank Statements and Transfers of Real Property Justified an Adverse Inference Against Her

In Gering v Tavano, --- N.Y.S.2d ----, 2008 WL 879674 (N.Y.A.D. 1 Dept.) the Appellate Division held that the verdict of cruel and inhuman treatment was supported by legally sufficient evidence, which included evidence of defendant's denigrating comments about plaintiff's religious background, accusations of infidelity, and interference with plaintiff's relationship with the children and evidence of plaintiff's anxiety, depression, headaches and stomach aches resulting therefrom . Plaintiff showed a reasonable excuse for not filing the complaint alleging cruel and inhuman treatment until approximately two years after the commencement of the divorce action. The parties had stipulated that the issue of fault was resolved and that plaintiff would "take the divorce" on the ground of constructive abandonment. However, defendant objected to that ground two years later, after the inquest. Defendant was not prejudiced by the delay, since plaintiff's summons with notice indicated that he sought a divorce on the grounds of both constructive abandonment and cruel and inhuman treatment. Plaintiff was not required to submit an affidavit of merit. The court properly based its imputation of income to plaintiff on his admission that he took money from his business for personal expenses and failed to report it on his income tax returns. With respect to defendant's financial condition, her failure to disclose her bank statements and various transfers of real property among herself, her family members and third parties justified an adverse inference against her (see 22 NYCRR 202.16[k][5][I]; Wildenstein v. Wildenstein, 251 A.D.2d 189 [1998] ). The maintenance award of $2,000 a month was properly based upon the court's finding of defendant's failure to comply with discovery and disclose real estate transactions and bank statements and the family's pre-divorce standard of living. However, the one-year duration of the award was inadequate and it was increased to three years. The court properly articulated its reasons for setting the child support obligation at 25% of $150,000. Given the evidence of defendant's own substantial assets, the court properly required her to contribute 13% during the first year and 14% thereafter The award to defendant of a 15% interest in plaintiff's business was proper, given her failure to contribute to the business, lack of cooperation with respect to discovery of her own assets, and receipt of temporary maintenance.

Proper To Hold Defendant Responsible for the Plaintiff's Counsel Fees in Same Amount As He Paid His Counsel

In Ciampa v Ciampa, --- N.Y.S.2d ----, 2008 WL 193292 (N.Y.A.D. 2 Dept.), the Appellate Division held that Supreme Court did not err in awarding the plaintiff counsel fees up to the amount defendant paid for his own counsel of $201,437.80, as well as expert fees of $50,00. This matrimonial action required the expenditure of significant counsel fees to deal with the myriad of legal issues presented, as well as substantial expert fees in order to evaluate the parties' multimillion-dollar business assets and residential and commercial real estate. The defendant's expenditure of $201,437.80 for his counsel fees paled in comparison to the plaintiff's expenditure of more than $484,142 for her counsel and experts, the plaintiff having utilized at least five law firms during the course of this matrimonial proceeding. Given, inter alia, the delay attributable to the plaintiff, the Supreme Court properly exercised its discretion.

Error to Admit into Evidence Determination of Social Security Administration on Issue of Wife’s Disability

In Grasso v Grasso, --- N.Y.S.2d ----, 2008 WL 193262 (N.Y.A.D. 2 Dept.) the Appellate Division found that that while the husband correctly contended that the court improperly admitted into evidence and relied upon a determination of the Social Security Administration as to the wife's disability, there was other sufficient admissible evidence which supported the finding that the wife was totally disabled.

Proper to Enjoin Defendant from Mailing Any Nonfinancial Correspondence to the Plaintiff

In Meccariello v Meccariello, 847 N.Y.S.2d 618 (2d Dept., 2007) Supreme Court permanently enjoined the wife from mailing any nonfinancial correspondence to the plaintiff. The Appellate Division held that Supreme Court was correct in permanently enjoined her from mailing any nonfinancial correspondence to the plaintiff, since the plaintiff demonstrated that he would suffer irreparable harm absent the injunction (citing Icy Splash Food & Beverage, Inc. v. Henckel, 14 A.D.3d 595, 596, 789 N.Y.S.2d 505; Kane v. Walsh, 295 N.Y. 198, 205-206, 66 N.E.2d 53).

April 16, 2008

Marital Property Cannot Be Shielded from Equitable Distribution by Investing it in Educational Trust

In Pea v Alves, --- N.Y.S.2d ----, 2008 WL 927951 (N.Y.A.D. 1 Dept) the Appellate Division held that the trial court correctly found the severance pay plaintiff received after commencement of the action to be a form of deferred compensation earned during the marriage, not, as plaintiff argued, compensation for future lost earnings, and thus a distributable marital asset. The court also properly rejected plaintiff's claim that the severance pay should, in effect, be exempt from distribution since she had already invested it in an educational trust for the parties' three children. Marital property cannot be shielded from equitable distribution in this way.

No Basis to Shield Wife from Economic Consequences of Shared Decision to Renovate Property. Spouses Contribution to Separate Assets and Liabilities of Former Spouse May Be Recouped in Equitable Distribution.

In Johnson v Chapin, --- N.Y.S.2d ----, 2008 WL 664929 (N.Y.A.D. 1 Dept.) during the marriage the parties renovated a house that was the separate property of the husband with money’s earned during the marriage. It appreciated during the marriage "due in part" to the direct and indirect efforts of both spouses, including the wife's assistance. The appreciated value of the property was less than its value at the time of the marriage plus the cost of the renovations and improvements. The Appellate Division held that the couple shared the risk that the property's appreciation would not equal their investment, and there was no basis in law or equity to shield the wife from the economic consequences of a shared decision to renovate the property. It also held that a spouses contribution to the separate assets and liabilities of his or her former spouse may be recouped in an award of equitable distribution. Marital funds should not be used to pay off separate liabilities' and, whenever that occurs, the inequity may be remedied by permitting the injured spouse to recoup his or her equitable share of the marital funds so used . The trial court determined that because the wife had not worked outside the home for nine years, she could not re-establish her legal career. It also concluded that it would take at least six years for her to develop her career in photography. The court awarded the wife durational maintenance of $6,000 per month for six years. The Appellate Division held that the durational maintenance award was not an abuse of discretion. The wife was 51 years old at the time of the commencement of this action. She had been out of the work force for nine years, during which time she had primary responsibility for raising the parties' child. As such, it was both fair and realistic for the court to have concluded that since it would take at least six years for the wife to develop a career in photography, a six-year maintenance award of $6,000 a month would provide her with appropriate assistance in reaching her vocational goals and allowing her to become self-sufficient. The trial court noted that the wife and her son "have suffered day to day crises resulting from the [husband's] harassment of them" with respect to every aspect of this protracted litigation. It thus awarded the wife $800,000 for the wife's counsel fees, and $85,000 for her expert fees. The Appellate Division held that the court's award was appropriate. The record, including his imputed future earnings, showed that he was in a superior financial position. He engaged in a pattern of obstructionist conduct which unnecessarily delayed and increased the legal fees incurred in the litigation. Given that the wife was required to hire an expert to counter the husband's facially inaccurate valuation of the appreciation of the Claverack property, the court properly granted the wife an award for her expert's fees . The Appellate Division held that equity required that the husband be awarded a distributive credit for $548,460, the amount that his pendente lite support payments exceeded what he would have been required to pay consistent with the final maintenance award. It also required that the husband be credited $484,370.50, 50% of the $968,741 in mortgage and maintenance payments made for the marital residence during the pendency of the divorce action.

For Appreciation of Separate Property to Be Marital Must Demonstrate Manner in Which Contributions Resulted in Increase

In Embury v Embury, --- N.Y.S.2d ----, 2008 WL 809026 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court properly determined that certain real property which was gifted to the plaintiff by her mother during the marriage, was the plaintiff's separate property. Property acquired during the marriage is presumed to be marital property and the party seeking to overcome such presumption has the burden of proving that the property in dispute is separate property. The plaintiff sustained that burden with evidence that she and her mother purchased the property in November 2005, with her mother paying the down payment and all the closing costs, and the mother subsequently gifting to her the mother's interest in the home. Moreover, in order for appreciation in the value of separate property to be deemed marital property subject to equitable distribution the nontitled spouse must demonstrate the manner in which his contributions resulted in the increase in value and the amount of the increase which was attributable to his efforts. The defendant did not sustain his burden, as he failed to set forth proof that the property actually increased in value and, he did not demonstrate the manner in which his contributions resulted in any alleged appreciation. The Supreme Court erred in determining the defendant's child support obligation. While a court may depart from a party's reported income and impute income based on the party's past income or earning potential, such determination must be grounded in law and fact. Here, the court failed to properly consider that a contractual agreement under which the defendant was paid approximately $2,500 per month, or approximately $30,000 annually, had ended in 2003, and that the defendant's income, therefore, was reduced to that extent. The Appellate Division recalculated the defendant's child support obligations based on a total annual income of $60,000, since his federal tax return for his incorporated business, and his claimed monthly expenses, including his pendente lite support obligations, generally approximated that level of income. Since the plaintiff's annual income was $30,000, the parties' combined parental income amounted to $90,000, with the defendant's proportional share thereof at 67%, his child support obligation was $1,557.75 monthly, and he was obligated to pay a 67% pro rata share of child care expenses and the children's unreimbursed health care costs.

Stocks Purchased During Marriage Jointly Titled in Spouse and Son Are Presumptively Marital Property

In Lee v Lee, 48 A.D.3d 377, 853 N.Y.S.2d 34 (1st Dept. 2008) the Appellate Division found that stocks and an insured money mart account, and stock shares resulting from a demutualization, that were jointly titled in defendant and his son were purchased or obtained during the marriage, and were presumptively marital property despite the form of the title. It was defendant's burden to rebut this presumption and he failed to do so. Since he did not, the Appellate Division deemed half the shares and money to be separate property and half marital property.

Error to Admit Into Evidence Report of Neutral Forensic Psychologist Where Report Not Submitted Under Oath

In Tercjak v Tercjak, --- N.Y.S.2d ----, 2008 WL 740405 (N.Y.A.D. 2 Dept.) the Second Department held that Family Court improvidently exercised its discretion in admitting into evidence the report of the neutral forensic psychologist, since the report was not submitted under oath (see 22 NYCRR 202.16[g][2] ) and relied on information other than that upon which an expert may properly base an opinion (see Matter of D'Esposito v. Kepler, 14 AD3d 509). However, the error in admitting the report was harmless.

April 1, 2008

Constructive Abandonment Found Where Unreasonable Condition Imposed by Wife

In Dunne v Dunne, 47 A.D.3d 1056, 850 N.Y.S.2d 659 (3d Dept. 2008) the parties were married in 1976. Around 1996 or 1997, plaintiff was diagnosed with a general anxiety disorder. He was prescribed medications, including Xanax (a Benzodiazepine medication) and Ambien, to alleviate his constant worrying and inability to sleep. Defendant, after reading various articles on the potentially dangerous effects of such medications and noticing a hostile change in plaintiff's demeanor, insisted that plaintiff stop taking the medications. Plaintiff's doctor began decreasing the medications, but, as a result, plaintiff began drinking alcohol in order to cope with his increased anxiety. This led to an incident in February 2002 when plaintiff was found unconscious after excessive drinking and was taken to the hospital. As a result of his consumption of alcohol while taking medication, he was taken completely off the medications. In May 2002, defendant moved plaintiff's belongings from the marital residence to an apartment which they owned. Plaintiff returned to the marital residence shortly thereafter; however, defendant demanded that he leave after she noticed the smell of alcohol. Thereafter, plaintiff sought treatment for alcohol abuse and stopped drinking. In early 2003, his doctor prescribed two prescription medications, one of which was the Benzodiazepine medicine Klonopin, to control his anxiety disorder. Although the parties engaged in marriage counseling, according to plaintiff, defendant insisted that a condition to their reconciliation was that he cease taking any and all prescription Benzodiazepine medications. In April 2004, plaintiff commenced this action for divorce on the ground of constructive abandonment. Supreme Court, crediting plaintiff's testimony, granted the divorce. The Appellate Division affirmed. Defendant contended that plaintiff failed to establish constructive abandonment inasmuch as his exclusion from the marital residence was not complete, was on consent and was justified under the circumstances. In an action for divorce based upon constructive abandonment, the party seeking the divorce must establish that the other spouse has refused to fulfill the basic obligations of the marriage relationship for a period of one year or more, without justification or consent by the abandoned spouse. In addition, the evidence must show a 'hardening of resolve' by one spouse not to live with the other. Here, defendant moved plaintiff's belongings to an apartment and demanded that he leave the marital residence. Plaintiff's testimony established that defendant denied his repeated requests to return to the marital residence. Defendant contended that she was justified in excluding plaintiff from the marital residence until he stopped taking the Benzodiazepine medication. However, it was undisputed that plaintiff suffered from a psychological anxiety disorder. Plaintiff testified that, although he had attempted to control his condition without the use of prescription medication, his doctors advised him that anxiety disorder can only be alleviated through prescription medication. Plaintiff also testified that he had no behavioral problems with his current medications and that his anxiety is under control. Defendant's uncompromising position that plaintiff choose to either adhere to the advice of his treating physicians or cease taking his anxiety medication in order to return to the marital residence, thereby risking his well-being, amounted to "an unreasonable condition as a term of their relationship," which violated her marital obligation to plaintiff.

Counsel Fees Justified by Discovery Misconduct. Defendant Properly Precluded For Failure to Timely Comply with Discovery

In Schorr v Schorr, \_\_\_NYS2d\_\_\_, 848 N.Y.S.2d 614 (1st Dept.2007) Supreme Court awarded plaintiff 50% of the marital property, monthly maintenance of $6,500 for five years, and counsel fees of $100,000. The Appellate Division reduced the award to plaintiff to 40% and otherwise affirmed. It found that Plaintiff's contributions to defendant's business interests, which accounted for a substantial portion of the marital assets, were modest. The maintenance award to plaintiff was appropriate in light of the parties' standard of living during the marriage, plaintiff's career sacrifices during the marriage, defendant's substantially superior financial circumstances, and plaintiff's demonstrated inability to meet her living expenses and need for time to establish herself in her new career. Plaintiff's receipt of the distributive award did not obviate the need for maintenance. The award of $100,000 in counsel fees, representing approximately one-half of plaintiff's counsel fees at the time of trial, was justified by the financial disparity between the parties and defendant's discovery misconduct resulting in unnecessary escalation of litigation costs. Defendant was properly precluded from offering evidence at trial as to any financial issues because of his failure to timely comply with discovery requests concerning his businesses and to pay the fees of the expert appointed to value his business interests; such conduct resulted in the expert being unable to submit a complete report of the value of defendant's business interests at trial. Because the various business interests could not be parsed from the other financial issues in the case, to have limited the preclusion order only to testimony challenging the valuation of his business interests by the expert would have allowed defendant to benefit from his concealment of critical information regarding his assets and income.

Property Is Not Marital Property Where Neither Wife Nor Husband Hold Any Valuable Property Rights in It. Defendant Not Required to List Possible Future Rights to Marital Property in Bankruptcy Schedules.

In Mattioli v Mattioli,--- N.Y.S.2d ----, 2008 WL 275078 (N.Y.A.D. 4 Dept.) the Appellate Division held that Supreme Court properly refused to treat the former marital residence, which was titled in the names of plaintiff's parents or in one of their names, as marital property subject to equitable distribution, despite the fact that plaintiff paid her father $42,899 during the marriage as a down payment towards its purchase. The court erred, however, in basing its decision solely on the fact that title to the property was held by one or both of plaintiff's parents, rather than by plaintiff and/or defendant. That fact was not necessarily dispositive because Domestic Relations Law 236(B)(1)(c) defines marital property as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held." Thus, the dispositive issue was whether plaintiff and/or defendant held "any valuable property rights" in the former marital residence, inasmuch as property is "not marital property [where] neither the wife nor the husband [holds] any valuable property rights" in it (Pulitzer v. Pulitzer, 134 A.D.2d 84, 88). While the parties in this case alluded to an agreement between plaintiff, defendant, and plaintiff's parents for the purchase of the former marital residence, no written agreement for the purchase and sale thereof was presented to the court. In the absence of a written contract, there was no evidence before the court that either plaintiff or defendant held the requisite "valuable property rights" in the former marital residence to render it marital property. The Appellate Division held that the court erred in applying the doctrine of judicial estoppel in precluding defendant from presenting evidence of funds received by plaintiff from the sale of the former marital residence. Defendant attempted to establish that the $8,000 to $9,000 received by plaintiff from the sale of the former marital residence was marital property in the form of appreciation in the value of the property resulting from improvements he made to it during the marriage. The Supreme Court erred in relying on its decision in Matter of Miller (Berti) (1 AD3d 885) when it applied the doctrine of judicial estoppel to the former marital residence. The record established that during the marriage defendant twice filed for bankruptcy under chapter 7 of the Bankruptcy Code and received discharges, and that he claimed in both bankruptcies that he was single and did not list the former marital residence as an asset in his bankruptcy schedules. The court thus determined that judicial estoppel prevented defendant from claiming any interest in funds received upon the sale of the former marital residence. That was error, inasmuch as the discussion of the doctrine of judicial estoppel in Miller was in the context of a bankruptcy proceeding, while here the issue concerned the property rights of the parties in a matrimonial action. [M]arital property rights are determined upon the granting of a divorce", and defendant was not required to list possible future rights to marital property in the bankruptcy schedules (see 11 USC s 541[a][2][A] ). It modified the judgment by remitting the matter to Supreme Court to reopen the proof at trial to permit defendant to submit evidence that the funds received by plaintiff from the sale of the former marital residence were marital property.

Failure to Provide Client with Statement of Client's Rights and Responsibilities Constitutes Violation of DR 2-106(f) . Failure to Send Bill During One and One-half Year Divorce Proceeding Violates DR 1-102(A)(5).

In Matter of Larsen, --- N.Y.S.2d ----, 2008 WL 249850 (N.Y.A.D. 1 Dept.), a disciplinary proceeding, the First Department held that the failure of the attorney to provide her client with a Statement of Client's Rights and Responsibilities constituted a violation of DR 2-106(F). It also found that Respondent either improperly notarized her client's signature, or signed her client's name, with the client's consent, notarized that signature, and then submitted the documents to Supreme Court . This was a violation of DR 1-102(A)(4), even if done with the consent of the client. Respondent’s failure to send her client a bill during the one and one-half year divorce proceeding was held to be in violation of DR 1-102(A)(5).

March 17, 2008

Proper Standard for Establishing Willful Violation of a Family Court Order Is Clear and Convincing Evidence.

In Matter of Blkaize F., --- N.Y.S.2d ----, 2008 WL 516789 (N.Y.A.D. 3 Dept.), the Appellate Division addressed the proper burden of proof to establish a willful violation under Family Court t Act 1072. The statute itself only mentions "competent

proof." The Court noted that it had previously used various phrases in enunciating the standard, including the burden as being simply "ample evidence", "competent and credible evidence", "a fair preponderance of the evidence", and "clear and convincing evidence". It found that except for the terms of punishment, the provisions of Judiciary Law 753 applied here. Based upon that statute, and considering the potential penalty of imprisonment here it held that the proper standard for establishing a willful violation of a Family Court order is clear and convincing evidence.

Counsel Fee Not Barred By Failure to Provide Itemized Statement

In Johnner v Mims, 850 N.Y.S.2d 786 (4th Dept. 2008) the Appellate Division held that Supreme Court did not abuse its discretion in granting in part plaintiff's application for counsel fees in this matrimonial action. Defendant contended that the court erred in awarding plaintiff counsel fees because plaintiff's attorney failed to provide plaintiff with written, itemized bills at least every 60 days (see 22 NYCRR 1400.2, 1400.3). The Appellate Division rejected that contention. It found that Plaintiff's attorney complied with 22 NYCRR part 1400 by providing plaintiff with the requisite statement of rights and responsibilities and by executing the requisite written retainer agreement with her. It held that although plaintiff's attorney waited until December 2005 to bill plaintiff for services rendered between August 2004 and December 2005, the right to be billed at least every 60 days is a right afforded to plaintiff, not defendant, and plaintiff waived that right by failing to object to the December 2005 bill . Moreover, denial of plaintiff's application on that ground would result in a windfall to defendant.

Family Court Act Does Not Authorize Dismissal for Forum non Conveniens or Improper Venue

In Cruz v Cruz, --- N.Y.S.2d ----, 2008 WL 525919 (N.Y.A.D. 2 Dept.) the Family Court dismissed the petitions for visitation with the parties' two younger children, on the ground that "it appears that ... the subject children now reside in Brooklyn,

New York" and therefore "proper venue now lies in Kings County." The Appellate Division held that Family Court Act does not authorize dismissal of proceedings for forum non conveniens or improper venue. The proper remedy when the venue of a proceeding is placed in an improper or inconvenient county is to transfer the proceeding to the proper or more convenient county pursuant to Family Court Act 174. Nevertheless, the proceedings should have been dismissed on the ground that the

Family Court did not acquire personal jurisdiction over the mother. There was no evidence as to where the mother and the children resided. The father stated, in his petitions, that it is "likely" that the mother moved into the maternal grandmother's apartment in Brooklyn with the children, but he did not provide the court with a name or address for the maternal grandmother. The father sought authorization to serve the mother by publication, since he did not know her current address. Because the Family Court, sua sponte, dismissed the proceedings based on improper venue, it did not address this request, and the petitions were never served. The Appellate Division pointed out that there is no provision of the Family Court Act which authorizes service by publication in a visitation proceeding and that service by publication is basically a symbolic gesture, not a manner reasonably calculated to give notice. It held that if there is good cause shown, service by an alternative method specifically tailored to the particular facts of the case and reasonably calculated to give notice would be sufficient (citing CPLR 7005). As the father failed to provide the court with any information upon which to base such an alternative method of service, the proceeding should have been dismissed, sua sponte, for lack of personal jurisdiction over the mother.

Mismanagement of Receivership Estate by Plaintiff -Wife Warrants Surcharge for Fees, Expenses, and Financial Damage.

In Saline v Saline, --- N.Y.S.2d ----, 2008 WL 328788 (N.Y.A.D. 2 Dept.) a divorce action, the plaintiff was appointed receiver of several investment properties owned by the defendant. The plaintiff was explicitly directed by the Supreme Court to obtain authorization before obtaining the services of any other parties, such as an attorney or managing agent. The plaintiff nevertheless proceeded to hire and pay an inexperienced property manager without court authorization, to collect rents from only a few tenants and to approve minor repairs on the properties. She also allowed one property to remain in foreclosure for more than a year before giving an exclusive listing to her property manager, selling the property far below market value, and paying a full broker's commission to her property manager even though he did not find the purchaser. She also engaged an attorney and paid an apparently excessive attorney's fee for the closing, also without court authorization. When the plaintiff finally provided an accounting of the receivership properties, she was unable to connect receipts for repairs with any particular property, admitted to commingling funds with her personal funds, and was unable to provide documentation to support the claimed expenses. The Appellate Division held that given these facts, the court properly declined to approve the plaintiff's hiring and payment of a property manager and attorney without court authorization. As receiver, the plaintiff was obligated to keep itemized accounts of the receivership estate and it is the receiver's burden to justify the accounting. Given the plaintiff's inability to do so, the court properly declined to approve the belated and incomplete accounting. In light of the overall evidence of the plaintiff's mismanagement of the receivership estate, the court properly surcharged her for fees, expenses, and financial damage caused by her mismanagement. Considering the relative merit of the parties' positions, as well as the plaintiff's conduct, the court also properly awarded the defendant an attorney's fee.

Error for Supreme Court to Have Raised Defect in Commencement Sua Sponte and Vacate Judgment on That Ground Where Defendant Waived Any Objection to the Defect in Commencement by Failing to Raise a Timely Objection.

In Khlevner v Khlevner --- N.Y.S.2d ----, 2008 WL 331474 (N.Y.A.D. 2 Dept.) defendant was served with a summons with notice on November 4, 2005, five days before initiatory papers were filed with the County Clerk. On December 15, 2005, the defendant signed an affidavit stating that he was appearing in the action but did not intend to respond to the summons or answer the complaint and a settlement agreement. A judgment of divorce was entered in March 2006. In May 2006 the plaintiff moved for an order of protection and for an order setting a visitation schedule. The defendant cross-moved, inter alia, to vacate the judgment and to set aside the settlement agreement on the ground, among others, that the plaintiff fraudulently induced him to sign the affidavit and settlement agreement. The matter was referred to a judicial hearing officer for a hearing and a determination of the defendant's cross motion. Before the hearing was completed, the court noted that its review of the court

file revealed that the defendant was served with the summons with notice before the initiatory papers were filed with the County Clerk. The court terminated the hearing prematurely and granted that branch of the cross motion which was to

vacate the judgment on the ground that the attempted service before the filing of the initiatory papers was a nullity (see Matter of Gershel v. Porr, 89 N.Y.2d 327). The Appellate Division held that Supreme Court should not have raised the defect in commencement sua sponte and vacated the judgment on that ground because the defendant waived any objection to the defect in commencement by failing to raise a timely objection thereto (see Harris v. Niagara Falls Bd. of Educ., 6 NY3d 155, 159; Matter of Fry v. Village of Tarrytown, 89 N.Y.2d 714). Since the hearing on the defendant's cross motion was not completed, it remitted the matter to the Supreme Court, for a continuation of the hearing and for a new determination of the cross motion.

Request for Law Guardian, Forensic Expert, or In Camera Must Be Made to Be Preserved of Review

In Dana-Sitzer v Sitzer, --- N.Y.S.2d ----, 2008 WL 496071 (N.Y.A.D. 1 Dept.) the Supreme Court awarded sole custody of the children to the mother. The father appealed, arguing, inter alia, that the trial court should have appointed a law guardian or forensic mental health expert for the parties' children, or conduct an in camera interview with the children. The Court held that since he never asked the trial court to appoint a law guardian or forensic mental health expert for the parties' children, or to conduct an in camera interview with the children his argument that the trial court should have done all of these things was unpreserved for review and it did not not find any public policy exception to the preservation requirement in this case.

March 3, 2008

Court of Appeals Holds that FFCCSOA and UIFSA Prohibit New York From Awarding Child Support After Connecticut Child Support Order Expires

In Matter of Spencer v. Spencer \_\_NY3d\_\_\_(February 14, 2008) the Court of Appeals held that when a Connecticut child support order has expired because the child has reached 18 (the age of majority under Connecticut law), and the father still resides in Connecticut, although the mother and children now reside in New York, a subsequent New York child support order for support of the same child to age 21 (the age of majority under New York law) is considered a petition for modification of the Connecticut order. Under the Full Faith and Credit for Child Support Orders Act (28 USC § 1738B) and the Uniform Interstate Family Support Act (Family Ct Act § 580-611), New York lacks subject matter jurisdiction over a modification petition where the father still resides in the state of the expired original support order, absent a consent to jurisdiction.

Appellate Division Sets Standards For Granting of Continuance. Reversal Not Warranted for Alleged Failure to Comply with ADA

In Kadanoff v Kadanoff, \_\_\_NYS2d\_\_\_, 848 N.Y.S.2d 661 (1st Dept, 2007) Supreme Court distributed the marital assets between the parties in accordance with a stipulation of the parties, awarded the wife durational maintenance of $4,000 per month for five years, and fixed the value of a charging lien in favor of her former attorney, and against her, at $66,137.19. The Appellate Division held that reversal of the judgment was not warranted based on the court's alleged failure throughout the course of the litigation and, in particular, when the defendant appeared pro se at trial, to provide reasonable accommodation for her alleged disability, in violation of the Americans with Disabilities Act. The defendant submitted insufficient evidence in support of her claim that she was disabled. Moreover, she failed to demonstrate, as required by the ADA, that, by reason of her alleged disability, she was substantially limited in a major life activity. The Court found no merit to the defendant's contention that reversal of the order fixing the value of a charging lien in favor of her former attorney, was required because the Supreme Court denied her applications for a continuance of the attorney's fee hearing. It held that it is an improvident exercise of discretion to deny a continuance where the application is properly made, is not made for purposes of delay, the evidence is material, and the need for a continuance does not result from the failure to exercise due diligence. Here, the defendant failed to show that a continuance would produce evidence that was material to the issue of the value of the legal services rendered or that her requests for a continuance were not the result of her successor counsel's failure to exercise due diligence in preparing for the hearing.

Improper to Permit Spouse to Select Forensic Evaluator

In Armstrong v Heilker, --- N.Y.S.2d ----, 2007 WL 4723608 (N.Y.A.D. 3 Dept.) Family Court entered an order which granted the father's request for full disclosure to the father of the mother's "mental and physical health records," but limited the disclosure to a 15-month period of time; the court also directed the mother to provide additional records covering a broader time period for the court's in camera review. Thereafter, the court granted the mother's motion to reargue and entered a new order in May 2006, which limited its previous order by requiring that the mother provide her mental health records only to the court for its in camera review. In May 2007, after a review of the mother's "medical records," Family Court entered an order which directed her to submit to a mental health evaluation by an expert to be selected by the father and to fully disclose her "complete medical records" to that expert for the purpose of an "evaluation of her mental health." On appeal the mother contended that it was error to allow the father to choose the expert and the Appellate Division agreed. In the absence of a binding agreement by the parties, the accepted practice is for the court to order an independent evaluation. The statute "makes it clear" that such an evaluation "should be done by a court-appointed [qualified mental health] professional and not one chosen by a party to the proceeding" In a footnote the court pointed out that notwithstanding the provisions of the CPLR (see CPLR 3121, 3124) regarding medical examinations including psychiatric and psychological examinations, Family Ct Act 251 should be followed in Family Court proceedings in which any such examination "will serve the purposes of this act." These examinations have become known as "forensic evaluations" meaning they fall within that part of medical science--forensics--which relates to the law and, as here, are deemed material and necessary by the court in reaching a proper outcome. The matter was remitted to Family Court with instructions that if the court deemed it appropriate to order a forensic mental health evaluation of the mother, it must select an independent or neutral (or agreed-upon) psychiatrist or psychologist to examine her and submit a report to the court. It also directed the court to further exercise its discretion as to the scope of the evaluation, directing, among other things, which medical records of the mother would be made available to that professional, what access the parties and/or their attorneys would have to the report, how the report would be used at trial and who would bear the expense of the evaluation.

Appellate Division Defines Proceeding Which Must Be “Pending” in a Jurisdiction That Is "Substantially in Conformity" with Provisions of UCCJEA Article 5-A

In re Michale McC., v. Manuela A.,--- N.Y.S.2d ----, 2007 WL 4533431 (N.Y.A.D. 1 Dept.) the parties were married in the United States and had one child, Liam, who was born in Italy in 2001 and who had dual citizenship. A 2004 judgment of divorce entered determined that the court had no jurisdiction over custody issues because Liam had lived in New York for only 9 out of his 27 months since birth. Subsequent to filing divorce proceedings in New York, the mother filed parallel proceedings in Rome and the father consented to the court in Rome entering orders for custody and visitation. In December 2005, the Court of Rome granted the divorce and awarded the mother sole custody of Liam. The order permitted the mother to decide whether she wanted to reside in Italy or in the United States and provided for the father to have visitation under both circumstances. In July 2006, the father filed an appeal in the Appeal Court of Rome. As of January 2005, the mother (with Liam), and the father were living separately in New York. On August 16, 2006 the mother petitioned Family Court in New York to modify the Italian court's order of visitation and to suspend the father's visitation rights on the grounds that the father had abused Liam. The father cross-moved to obtain sole custody of Liam. On or about March 6, 2007 the mother fled with Liam to Italy in violation of a specific court order not to take the child out of New York State. The Appellate Division held that Family Court had jurisdiction to modify the custody order of the Italian court because New York was the child's "home state" at the time both the petition and the cross petition were filed. Under New York's UCCJEA, a New York court has jurisdiction to modify a child custody determination made by a court of another state if this state is the "home state" of the child. DRL 76-b. A court of this state must treat a foreign country as if it were a state of the United States. DRL 75-d. The fact that a custodial parent flees in the middle of a custody litigation commenced properly in New York does not deprive the New York courts of subject matter jurisdiction to issue an order concerning custody, visitation, and related issues so long as the father resided here. The, mother, father and child were living in New York since January 2005, a period of 19 months prior to the mother's petition for a modification of the initial custody order, and 22 months prior to the father's cross petition for sole custody. On appeal the mother argued that "home state" notwithstanding, the New York Court did not have jurisdiction because the father's appeal of the Italian court's sole custody order was pending in Rome. She relied on DRL 76- e(1) which states: "a court of this state may not exercise its jurisdiction under [article 5- A] if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this article, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum ..." The Appellate Division held that the mother's reliance on DRL 76-e was misplaced. Even though there was an appeal pending in Rome, the mother's contention failed to recognize that the "pending" proceeding must be pending in a jurisdiction that is "substantially in conformity" with the provisions of article 5-A. In other words, it must be a jurisdiction that was either the "home state" when the proceeding was commenced or satisfies one of the other jurisdictional predicates of section 76. When the appeal was filed by the father in July 2006, the Italian court did not have jurisdiction "substantially in conformity" with the UCCJEA since by that time New York, not Italy, was the "home state". The cross petition was reinstated and the matter remanded for further proceedings consistent with the decision, including a custody inquest.

February 16, 2008

Law Guardian May Not Be Unsworn Witness and Must Comply with Law Guardian Rules of the Chief Judge

In Naomi C v Russell A, --- N.Y.S.2d ----, 2008 WL 304936 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed without a hearing Court’s dismissal of a petition to modify a custody order. The Appellate Division pointed out that with the parties present, the court asked the Law Guardian, on the record, to discuss the position of the 10-year-old child regarding how well the current custody arrangement was working. Although the court was warranted in dismissing the petition on its face, the questioning of the Law Guardian (now called Attorney for the Child) by the court was “ something that should not be repeated”. Although the court was correct to disallow the "cross-examination" of the Law Guardian by petitioner's counsel, the court should not consider the hearsay opinion of a child in determining the legal sufficiency of a pleading in the first place. Most importantly, such colloquy makes the Law Guardian an unsworn witness, a position in which no attorney should be placed. It emphasized that the attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not

limited to becoming a witness in the litigation. (Citing Rules of the Chief Judge [22 NYCRR] 7.2[b] ).

Creation of Joint Account Vests in Each Tenant a Present Unconditional Property Interest in Undivided One Half of Money

In Bailey v Bailey, --- N.Y.S.2d ----, 2008 WL 275056 (N.Y.A.D. 4 Dept.) the Appellate Division held that although the court properly determined that plaintiff was entitled to retain the amount of $43,000 she had removed from the parties' joint HSBC checking accounts containing $66,000, the court erred in allocating the entire amount as separate property. "The creation of a joint account vests in each tenant a present unconditional property interest in an undivided one half of the money deposited, regardless of who puts the funds on deposit The creation of a joint account vests in each tenant a present unconditional property interest in an undivided one half of the money deposited, regardless of who puts the funds on deposit" (Parry v. Parry, 93 A.D.2d 989, 990; see Nasca v. Nasca, 302 A.D.2d 906). Thus, each party was entitled to a distributive award of $33,000 from that account. The Appellate Division held that the court properly distributed the various retirement accounts. The appreciation to defendant's Vanguard Money Market Reserves Account was marital property because plaintiff indirectly contributed to the appreciation of this asset by handling the household matters, thereby permitting [defendant] the freedom to devote energy to his financial endeavors. The remaining accounts in question contained commingled marital property and separate property, and defendant failed to trace the source of the funds [that he contended were separate property] with sufficient particularity to rebut the presumption that they were marital property.

Property Not Marital Where Neither Wife Nor Husband Hold Any Valuable Property Rights in It. Marital Property Rights Are Determined upon Divorce. Thus, Defendant Not Required to List Possible Future Rights to Marital Property in Bankruptcy Schedules.

In Mattioli v Mattioli,--- N.Y.S.2d ----, 2008 WL 275078 (N.Y.A.D. 4 Dept.) the Appellate Division held that Supreme Court properly refused to treat the former marital residence, which was titled in the names of plaintiff's parents or in one of their names, as marital property subject to equitable distribution, despite the fact that plaintiff paid her father $42,899 during the marriage as a down payment towards its purchase. The court erred, however, in basing its decision solely on the fact that title to the property was held by one or both of plaintiff's parents, rather than by plaintiff and/or defendant. That fact was not necessarily dispositive because Domestic Relations Law 236(B)(1)(c) defines marital property as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held." Thus, the dispositive issue was whether plaintiff and/or defendant held "any valuable property rights" in the former marital residence, inasmuch as property is "not marital property [where] neither the wife nor the husband [holds] any valuable property rights" in it (Pulitzer v. Pulitzer,

134 A.D.2d 84, 88). While the parties in this case alluded to an agreement between plaintiff, defendant, and plaintiff's parents for the purchase of the former marital residence, no written agreement for the purchase and sale thereof was presented to the court. In the absence of a written contract, there was no evidence before the court that either plaintiff or defendant held the requisite "valuable property rights" in the former marital residence to render it marital property. The Appellate Division held that the court erred in applying the doctrine of judicial estoppel in precluding defendant from presenting evidence of funds received by plaintiff from the sale of the former marital residence. Defendant attempted to establish that the $8,000 to $9,000 received by plaintiff from the sale of the former marital residence was marital property in the form of appreciation in the value of the property resulting from improvements he made to it during the marriage. The Supreme Court erred in relying on its decision in Matter of Miller (Berti) (1 AD3d 885) when it applied the doctrine of judicial estoppel to the former marital residence. The record established that during the marriage defendant twice filed for bankruptcy under chapter 7 of the Bankruptcy Code and received discharges, and that he claimed in both bankruptcies that he was single and did not list the former marital residence as an asset in his bankruptcy schedules. The court thus determined that judicial estoppel prevented defendant from claiming any interest in funds received upon the sale of the former marital residence. That was error, inasmuch as the discussion of the doctrine of judicial estoppel in Miller was in the context of a bankruptcy proceeding, while here the issue concerned the property rights of the parties in a matrimonial action. [M]arital property rights are determined upon the granting of a divorce", and defendant was not required to list possible future rights to marital property in the bankruptcy schedules (see 11 USC s 541[a][2][A] ). It modified the judgment by remitting the matter to Supreme Court to reopen the proof at trial to permit defendant to submit evidence that the funds received by plaintiff from the sale of the former marital residence were marital property.

Third Department Holds "Substantial Change in Circumstances" Standard Correct Where Supreme Court Refers Child Support to Family Court

In Zwickel v Szajer,--- N.Y.S.2d ----, 2008 WL 191640 (N.Y.A.D. 3 Dept.) in April 2003 the Support Magistrate entered an order for child support. Shortly thereafter, plaintiff commenced an action for divorce where the issue of child support was referred to Family Court. At about the same time, plaintiff commenced a proceeding, pursuant to Family Ct Act article 4, alleging a violation of the April 2003 order. After a hearing on both matters, the Support Magistrate found That defendant was in willful violation of its prior order and, by separate order, that there was no substantial change in circumstances to warrant an upward modification of child support. Plaintiff's objections were denied by Family Court. The Appellate Division agreed with Family Court that the Support Magistrate applied the correct standard in determining plaintiff's application for an upward modification of the April 2003 order of support. It held that in a matrimonial action, unless a prior support order from Family Court is continued by Supreme Court, the prior order terminates when Supreme Court makes a new support determination. As no such order was issued by Supreme Court, instead referring the matter to Family Court to determine the application, the "substantial change in circumstances" standard was correctly applied upon plaintiff's application for a modification of the Support Magistrate's prior order of support (Citing Cynoske v. Cynoske, 8 A.D.3d 720, 722-723 [2004] ). Ed Note: But see Blauner v Blauner,60 App Div 2d 215 ( 1st Dept.1977) holding that when divorce follows separation the court may consider child support de novo. The same rule was applied to alimony in Kover v Kover, 29 N.Y.2d 408 (1972).

Failure to Provide Client with Statement of Client's Rights and Responsibilities Constitutes Violation of DR 2-106(f). Failure to Send Bill During One and One-half Year Divorce Proceeding Violates DR 1-102(A)(5).

In Matter of Larsen, --- N.Y.S.2d ----, 2008 WL 249850 (N.Y.A.D. 1 Dept.), a disciplinary proceeding, the First Department held that the failure of the attorney to provide her client with a Statement of Client's Rights and Responsibilities constituted a violation of DR 2-106(F). It also found that Respondent either improperly notarized her client's signature, or signed her client's name, with the client's consent, notarized that signature, and then submitted the documents to Supreme Court. These false signatures and false notarizations constituted violations of DR 1-102(A)(4), even if done with the consent of the client. Respondent’s failure to send her client a bill during the one and one-half year divorce proceeding was held to be in violation of DR 1-102(A)(5).

February 1, 2008

Attempt to Bribe Former Trail Justice Constituted Egregious Marital Fault

In Levi v Levi, 848 N.Y.S.2d 225 (2d Dept., 2007) the parties originally appeared before a Justice of the Supreme Court, Kings County and the action terminated abruptly following allegations that the plaintiff attempted to bribe the former Justice for a favorable outcome. At a criminal proceeding in 2004, the plaintiff admitted that he conspired to bribe the former Justice in the pending divorce action, providing a $10,000 payment to influence a favorable outcome on his behalf. Following a second trial, the Supreme Court equitably distributed the sole marital asset, the marital residence, entirely to the defendant, based in part, on the egregious behavior of the plaintiff in attempting to bribe the former Justice. The Appellate Division affirmed. It held that Supreme Court properly exercised its discretion in finding that the plaintiff's attempt to bribe the former Justice constituted egregious marital fault to be factored into the equitable distribution award in addition to other considerations.

"Substantial Change in Circumstances" Standard Correct Where Supreme Court Refers Child Support to Family Court

In Zwickel v Szajer,--- N.Y.S.2d ----, 2008 WL 191640 (N.Y.A.D. 3 Dept.) in April 2003 the Support Magistrate entered an order for child support. Shortly thereafter, plaintiff commenced an action for divorce where the issue of child support was referred to Family Court. At about the same time, plaintiff commenced a proceeding, pursuant to Family Ct Act article 4, alleging a violation of the April 2003 order. After a hearing on both matters, the Support Magistrate found that defendant was in willful violation of its prior order and, by separate order, that there was no substantial change in circumstances to warrant an upward modification of child support. Plaintiff's objections were denied by Family Court. The Appellate Division agreed with Family Court that the Support Magistrate applied the correct standard in determining plaintiff's application for an upward modification of the April 2003 order of support. It held that in a matrimonial action, unless a prior support order from Family Court is continued by Supreme Court, the prior order terminates when Supreme Court makes a new support determination. As no such order was issued by Supreme Court, instead referring the matter to Family Court to determine the application, the "substantial change in circumstances" standard was correctly applied upon plaintiff's application for a modification of the Support Magistrate's prior order of support (Citing Cynoske v. Cynoske, 8 A.D.3d 720, 722-723 [2004] ). Ed Note: In Blauner v Blauner, 60 App Div 2d 215 ( 1st Dept.1977) the First Department held that when divorce follows separation the court may consider child support de novo. In Kover v Kover, 29 N.Y.2d 408 (1972) the Court of Appeals held that alimony may be considered de novo).

Wilful Violation Order Reversed Based Upon Ineffective Assistance of Counsel In Support Enforcement Proceeding

In Matter of Martin v Martin, --- N.Y.S.2d ----, 2007 WL 4530824 (N.Y.A.D. 3 Dept.) petitioner father and respondent stipulated to a joint custody arrangement, whereby the father would pay child support of $200 per week. In 2004 the mother sought a finding that the father had willfully violated the order of support and the father sought modification of his support obligation. In his petition, the father listed verbal agreements and health as the change in circumstances justifying modification. On the first day of trial, the father's attorney attempted to introduce medical records but, after the mother objected, the Support Magistrate refused to receive the records "at this time," apparently in the absence of proper authentication. The father testified that in the spring and summer of 2003 his business collapsed, he was diagnosed with an illness which crippled his ability to work until approximately January 2005 and, between September 2003 and May 2004, he lived with the mother and their children under an agreement that he would perform the duties of a "stay-at-home parent" in lieu of support payments. On the second day of trial a month later, the father attempted to introduce the testimony of his therapist who was apparently prepared to testify that during an addiction counseling session the parties had "agreed to have [the father] provide services instead of providing child support dollars." However, the mother objected to such testimony on the ground that it was privileged. The Support Magistrate adjourned the trial for research on the issue of privilege. Thereafter, the Support Magistrate determined that the mother was involved in the counseling only for the purpose of assisting with the father's therapy and that the therapist would be permitted to testify as a fact witness regarding the alleged agreement. On the date of that decision--May 5, 2005--the Support Magistrate set the next date for the continuation of the trial for June 28, 2005. On June 28, 2005, almost eight weeks after her decision, the Support Magistrate was prepared to accept the therapist's testimony. The father's attorney, reported to the court that the therapist was not available and requested that another date be set for the therapist's testimony or, in the alternative, that the mother consent to the receipt in evidence of the therapist's affidavit, which had been submitted previously in support of the father's earlier assertion that the therapist should be allowed to testify. The mother objected to both of these options, and the Support Magistrate agreed. The father's testimony resumed and it was revealed that he had recently been incarcerated on pending criminal charges. The mother testified that the father had indeed resided with her and the children at times and that she had attended therapy sessions with him, but she asserted that they had not entered into any agreement to suspend child support. After again denying the father's requests for an opportunity to call the therapist or introduce the therapist's affidavit, the Support Magistrate ruled from the bench dismissing both petitions based on the father's failure to establish a change in circumstances and finding that he had willfully violated a support order. In her ruling, the Support Magistrate noted that no medical evidence of the father's alleged inability to work due to diminished health was introduced, incarceration is not a basis to modify an order of support, and no credible evidence supported his claims regarding the alleged arrangement between the parties. She issued an order finding that he willfully violated an order of support. Family Court affirmed. The Appellate Division rejected the father's contention that the Support Magistrate's refusal to adjourn the trial so that a key witness could be located amounted to an abuse of discretion and that the decision to not consider the therapist's affidavit in place of his testimony was error. "The grant or denial of a motion for 'an adjournment for any purpose is a matter resting within the sound discretion of the trial court. Here, it was clear that the father's inability to produce the therapist resulted from his counsel's lack of due diligence in preparing for the hearing. His counsel conceded that he never spoke directly with the therapist--simply asserting that a letter was sent and it never came back so "[he] expected him to be [t]here"--and there was no indication in the record that any pretrial attempt was made to obtain a continuance or to reschedule. As for the refusal to admit the therapist's affidavit into evidence, the father failed to suggest any basis on which admission of that hearsay document would have been permissible. The court was persuaded by the father's ineffective assistance of counsel claim based upon his attorney's failure to present sufficient evidence regarding his medical condition and to ensure that a key witness was present at trial. Under Family Ct Act 262(a)(vi), a person has the right to the assistance of counsel in any proceeding before the court in which an order or other determination is being sought to hold such person in contempt of the court or in willful violation of a previous order of the court. The standard for effective assistance of counsel here is whether, viewed in its totality, the representation was meaningful and whether actual prejudice was suffered as a result of claimed deficiencies. The father's initial modification petition and his defense to the willful violation allegations turned on his health-related inability to work due to his treatment for a serious illness and an alleged agreement with the mother to suspend his support payments, and his counsel did not get important evidence admitted that would have advanced these assertions. Counsel failed to properly obtain authentication for the father's medical records, call any witnesses to testify as to the effects of the father's illness, subpoena the therapist, or otherwise ensure his availability as a witness on the trial date. Family Court made specific reference to the lack of medical evidence in its decision, finding that the father had not refuted the mother's prima facie showing of willfulness, and affirmed the specific finding that no credible proof was offered to support the father's assertions of an agreement between the parties--the precise issue on which the therapist was to testify. Had this proof been admitted into evidence, the father would have had independent verification for his assertions which may have relieved him of several months worth of support obligations and may have undermined the allegation of willfulness. Taken together, the omissions constituted a failure to meaningfully represent the father, and he was entitled to a new hearing on his initial modification petition and the mother's violation petition.

Hearsay Evidence of Abuse or Neglect Admissible and May Be Considered in Custody Case Where Corroborated

In Matter of Bartlett v Jackson,--- N.Y.S.2d ----, 2007 WL 4722934 (N.Y.A.D. 3 Dept) the mother argued on appeal that Family Court incorrectly admitted hearsay evidence and then relied upon such evidence in its custody decision. The Appellate Division held that in custody proceedings involving allegations of abuse or neglect, hearsay statements of the child pertinent to those allegations may be admitted and considered so long as they are corroborated by other evidence.

January 16, 2008

Father Directed to Put 50% of Child Support Obligation in Escrow until the Mother Can Certify Compliance with Visitation Order and Absence of Interference with Father's Visitation Rights

In Matter of Lew v Sobel,--- N.Y.S.2d ----, 2007 WL 4555624 (N.Y.A.D. 2 Dept.) the Appellate Division noted that a custodial parent's deliberate frustration of, or active interference with, the noncustodial parent's visitation rights can warrant the suspension of future child support payments (citing Domestic Relations Law 241) In view of the evidence presented at the hearing and the Supreme Court's determination that the mother deliberately had interfered with the father's visitation rights, it directed the father to pay 50% of his child support obligation to the mother's attorney, to be held in an escrow account until the mother can certify, to the satisfaction of the Supreme Court, her compliance with the visitation provisions of the first order dated April 28, 2006, and the absence of her interference with the father's visitation rights. When the mother can establish to the satisfaction of the court that she was not interfering with the father's visitation with the children, there will then be a basis to direct the mother's attorney to release, to the mother, the child support payments held in escrow. It also held that under the circumstances of this case, the Supreme Court should have reapportioned the parties' responsibility for the fees of the therapeutic visitation facilitators, the Law Guardian, and the forensic evaluator employed during the course of the proceeding so that the mother was responsible for 75% of such fees and the father was responsible for 25% of such fees.

Strict Application of Tropea Factors Not Required When There No Prior Custody Award

In Streid v Streid, --- N.Y.S.2d ----, 2007 WL 4440940 (N.Y.A.D. 3 Dept.) the father filed a petition seeking custody of the children, after the mother removed them from the marital home and relocated to Georgia without his consent. Family Court awarded custody to the mother, provided that she remained in New York. The Appellate Division affirmed. It noted that the mother was correct that a strict application of the factors set forth in Matter of Tropea v. Tropea (87 N.Y.2d 727 [1996] ) is not required when there is no prior award of custody (citing Furman v. Furman, 298 A.D.2d 627, 628-629 [2002], lv dismissed and denied 99 N.Y.2d 575 [2003] ). Nevertheless, a parent's decision to reside in a distant locale is a very important factor among the constellation of factors to be considered in arriving at a best interests determination, particularly where there is evidence that it would detrimentally affect the other parent's relationship with the children. Other relevant factors to be considered include the ages of the children, fitness of the parents, quality of the home environment, each parent's ability to provide for the child[ren's] intellectual and emotional development, and the effect the award of custody to one parent would have on the children's relationship with the other. After considering the mother's role as the primary caregiver and the father's strong relationship with the children and significant involvement in their educational and extracurricular activities, as well as the incidents of domestic violence perpetrated by both parties and the mother's alcohol abuse, the award was proper.

Where Every CSSA Requirement Met But BCSO Miscalculated, That May Not Be Enough to Invalidate Agreement

In Sullivan v Sullivan, --- N.Y.S.2d ----, 2007 WL 4441111 (N.Y.A.D. 3 Dept.) the parties settlement agreement was incorporated, but not merged, into a February 2005 judgment of divorce. When plaintiff moved to enforce the maintenance and child support provisions, defendant cross-moved to have them declared void. Supreme Court denied defendant's motion.. The Appellate Division affirmed. It noted that the agreement indicated that the parties were advised of the Child Support Standards Act, the presumptive amount which would be awarded thereunder, albeit miscalculated, and the reasons why the parties sought to deviate therefrom. While agreeing that an omission of the non-waivable statutory requirements would render the agreement void, the Appellate Division held that where, as here, each and every other statutory requirement is met, yet the basic child support obligation from which the deviation is sought is stated but miscalculated, that alone may not be enough to invalidate the agreement. It was clear that the error emanated from the parties' failure to deduct the agreed upon maintenance from defendant's income prior to the calculation under the CSSA. The error resulted in defendant's agreement to pay child support of $1,500 when the presumptively correct CSSA amount would have been $1,548. With the settlement agreement providing that there will never be any upward modification of child support, only a downward modification based upon defendant's income, and that all of the enumerated tax benefits would enure to defendant, despite the fact that they would have been properly credited to plaintiff, the Appellate Court found no basis upon which it would void the otherwise valid child support provisions in the agreement. Moreover, with Supreme Court having stated its reasons for allowing the deviation in its decision supporting the issuance of the judgment of divorce on the same date when it permitted the incorporation of the parties' agreement in the action for divorce, there was no viable challenge to the judgment.

Evidence By Unnamed Preparer is Outside Business Record Exception to Hearsay Rule

In Re Ashley Lisa D, --- N.Y.S.2d ----, 2007 WL 4390621 (N.Y.A.D. 1 Dept.) the Appellate Division held that Family Court properly excluded from evidence the Very Intensive Preventive Services program closing summary and a psychological evaluation by an unnamed preparer, as these documents do not fall under the business record exception to the hearsay rule (citing Matter of Bronstein-Becher v. Becher, 25 AD3d 796, 797 [2006] ).

Failure to Indicate If Amount of Child Support Was Presumptively Correct or If it Represented Deviation from CSSa Renders it Void. Not Error to Utilize Amount of Maintenance Actually Paid.

In Bellinger v Bellinger, --- N.Y.S.2d ----, 2007 WL 4441204 (N.Y.A.D. 3 Dept.)Supreme Court partially granted defendant's motion prior to trial to set aside the child support provisions of the parties stipulation because it did not indicate whether the amount of child support was presumptively correct or whether it represented a deviation from the Child Support Standards Act. Following trial, Supreme Court’s judgment of divorce awarded child support in an amount in excess of that contained in the prior stipulation, ordered plaintiff to pay defendant $2,475 in previously owed car insurance and determined that defendant was entitled to submit an application for counsel fees, and awarded defendant counsel fees of $15,874.47. The Appellate Division held that as no appeal was taken from the order vacating that portion of the stipulation that dealt with child support this issue was not properly before it. In any event, Supreme Court correctly determined that the stipulation failed to comply with nonwaivable requirements of the CSSA. Supreme Court correctly found that the before-tax health insurance deductions in the sum of $1,895 .05 were a fringe benefit provided as part of plaintiff's compensation for employment and includable in the calculation of his income for child support purposes. There was no error in the inclusion of $15,496 .56 in plaintiff's income. Contrary to his claim that this was a one-time nonrecurring payment, the record revealed that he received a similar cash payment in 2003 and the record reflected that his income had consistently increased for three consecutive years. Under these circumstances, even assuming the one-time nature of this payment, Supreme Court permissively exercised its broad discretion to impute that sum as income to plaintiff. With respect to maintenance, plaintiff pointed out that his annual maintenance payment would be $9,804, but that Supreme Court gave him credit only for the amount actually paid in 2005 ($7,353). As the statute authorizes a deduction for "alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action" (Domestic Relations Law 240[1-b][b][5][vii][C] ), there was no error in Supreme Court utilizing the figure actually paid. With respect to plaintiff's argument that he received improper credit for FICA contributions, it held that Supreme Court committed a minor error in only deducting $5,580 for Social Security and not including $1,648.98 for Medicare. After plaintiff received credit for the Medicare portion of his FICA deduction, his income for child support purposes was $97,549. When added to defendant's income of $21,298.39, the combined parental income was $118,847.39. As the parties had two children, application of 25% to this income yielded an annual child support obligation of $29,711.85 or $571.38 per week. Plaintiff was responsible for 82% of this total or $468.53.

January 1, 2008

DRL 236 [B](6)(a)(1) Contains No Express Time Limitation with Respect to Calculating Income for Maintenance Award.

In Haines v Haines, 44 A.D.3d 901, 845 N.Y.S.2d 77 (2d Dept.2007) Supreme Court awarded the plaintiff maintenance of $1,200 per month until May 1, 2019. The Appellate Division reduced the award to $900 per month until May 1, 2019, or until

the death of either party or the plaintiff's remarriage, whichever shall occur sooner. The Appellate Division held that Supreme Court improvidently exercised its discretion in failing to impute income from the plaintiff's second job as a data entry clerk

since that income contributed to the predivorce standard of living and was demonstrative of the plaintiff's earning capacity. The plaintiff had been working at the second job for several years prior to the commencement of the matrimonial action, and the defendant had been working for considerably more than 40 hours per week during this time period. While the plaintiff had been earning only approximately $39,000 per year at the time of the commencement of this action, by the time the matter was

heard by the trial court, she had increased her earnings to approximately $56,000. Unlike the Equitable Distribution Law, Domestic Relations Law s 236(B)(6)(a)(1) contains no express time limitation with respect to calculating income. Thus, when considering the "income and property of the respective parties," the trial court should not exclude any property or income increase which has occurred between the time of commencement of the action and the time of trial. Accordingly, the trial court should have attributed to the plaintiff a yearly income of $56,000. Additionally, the trial court erred in failing to include a provision that the award of maintenance will terminate upon the death of either party or the plaintiff's remarriage.

First Department Holds That Request for Extension to File Objections under FCA 439(e) is Procedural and Can Be Granted At Any Time

In Judith S. v Howard S. ,--- N.Y.S.2d ----, 2007 WL 4336196 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order of Family Court, which denied respondent father's motion for an extension of time to file objections to the final order of child support issued by the Support Magistrate six months earlier. Respondent father failed to file objections to the final order of child support within the 35-day period set forth in Family Court Act 439(e). It pointed out that CPLR 2004, upon which he relied, contains general authorization for a court to "extend the time fixed by any statute, rule or order for doing any act." It noted that the scope of this section was restricted by the Second Department to "extensions of time for the doing of acts in actions and proceedings and not for the doing of acts which are substantive in character and provided for under other statutes " (Matter of Powers v. Foley, 25 A.D.2d 525 [1966], emphasis added). The request in this case was directed at a procedural time limitation, and not a substantive one, and thus could have been granted even if based on a statute outside the CPLR. However, CPLR 2004 additionally requires a showing of "good cause," and respondent father had not demonstrated good cause for failing to file timely objections. Settlement negotiations alone are an insufficient excuse for delay, and the prejudice that would result to petitioner as a result of the father's delay in filing objections was obvious, given his chronic failure to meet his child support obligations in a full and timely fashion, with no effort to pay down his substantial arrears. The Court pointed out that the Third Department denies its application to time limits set forth in any statutes or regulations "other than those contained in the CPLR" (Matter of Carassavas v. New York State Dept. of Social Servs., 90 A.D.2d 630 [1982] ), and has consistently held to that position (see Matter of Monahan v. Hartka, 17 A.D.3d 758, 759 [2005] ).

Family Court Required to Consider Whether Cola Increase Should Be Applied and to Review Order To Determine Whether Adjustment Warranted Based on Guidelines

In Matter of Palmer v Palmer. --- N.Y.S.2d ----, 2007 WL 4328453 (N.Y.A.D. 2 Dept.), at the mother's request and the SCU issued a cost-of-living adjustment order, which increased the father's monthly support obligation. The Appellate Division held that in considering the father's objections to the COLA increase, the Family Court was required to consider not only whether the COLA increase should be applied, but also to review the order "to determine whether an adjustment is warranted based on the guidelines" set forth in Family Court Act 413 (citing Matter of Tompkins County Support Collection Unit v. Chamberlin, 99 N.Y.2d 328, 335; see Family Ct Act s 413-a[3][b][1]; Social Services Law s 111-n [5][b] ). In the order appealed from, however, was apparent that the Family Court did neither. As a matter of law, the court's calculation was flawed inasmuch as it assumed, incorrectly, that each parent's share of child support could be determined simply by applying the statutory child support percentage of 17% to that party's gross income. Under the Family Court Act, the child support percentage of 17% must be applied to the "combined parental income" , up to $80,000, and the amount must then be "prorated in the same proportion as each parent's income is to the combined parental income" . Moreover, if the combined parental income exceeds $80,000, then "the court shall determine the amount of child support for the amount of the combined parental income in excess of such dollar amount through consideration of the facts set forth in [Family Court Act s 413(1)(f) ]" (Family Ct Act s 413[1][c][3] ). Here, the Family Court's methodology failed to account for the mother's gross income and its possible impact on the father's prorated share of child support. It also held that Family Court improvidently exercised its discretion by using the SCU's adjusted support obligation amount, which had been calculated in accordance with Social Services Law 111-n(4)(a), without regard to the guidelines contained in Family Court Act s 413, to compute a gross income figure, which the court then imputed to the father pursuant to Family Court Act 413(1)(b)(iv). Among other things, the Family Court failed to appreciate that, pursuant to the prior order, only part of the father's support obligation represented his prorated share of 17% of what was then the combined parental income. The remaining amount represented his prorated share of health care, child care, educational, and other extraordinary expenses.

When QDRO Conflicts with Stipulation of Settlement the Stipulation Controls, and QDRO must Be Modified Accordingly

In Condon v Condon, --- N.Y.S.2d ----, 2007 WL 4328729 (N.Y.A.D. 2 Dept.) the Appellate Division held that a proper QDRO obtained pursuant to a stipulation of settlement can convey only those rights to which the parties stipulated as a basis for the judgment. It agreed with the former husband's contention that the distribution of his pension as ordered in the QDRO differs from the distribution of the pension as stated in the parties' stipulation of settlement. The plain language of the relevant provision of the stipulation of settlement governing the former husband's pension stated that the former wife shall be entitled to a 50% interest in the retirement plan as calculated from the date of marriage through the date of separation, that is, 50% of the benefits earned during the relevant 17-year period the former husband was working and was a member of the pension plan. However, the QDRO directed that the former wife receive a percentage of the former husband's pension based upon his final pension benefits, and was not limited to her interest in it as provided for in the stipulation. When the QDRO conflicts with the stipulation of settlement upon which it was based, the stipulation of settlement controls, and the QDRO must be modified accordingly. The court also held that the former wife was entitled to share in cost-of-living adjustments in retirement benefits as long as the increases were limited to her portion of the pension.

Family Court Lacks Authority to Enforce Provisions of Settlement Agreement Pertaining to Distribution of Equity of Marital Residence.

In Gambacorta v Gambacorta, --- N.Y.S.2d ----, 2007 WL 4183000 (N.Y.A.D. 2 Dept.) the parties judgment of divorce incorporated by reference, but did not merge, a stipulation of settlement, which provided for distribution of the remaining equity in the marital residence, allocated responsibility for debts incurred by the former wife and required the former husband to pay the wife maintenance and for certain dental expenses. The Appellate Division held that contrary to the husband's contention, the Family Court is authorized by statute to entertain petitions for the enforcement of an order or decree awarding maintenance or support, and to enter money judgments for support arrears, unless the Supreme Court expressly retains exclusive jurisdiction to enforce the terms of a judgment of divorce (see Family Ct Act s 466[c]. However, Family Court, as a court of limited jurisdiction, lacked authority to determine so much of the wife's petition as sought to enforce those provisions of the Settlement Agreement which pertain to distribution of the equity of the marital residence. The Settlement Agreement also required the husband to pay up to $5,000 towards dental work to be provided to the wife. The husband only submitted evidence sufficient to prove payment of $2,500 to the wife's dentist. The unsworn letter from the dentist stating that a total payment of $5,000 had been received did not have the indicia of reliability associated with a receipt or business record, because it was not created contemporaneously with the purported payments and there was no showing that it was created in the ordinary course of business (see CPLR 4518[a] ). Accordingly, the husband was obligated to pay $2,500 to the wife for dental expenses.

December 17, 2007

Appeal Dismissed With Leave to Reinstate After Argument Based upon Fugitive Disentitlement Doctrine

In Wechsler v Wechsler, --- N.Y.S.2d ----, 2007 WL 4168955 (N.Y.A.D. 1 Dept.) the a judgment of divorce directed the appellant husband to pay respondent a distributive award of $22,770,623 in 60 equal installments of $379,510.50, and monthly

maintenance of $46,666.66 until appellant transferred certain assets to respondent. Appellant appealed from the judgment. As a consequence of his failure to comply with it Supreme Court granted the wife's motion to hold appellant in contempt. A subsequent order directed that appellant be arrested and incarcerated, and a warrant was issued for his arrest. By subsequent order, Supreme Court granted judgment against appellant for approximately $1 million in maintenance and distributive award arrears. On May 1, 2007, the appeal from the judgment of divorce was argued. On August 16, 2007, respondent moved to dismiss the appeal on the ground that appellant was a fugitive from this jurisdiction and barred from maintaining this appeal under the fugitive disentitlement doctrine. The First Department dismissed the appeal with leave to defendant-appellant to make a motion to reinstate the appeal on condition that he post an undertaking of $9,151,920.57, and $500,000 in additional security relating to other amounts owed. It held that the fugitive disentitlement doctrine permits a court to 'dismiss an appeal if the party seeking relief is a fugitive while the matter is pending'. The doctrine is based on the inherent power of courts to enforce their judgments and it has long been recognized and applied to those who evade the law while simultaneously seeking its protection" (citing Matter of Skiff-Murray v. Murray, 305 A.D.2d 751, 752 [2003] ). The doctrine applies in civil cases provided there is a nexus between the appellant's fugitive status and the appellate proceedings. The nexus requirement is satisfied where the appellant's absence frustrates enforcement of the civil judgment. The principal rationales for the doctrine include: (1) assuring the enforceability of any decision that may be rendered against the fugitive; (2) imposing a penalty for flouting

the judicial process; (3) discouraging flights from justice and promoting the efficient operation of the courts; and (4) avoiding prejudice to the non-fugitive party. The Appellate Division found that appellant had willfully remained outside of New York

in order to avoid the jurisdiction and authority of the courts of this State and refused to afford him review of the judgment of divorce since he evaded court mandates.

Cross Motion Properly Entertained Without Notice of Cross Motion Where Plaintiff Aware of Cross Motion, Submitted Opposition, and Was Not Unduly Prejudiced

In Fugazy v Fugazy, 844 N.Y.S.2d 341 (2d Dept 2007) the Appellate Division held that under the circumstances of this case, the court did not err in entertaining the defendant's cross motion, which was set forth in his affidavit in opposition to the

plaintiff's order to show cause and did not include a formal notice of cross motion. Since the plaintiff was aware of the cross motion, submitted opposition to it, and was not unduly prejudiced by the lack of service of a notice of cross motion, the court

providently exercised its discretion in entertaining the defendant's cross motion (citing Wechsler v. People, 13 A.D.3d 941, 942, 787 N.Y.S.2d 433; Fox Wander W. Neighborhood Assn. v. Luther Forest Community Assn., 178 A.D.2d 871, 872, 577

N.Y.S.2d 729).

Child's Psychologist Allowed to Testify Concerning Out-of-court Statements Made by Child to Show the Child's State of Mind

In Matter of Noemi D, --- N.Y.S.2d ----, 2007 WL 2812268 (N.Y.A.D. 4 Dept.) Respondent appealed from an order terminating her parental rights based on a finding of permanent neglect. The Appellate Division held that the court properly allowed the child's psychologist to testify concerning certain out-of-court statements made by the child. Those statements were offered to show the child's state of mind rather than to establish the truth of the matter asserted).

Child Permitted to Assert Psychologist-Patient Privilege in Custody Modification Case

In Matter of Ascolillo v Ascolillo,--- N.Y.S.2d ----, 2007 WL 2782953 (N.Y.A.D. 2 Dept.) the parties stipulation of settlement which was incorporated but not merged in the parties' judgment of divorce dated November 20, 2003, the parties agreed to joint

custody of their two minor children and that the minor children would reside with the mother. However, the stipulation of settlement further provided that: "The parties shall acknowledge that the children's wishes when they are at an appropriate

age should be considered in connection with the exercise by the parents of the custodial and visitation rights." The instant proceeding was brought when the subject child requested to spend more time with his father. The Appellate Division found that under the circumstances of this case, there was no basis to disturb the Family Court's determination granting the father's petition to modify the parties' judgment of divorce to award him sole legal and physical custody of the subject child. It also held that the Family Court properly refused to permit the mother to call the child's therapist as a witness, since the Law Guardian did not consent to the disclosure of confidential communications between the child and his therapist (citing Matter of Billings v. Billings, 309 A.D.2d 1194), and the proceeding was not a child protective proceeding pursuant to Family Court Act article 10 (see Family Ct Act s 1046[a][vii] ).

Error to Deny Credit For Entire Mortgage Payment Against Child Support

In Lauria v Lauria --- N.Y.S.2d ----, 2007 WL 3317916 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court erred in failing to credit the husbands child support account for the entire amount that he paid for the plaintiff's mortgage pursuant

to a pendente lite order because the payment of the mortgage in addition to child support resulted in giving the plaintiff a double shelter allowance.

Supreme Court Correctly Precluded Testimony by the Defendant's Expert Witnesses Because the Defendant Had Not Complied with the Requirements of Cplr 3101(d)(i)

In Fox v Fox --- N.Y.S.2d ----, 2007 WL 3209615 (N.Y.A.D. 2 Dept.) Supreme Court , awarded the plaintiff sole custody of the parties' children, awarded the defendant supervised visitation with the parties' children, denied her an award of maintenance,

directed her to pay child support of $1,039 per month and 27% of statutory "add-ons" for the expenses of child care, education, and extracurricular activities of the parties' children, and directed her to pay an attorney's fee in the amount of $42,642.42 to

the plaintiff. The Appellate Division held that Supreme Court correctly precluded testimony by the defendant's expert witnesses because the defendant had not complied with the requirements of CPLR 3101(d)(i) for expert witness disclosure (citing Schwartzberg v. Kingsbridge Hgts. Care Ctr., Inc., 28 AD3d 463, 464-465). It also properly awarded custody to the plaintiff. However, the court should have held a hearing on the issue of visitation. It reduced the child support award in light of the defendant's employment situation, directing that the defendant should pay child support in installments of $75 per week, and 10% for the add-ons. It also held that Supreme Court erred in allocating one-half of the plaintiff's educational loan debt to the

defendant, as the plaintiff earned his medical license prior to the marriage. It was more appropriate to require the parties to equally divide the medical bills debt, and the plaintiff's TD Waterhouse IRA. In addition, the defendant should not have been

held responsible for repayment of any part of the plaintiff's $50,000 loan from his parents and should not have been directed to pay the plaintiff an attorney's fee.

Error to Use Date That Prior Dismissed Matrimonial Action Was Commenced, as “Cut-off” Date for Identification, Classification, and Valuation of Marital Assets

In Montalvo v Montalvo, 842 N.Y.S.2d 504 (2d Dept.,2007) the Appellate Division held that Supreme Court erred in granting the husband's motion to establish February 4, 1999, the date that a prior matrimonial action was commenced, as the last date

for the identification, classification, and valuation of the parties' marital assets. It pointed out that the prior matrimonial action, commenced by the husband on the ground of abandonment, was dismissed in its entirety on the merits following a trial. Such a dismissal on the merits foreclosed any claim or entitlement of the husband to equitable distribution of the parties' marital property in that action). Thus, the commencement date of the prior dismissed action may not be utilized as a "cut-off" date for the accumulation of marital property for the purpose of identifying, classifying, and valuing that property in connection with its equitable distribution. Nonetheless, the parties' conduct with respect to their property during the interval between the dismissal of the first action and the commencement of the instant action may, if deemed appropriate, be considered by the Supreme Court in the exercise of its broad discretion to fashion an appropriate distribution of what is characterized as marital property.

December 3, 2007

Rules of the Chief Judge Define the Role of the Law Guardian.

Rule 7.2 of the Rules of the Chief Judge, adopted October 17, 2007, define the role of the law guardian. The rule defines 'Attorney for the child' as a law guardian appointed by the family court pursuant to section 249 of the Family Court Act, or by the supreme court or a surrogate's court in a proceeding over which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto. [7.2 (a)]

The attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on: ex parte communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation. [7.2 (b)]

In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the attorney for the child must zealously defend the child.[ 7.2 (c)]

In other types of proceedings, where the child is the subject, the attorney for the child must zealously advocate the child's position. In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances. If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests. When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a

position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position. [7.2 (d)]

First Department Explains Requirements for Extent of Temporary Custody Hearing

In Alex A v Ericka H., --- N.Y.S.2d ----, 2007 WL 3380148 (N.Y.A.D. 1 Dept.) the Appellate Division reversed on the law an order which awarded custody of the parties daughter to petitioner. It held that mother was deprived of her fundamental rights when the hearing court, without any notice, transferred custody of her child to petitioner father. The mother was not represented by counsel at the time the court abruptly ordered this transfer, nor was she afforded a hearing with the opportunity to present evidence and to call and cross-examine witnesses. While the mother was entitled to a full, plenary hearing to decide the issue of permanent custody, the court found that, based on this record, the temporary custody arrangement ordered by Family Court was not without support and the court was fully familiar with the history of the case. While these facts did not provide all the necessary legal justification for the court's precipitous action the Appellate Divison pointed out that it was cognizant that family courts in many counties have crushing case loads, extremely difficult family issues to decide, and limited time to make fair and informed determinations in what are often chaotic and highly charged emotional cases. It indicated that it had these considerations in mind when it said in its recent holding in Matter of Martin R.G. v.. Ofelia G.O. (24 AD3d 305, 306 [2005] ): The nature and extent of a [temporary custody] hearing may be as abbreviated, in the court's broad discretion, as the particular allegations and known circumstances warrant. The extent of the hearing may perhaps be as little as questioning the parties under oath by the court, subject to limited questioning by the lawyers. In any such case, the court should insure that the factual underpinnings of any temporary order are made clear on the record. The matter was remitted to the Family Court for an expedited determination.

Strong Public Policy Against Restitution or Recoupment of Support Overpayments

In the Matter of Annette M.R., v. John W.R.--- N.Y.S.2d ----, 2007 WL 3318246 (N.Y.A.D. 4 Dept.)the mother commenced a proceeding seeking an upward modification of a prior child support order. The Support Magistrate increased the father's child support obligation but Family Court thereafter granted this objections and restored his prior child support obligation. The Appellate Division held that the Family Court erred in permitting the father to recoup overpayments in child support made in the interim between the Support Magistrate's order and the order granting the father's objections. It held that there is a strong public policy against restitution or recoupment of support overpayments. It noted that although recoupment may be permissible under limited circumstances (citing Tuchrello v. Tuchrello, 233 A.D.2d 917), no such circumstances were presented here.

On Motion to Dismiss at Close of Petitioner's Proof, Court must Accept Petitioner's Evidence as True, Afford Petitioner Every Favorable Inference and Resolve All Credibility Questions in Petitioner's Favor

In Matter of David WW v Laureen QQ, --- N.Y.S.2d ----, 2007 WL 2002451 (N.Y.A.D. 3 Dept.) a custody modification proceeding, the Appellate Division held that when deciding a motion to dismiss at the close of a petitioner's proof, the court must accept the petitioner's evidence as true and afford the petitioner every favorable inference that could reasonably be drawn from that evidence, including resolving all credibility questions in the petitioner's favor. At the close of petitioner’s case the court acknowledged that it was resolving credibility questions in a manner that would require it to disregard large portions of testimony offered on petitioner's case. Thus, the court did not adhere to the proper standard when considering the motion. It found that Family Court should have denied respondent's motion to dismiss the petition because petitioner presented sufficient prima facie evidence of a change in circumstances and a need to modify custody to ensure the child’s best interests. It remitted for further proceedings on the custody and visitation petitions before a different judge.

Life Insurance Increased to Cover Total Child Support. Court May Consider Current Income for Tax Year Not Yet Completed

In Moran v Grillo, 843 N.Y.S.2d 674 (2d Dept.,2007) after a hearing, family court directed the father to pay child support of $1,321 per month, and directed the father to maintain a life insurance policy of $100,000, with the child named as beneficiary and the mother as trustee. The Appellate Division noted that in determining the amount of child support that a parent must pay under the Child Support Standards Act the court is required to begin the calculation with the parent's "gross (total)

income as should have been or should be reported in the most recent federal income tax return" .The court is also permitted to consider current income figures for the tax year not yet completed (citing Matter of Taraskas v. Rizzuto, 38 A.D.3d 910, 835 N.Y.S.2d 212; Matter of Culhane v. Holt, 28 A.D.3d 251, 252, 813 N.Y.S.2d 400; Matter of Kellogg v. Kellogg, 300 A.D.2d 996, 752 N.Y.S.2d 462). Here, the father's 2005 income tax return reflected a gross income of $77,475. Although the income reported on the father's 2004 tax return, $163,605, was significantly higher, the Support Magistrate concluded, based upon testimony that she found to be credible, that the father's 2004 income was unusually high. Considering, in addition, the evidence that the father had claimed a portion of his personal expenses as business expenses, the Support Magistrate acted properly within her discretion in determining the father's income for child support purposes to be $100,000. The Support Magistrate did not improvidently exercise her discretion in imputing income of $20,000 to the mother, based on her previous employment as a nurse, a real estate agent, and an office employee. In determining a parent's child support obligation, the Family Court is not required to rely upon a party's own account of his or her finances, and may impute income based on that party's past income or demonstrated earning potential. The father was directed to maintain a policy of insurance on his life in the amount of $100,000. The Appellate Division held that this sum was insufficient. The plain language of Domestic Relations Law s 236(B)(8)(a) expressly provides that life insurance may be used as a means to secure maintenance and child support payments, so that dependent spouses and children will be adequately protected. In light of the balance of the father's future child support obligations, the Family Court should have required that the father maintain a life insurance policy in the amount of the total support due until the child reaches the age of majority or a declining term policy that would permit the father to reduce the amount of coverage by the amount of child support actually paid. Considering that the amount of child support that the father had to pay was $1,321 per month and the fact that his obligation to do so will continue for more than a decade, the amount of the life insurance policy should have been fixed at $150,000, and not $100,000.

November 15, 2007

The 2007 New York Law Reports Style Manual, Official Edition is now available online at http://www.nycourts.gov/reporter. The Style Manuel is the only official and correct citation authority for New York attorneys and judges

- A new rule (2.1 [a] [1]) requires that published New York decisions be cited by the case names specified in the newly published Official Case Name and Citation Locator (http://iapps.courts.state.ny.us/lawReporting/SearchCitation) and in the “Cite Title As” fields of the on-line Reports.

- The use of supra to indicate that an authority has been cited previously is no longer permitted with shortened citations (1.3 [b] [2]) and is no longer required for any subsequent reference (1.3 [c]).

- The placement of a comma between a citation signal and the citation is no longer permitted (1.4 [a]).

- The requirement to supply print page references where the electronic source cited does not provide them has been eliminated (1.5 [e]; 7.1 [a]).

- Formats for citing tabular or abstracted cases (table in print, full text on line) have been added (2.2 [b] [2]; 2.4 [a] [2]).

- The restrictions on citing Internet materials have been eased to permit Internet citations where the cited material is not readily available in another form (2.4 [a] [3]; 7.1 [c] [1]).

- A format for citing weblogs has been provided (7.1 [c] [4]).

- A new rule clarifies that the word “the” is not capitalized as part of the name of an entity (e.g., the New York Times) (10.4 [c]).

Other rules adopted in 2004 permit the use of the citational footnote style. (1.2 [e]); make mandatory the use of year of decision in full case citations (1.1 [a]); and require that an elision is to be indicated by three ellipsis points (. . .), not by asterisks (11.1 [c]). (Note: The citation style used in the “Bluebook” is not correct in New York and conflicts with the Style Manuel.)

Appeal from Judgment Directing Equitable Distribution Upon Default in Appearing at Trial Dismissed under CPLR 5511

In Gerteis v Gerteis, 843 N.Y.S.2d 425 (2d Dept, 2007) Supreme Court awarded the plaintiff a divorce on the ground of abandonment and, upon her default in appearing at the trial, directed the equitable distribution of the marital property. The Appeal from so much of the judgment as directed the equitable distribution of the marital property was dismissed and the judgment was affirmed “insofar as reviewed”. The Appellate Division affirmed. It held that "Abandonment is almost always a question of fact" and plaintiff made out a prima facie case of abandonment by demonstrating that the defendant failed to fulfill the " 'basic obligations springing from the marriage contract' " for one or more years and that her conduct was neither justified nor consented to by the plaintiff. Moreover, the defendant neither pleaded nor proved justification (see Maryon v. Maryon, 60 A.D.2d 623, 400 N.Y.S.2d 160). Thus, there was no reason to disturb the Supreme Court's conclusion that she abandoned the martial residence for more than a year and did not intend to return. The Court also held that since the portion of the judgment directing the equitable distribution of the marital property was entered upon the defendant's default in appearing at the trial on that issue, the appeal from that portion of the judgment must be dismissed (citing CPLR 5511; Atwater v. Mace, 39 A.D.3d 573, 573-574, 835 N.Y.S.2d 600).

Not Abuse of Discretion to Refuse to Enforce Mediation Confidentiality Agreement

In Hauzinger v Hauzinger, 842 N.Y.S.2d 646 (4th Dept.,2007) the Appellate Division affirmed an order which denied the motion of a nonparty witness in this divorce action to quash the subpoena issued by defendant for his appearance at a deposition in this action and for his records in connection with the mediation process that he conducted with the parties prior to the commencement of the action. The Appellate Division noted that the parties were not represented by counsel when they participated in the mediation process that concluded with the execution of a separation agreement. Even assuming, arguendo, that the subpoena and accompanying notice did not advise appellant of the "circumstances or reasons such disclosure [was] sought or required" (CPLR 3101[a][4] ) defendant's response to appellant's motion provided the requisite information. Thus, Supreme Court did not improvidently exercise its discretion in denying that part of appellant's motion seeking to quash the subpoena Inasmuch as defendant sought to establish the circumstances surrounding the execution of the separation agreement, and the court must determine in this action whether the terms of the separation agreement "were fair and reasonable at the time of the making of the agreement" the Court rejected appellant's contention that the court abused its discretion in refusing to enforce the confidentiality agreement entered into by the parties as part of the mediation process and in refusing to quash the subpoena as a matter of public policy. Although appellant urged the Court to apply the confidentiality provisions in the Uniform Mediation Act as a matter of public policy. As New York has not adopted that Act and it declined to do so.

Proper To Preclude Expert Witness Where Proposed Testimony Irrelevant and Not Based on Facts in Evidence.

In Jill S. v Steven S, 842 N.Y.S.2d 401 (1st Dept.,2007) the Appellate Division affirmed an order granting respondent's motion to dismiss the child support petition for lack of personal jurisdiction under the Uniform Interstate Family Support Act (UIFSA). It noted that under UIFSA, Family Court may exercise personal jurisdiction over a nonresident respondent if the child resides in New York as a result of the acts or directives of the individual (Family Ct. Act 580-201[5] ). The determination that petitioner failed to establish by a preponderance of credible evidence a pattern of abuse or harassment by respondent resulting in the child's relocation to New York, so as to exercise personal jurisdiction under the statute, was supported by the record, and there was no basis to disturb the Support Magistrate's credibility assessments. The Appellate Division also held that the Magistrate appropriately exercised his discretion in precluding petitioner's expert witness, inasmuch as the proposed testimony was irrelevant and not based on facts in evidence. Although the expert proposed to testify regarding the circumstances under which the child had left respondent's home in Ohio, she admitted that she had not re-evaluated the child since the parties' divorce proceeding three years earlier. Her proposed testimony was irrelevant to the issue of whether respondent's conduct sufficiently warranted the exercise of personal jurisdiction over him in the proceeding. The issue of whether respondent's conduct caused the child to flee Ohio was a question of fact, to which the child herself testified, and did not require an expert opinion. The expert's opinion regarding the child's physical and mental condition post-2002 was hearsay, based on documents that were not admitted into evidence at the hearing, and was thus inadmissible.

Family Court Lacks Power to Modify Separation Agreement and Power to Do So Can Not Be Conferred upon it by Agreement

In Smith v Smith, --- N.Y.S.2d ----, 2007 WL 2872438 (N.Y.A.D. 3 Dept.) the parties separation agreement provided, among other things, that respondent would provide petitioner $100 per week in spousal maintenance and $250 per week in child support. In January 2006, petitioner commenced a proceeding seeking an upward modification of maintenance and child support. Respondent counterclaimed, seeking a reduction of his obligations under the agreement and an order requiring petitioner to apply for certain Medicare health coverage benefits. A fact-finding hearing was held and Family Court dismissed petitioner's application for lack of jurisdiction and denied respondent's request for a downward modification. The Appellate Division affirmed. It noted that on its face, the parties' agreement was an attempt to permit petitioner to seek additional maintenance by filing in a court of appropriate jurisdiction for a modification of the present provisions concerning the payment of maintenance. Consistent with the agreement the petition expressly stated that it was an application to the Family Court for an upward modification of spousal support, premised on the loss of certain Social Security benefits. The Appellate Division held that it is well settled, however, that "Family Court is a court of limited jurisdiction which lacks the power to modify the terms of a separation agreement, as opposed to the terms of a divorce decree, and that this power cannot be conferred upon that court by agreement of the parties" (citing Kleila v. Kleila, 50 N.Y.2d 277, 282 [1980]). Moreover, there was no claim that any of the exceptions to this rule, i.e., that petitioner was likely to become a public charge, that the agreement was facially invalid or that respondent breached the agreement, were present here. The provision of the parties' agreement directing that Family Court treat any applications by petitioner as "de novo" was not sufficient to alter the substance of the agreement, which was an improper attempt to confer subject matter jurisdiction upon Family Court. To the extent that Matter of Spilman-Toll v. Toll (209 A.D.2d 1015, 1016 [4th Dept 1994] ) held that Family Court is a court of "competent jurisdiction" to modify a support agreement merely because the parties to the agreement have deemed it so, the court declined to follow it on the ground that it was inconsistent with the public policy as articulated by the Court of Appeals in Kleila v. Kleila (50 N.Y.2d at 282). (Justice Peters and Justice Rose dissented in an opinion by Justice Peters)

November 1, 2007

Although New York Personal Service Not Effected, Time Extended After Traverse to Serve Defendant in Japan

In Yamamoto v Yamamoto, 43 A.D.3d 372, 842 N.Y.S.2d 10 (2st Dept.,, 2007) the Appellate Division affirmed orders which which denied plaintiff's request that service of the summons and complaint on defendant be permitted by personal delivery to his attorneys, granted plaintiff's motion for an extension of time to serve the summons and complaint, permitted plaintiff to apply for reimbursement of attorney fees and costs to defray the expense of effectuating service on defendant in Japan, subject to reallocation at trial from the escrowed proceeds of the sale of the marital home, and granted defendant's motion to confirm the Referee's report to the extent that the Referee found defendant had not been personally served and granted plaintiff's motion to extend her time to serve defendant. It held that Supreme Court did not improvidently exercise its discretion in granting plaintiff an extension of time to serve defendant, in the interest of justice, given plaintiff's demonstration of reasonably diligent attempts to serve within the 120-day period after filing the summons with notice (CPLR 306-b), her reasonably prompt request for the extension, and the absence of prejudice to defendant, who had long had notice of plaintiff's claims. In view of the procedures in place for effectuating service upon defendant in Japan, and the absence of any evidence that service in that manner is "impracticable," the court properly denied plaintiff's request, pursuant to CPLR 308(5), for an order directing that service on defendant be effectuated by personal delivery of process upon his. Given defendant's alleged removal to Japan and his alleged failure to provide any support for his infant daughter, who allegedly lived in Manhattan with her mother, the court providently granted plaintiff leave to apply for funds to defray the additional expense of effectuating personal service upon defendant in Japan pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 UST 361 [1965] ).

First Department Holds Distributive Award and Attorneys Fees Are Reviewable on Direct Appeal From Default Judgment

In Warner v Houghton, 43 A.D.3d 376, 841 N.Y.S.2d 499 (1st Dept., 2007) defendant did not appear at a compliance conference and by Order dated August 24, 2006 the matter was set down for an inquest on the issue of equitable distribution. After the inquest, at which he did not appear, the court granted a divorcet, and made awards concerning the request for equitable distribution and counsel fees. The defendant appealed from the judgment. Plaintiff argued that the judgment of divorce was not reviewable on appeal because of defendant's various defaults. The Appellate Division held that while the issue of whether the divorce was properly granted may not be reviewable, the distribution award was a separate issue, and was still subject to scrutiny, even after a default (citing Michalek v. Michalek, 180 A.D.2d 890, 579 N.Y.S.2d 497 [1992] ). Defendant argued that the court did not delineate the factors it considered and its reasons for its decision in dividing the marital property. It observed he had not appeared at the inquest, and granted the relief requested by plaintiff with respect to equitable distribution, except that it awarded only 50% of the amount requested "for equitable distribution of lost opportunity." It appeared that defendant's campaign of avoidance, by inter alia discharging attorneys and failing to appear on various occasions, weighed heavily in the court's decision to grant plaintiff, without specific findings, virtually everything she requested. The Appellate Division held that while defendant's conduct bordered on the contemptuous, the equitable distribution award must still be justified on the record, and should be supported by specific findings. The record was barren of any such support. Thus, the equitable distribution awards had to be vacated and the matter remanded for a new hearing. It directed that the vacatur be conditioned upon the continued retention by defendant of New York counsel. Defendant argues that the combined award of attorneys' fees (for New York and Singapore counsel) in the amount of $252,922 was both unwarranted and excessive. Plaintiff responds that the award was justified because of defendant's obstructionist litigation tactics. The Appellate Division held that while it may be that some of the counsel fees were justified because of defendant's tactics, the court's failure to make specific findings prevented proper review. The issue of counsel fees was remanded for a showing of reasonableness, at least with regard to those fees incurred as a result of defendant's dilatory tactics. Except with regard to those fees the award of legal fees was unjustified. Plaintiff's annual earnings were over $150,000 per year, and there was no showing that her financial circumstances were constrained. Although she did not earn as much as defendant, there was no substantial disparity between their individual incomes. In its August 24, 2006 order, the court found defendant in default due to his failure to appear at a compliance conference the previous month, and directed that the financial issues to which plaintiff had sought discovery were resolved for purposes of the action in accordance with her claims. The Appellate Division held that although CPLR 3126 does not specifically require that formal notice be given, the Court had previously found that the same due process protections afforded under CPLR 3124 (motions to compel disclosure) should also be imposed when sanctions are sought (citing Postel v. New York Univ. Hosp., 262 A.D.2d 40, 42, 691 N.Y.S.2d 468 [1999] ). However, since defendant was advised of the compliance conference and had not offered a valid reason for failing to appear, which, inter alia, prompted the court's ire, costs should be imposed for whatever attorneys' fees were incurred as a result of appearing at the conference, and preparation of the ensuing order.

Misrepresenting Income for Purpose of Increasing Support Obligation Causes Wife to Forfeit Entitlement to Counsel Fees

In Griggs v Griggs, --- N.Y.S.2d ----, 2007 WL 2955678 (N.Y.A.D. 2 Dept.) Supreme Court awarded the defendant 35% of the value of the husbands medical practice, maintenance for eight years in the amount of $8,000 a month for the first three years and $6,000 a month for the five years thereafter, directed that he pay 100% of all unreimbursed and uncovered medical expenses of the two children until such time as they reach the age of 21, and awarded the defendant $159,230.50 in attorney's and experts' fees. The Appellate Division held that in light of the parties' long marriage and the defendant's partial subordination of her career to the care of the children and looking after the marital home, the court properly awarded the defendant maintenance. However, awarding maintenance for a period of eight years was an improvident exercise of discretion. Maintenance is designed to give the spouse economic independence and should continue only as long as is required to render the recipient self-supporting. In addition, while insuring that the recipient spouse' reasonable needs are provided for, it should also provide her with an appropriate incentive to become financially independent. Notwithstanding her testimony to the contrary, based on the record, there was no reason it should take the defendant, a graduate of the Wharton School of Business, with extensive experience in banking and finance, more than five years to find employment and return to a salary of at least $70,000 a year. Under the circumstances, a reduction in the duration of maintenance from eight years to five years would provide the defendant with a greater incentive to utilize her contacts and prepare for and take whatever tests are necessary to increase her employability, while at the same time still provide her with sufficient time to become financially independent. The Supreme Court providently exercised its discretion in awarding the defendant 35% of the plaintiff's medical practice. Although in a marriage of long duration, where both parties have made significant contributions to the marriage, a division of marital assets should be made as equal as possible, there is no requirement that the distribution of each item of marital property be made on an equal basis". The award of 35% takes into account the limits of the defendant's involvement with the Practice, while not ignoring the direct and indirect contributions that she did make . The Supreme Court erred in directing that the husband pay 100% of the health care expenses of the children not covered by insurance and mistakenly omitted the word "reasonable" to describe the unreimbursed health care expenses to be paid. Pursuant to the statute, the court was required to prorate these expenses between the parties "in the same proportion as each parent's income is to the combined parental income" (Domestic Relations Law 240[1- b][c][5]). Accordingly, the court should have directed that the plaintiff pay 78.6%, and that the defendant pay 21 .4%, of the children's unreimbursed reasonable health care expenses. The Appellate Divison held that the award of attorney's and experts' fees to the defendant was an improvident exercise of discretion. The circumstances here, in which there was no evidence of delaying tactics on the part of the plaintiff did not warrant an award of attorney's or experts' fees to the defendant. While "indigency is not a prerequisite to an award of counsel fees", the defendant wouldl be receiving a substantial equitable distribution award from the plaintiff, in addition to five years of maintenance. Furthermore, in misrepresenting her income for the purpose of increasing the plaintiff's obligation to support her, the defendant forfeited any entitlement she might otherwise have had to this form of equitable relief.

Waiver of Interest in Husband's Estate Not Construed as a Waiver of Right to Equitable Distribution.

In Moldofsky v Moldofsky, 842 N.Y.S.2d 505 (2d Dept.,2007) the defendant wife purportedly waived her interest in the plaintiff husband's estate pursuant to an antenuptial agreement executed by the parties shortly before their marriage in 1987. The Appellate Division held that this agreement could not be construed as a waiver of the defendant's right to equitable distribution in the event of a divorce.

October 15, 2007

Improvident Exercise of Discretion to Deny Wife Lifetime Maintenance on Ground That Certain Properties Were Distributed to Her in Lieu of Maintenance.

In Xikis v Xikis, --- N.Y.S.2d ----, 2007 WL 2728744 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court improvidently exercised its discretion in denying the defendant lifetime maintenance on the ground that certain properties were distributed to her in lieu of maintenance. The parties lived together for 28 years and were married for over 18 years. The defendant was not employed during most of the marriage, had limited education and skills, and was 60 years old at the time of the judgment. It held that an award of $1,500 as monthly nondurational maintenance was appropriate. It also held that Supreme Court erred in determining that the $200,000 in funds transferred by the plaintiff from an Atlantic Bank account to a Greek bank account on the date of commencement of the action was deposited into a joint bank account of the parties. In fact, the funds were deposited into a charitable account and were not distributed. The transfer constituted a dissipation of marital assets in contemplation of divorce. As such, the defendant was entitled to an additional award of $100,000 as contemplated by the parties' stipulation.

Nondurational Maintenance Inappropriate Where Durational Maintenance Requested in Supreme Court

In Sirgant v Sirgant,--- N.Y.S.2d ----, 2007 WL 2728804 (N.Y.A.D. 2 Dept.) Supreme Court, inter alia, awarded the wife nondurational maintenance of $825 per month and directed child support to the wife of $1,344.17 per month. The Appellate Division held that the overriding purpose of a maintenance award is to give the spouse economic independence, and it should be awarded for a duration that would provide the recipient with enough time to become self-supporting. Under the circumstances, the trial court providently exercised its discretion in awarding the wife maintenance, but the court erred in awarding her nondurational maintenance of $825 per month. It noted that the wife requested a maintenance award of $15,000 per year for a period of five years. It found that based on the evidence, an award of $1,250 per month for a period of

five years was appropriate in light of the wife's ability to become self-supporting. It also held that Supreme Court erred in its computation of the child support award by failing to deduct the amount of the maintenance award from the husband's income and by utilizing an incorrect adjusted gross income for the husband. Thus, the basic child support award should have been computed to be $1,171.18 per month.

Proper to Award Marital Residence to Wife Where it Was Transferred to Joint Names to Secure a Marital Loan

In Fitzpatrick v Fitzpatrick, --- N.Y.S.2d ----, 2007 WL 2728804 (N.Y.A.D. 2 Dept.) Supreme Court, inter alia, awarded the plaintiff wife spousal maintenance of $3,000 per month until she reached the age of 65, awarded ownership of the marital residence solely to the plaintiff and child support of $1,500 per month as of June 1, 2004, awarded the defendant certain stock options and shares of stock issued by his employer, and directed the defendant to pay the wife an attorney's fee in the sum of $21,000. The Appellate Division affirmed. It held that Supreme Court providently exercised its discretion in making the award of maintenance. It also properly awarded ownership of the marital residence, which had belonged to the plaintiff's parents who transferred it to the plaintiff, solely to the plaintiff. The transfer of title to the parties jointly, shortly before the commencement of the action, was effected to secure a marital loan and did not reflect any intent on the plaintiff's part to make the defendant a co-owner of the premises. The Supreme Court's award to the plaintiff of an attorney's fee was a proper exercise of the court's discretion, based in part on the disparity in the parties' incomes.

Supreme Court has Authority to Amend QDRO To Correct Ministerial Error

In Page v Page, 39 A.D.3d 1204, 834 N.Y.S.2d 764,(4th Dept., 2007) the parties were divorced in 1999, and plaintiff moved, inter alia, to modify a qualified domestic relations order (QDRO) entered in 2001. Plaintiff objected to the provisions in the QDRO granting survivor benefits to defendant because the stipulation of settlement, which was incorporated but not merged in the judgment of divorce except with respect to maintenance, did not provide for those benefits. Plaintiff also objected to the provision in the QDRO that calculated his retirement benefits by using 198 months as the numerator of the fraction rather than the correct figure of 183 months. In responding to the motion, defendant admitted that the QDRO listed an incorrect number of months in calculating the retirement benefits, but she asserted that she was entitled to the survivor benefits. Supreme Court denied that part of plaintiff's motion seeking to amend the QDRO on the ground that plaintiff either consented to the QDRO or did not raise any objection at the time it was signed by the court and therefore was precluded from raising his present objections. The Appellate Division held that that the court improvidently exercised its discretion in denying that part of the motion to amend the QDRO to reflect the proper number of months in calculating plaintiff's retirement benefits. A court has the discretion to cure a mistake or defect in a judgment or an order that does not affect a substantial right of a party. A court also has the inherent power upon an application for sufficient reason, in the furtherance of justice, "to relieve from judgments taken through 'mistake, inadvertence, surprise or excusable neglect' " (Ladd v. Stevenson, 112 N.Y. 325, 332, 19 N.E. 842). This was merely a ministerial error and the court had the authority to amend the QDRO. The court, in the furtherance of justice, should have addressed the merits of plaintiff's contention that the QDRO improperly provided for survivor benefits and remitted the matter to Supreme Court to determine that issue following a hearing, if necessary.

Marital Assets Must Be Valued Between Date of Commencement and Date of Trial

In Malloy v Malloy 39 A.D.3d 602, 835 N.Y.S.2d 262, (2d Dept., 2007 ) the Appellate Division rejected the husband's contention that the Supreme Court should have valued the other marital assets as of the date of the parties' separation in 1994, since neither party thereafter contributed to the appreciation of the other's assets. Pursuant to Domestic Relations Law 236[B][4][b], the Supreme Court was required to select a valuation date "from anytime from the date of commencement of the action to the date of trial." It held that Supreme Court providently exercised its discretion in selecting the date of the commencement of the action as the valuation date for the parties' pensions and the husband's savings and thrift plan. It also held that it was improper for the Supreme Court to have valued the marital residence as of the date of the parties' separation. It found that under the circumstances of this case, the husband should have been awarded a 25% share of the net proceeds from the sale of the home, which was consummated shortly before commencement of the trial. The Supreme Court also improperly valued the wife's pension by reducing it by the amount of a loan she took out against the pension, as there was no evidence that the loan was used for marital purposes.

Husband's Support Obligation Properly Based upon Imputed Income Including Overtime.

In Romano Romano, --- N.Y.S.2d ----, 2007 WL 1439552 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court properly, in effect, denied defendant’s post trial motion to dismiss the action upon the ground that the court lacked subject matter jurisdiction because the plaintiff failed to adduce any proof at trial as to grounds for the divorce. At a pretrial conference on the matter, the defendant consented to constructive abandonment as the ground for divorce. Therefore, when the Supreme Court, in effect, granted the plaintiff's motion to re-open the trial to allow her to aver by affidavit that she had been constructively abandoned as a ground for divorce, it merely corrected a technical error and did not prejudice the defendant. "The court may determine the sequence in which the issues shall be tried and otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum" . The husband's contention that the court failed to apportion the unsecured debt to various family members as well as an Advanta credit card debt was without merit because the husband discharged each of these obligations in his personal bankruptcy action. Supreme Court providently exercised its discretion in calculating the husband's support obligation based upon imputed income including overtime.

October 1, 2007

Cost of Living (Cola) Child Support Provision Interpreted as "Opting Out" of CSSA

Guidelines Requiring Parties' Reasons for Deviating

In Fasano v Fasano, --- N.Y.S.2d ----, 2007 WL 2729684 (N.Y.A.D. 2 Dept.) the parties

separation agreement dated October 21, 1993, provided, inter alia, that until October 31, 1996, the plaintiff would pay the defendant maintenance of $5,416.66 per month and child support of $833.33 per month. After October 31, 1996, the plaintiff's maintenance obligation would end and his monthly child support obligation would increase to $3,333 .33. The child support provisions of the separation agreement also obligated the plaintiff to pay increased child support in the event of increases in the cost of living, as reflected in the Consumer Price Index for the New York Metropolitan area. The separation agreement was incorporated, but not merged, into the judgment of divorce dated February 17, 1994. The Appellate Division held that the child support provision which set the plaintiff's child support obligation at the sum of

$3,333.33 per month was not invalid on the ground that it failed to calculate the

presumptively correct amount of child support pursuant to the Child Support Standards Act. A provision stating the correct amount of the basic child support obligation under the CSSA is not required unless it is apparent that the parties have "opted out" of the basic child support obligation pursuant to the CSSA. Here, the child support obligation in the sum of $3,333.33 per month did not differ significantly from the correct amount

as calculated by a strict application of the statute, and thus, such provision in the

separation agreement cannot reasonably be interpreted as indicating that the parties intended to "opt out" of the basic child support obligation pursuant to the CSSA. However, the plaintiff correctly contended that the provision contained in paragraph 5, Article F, of the separation agreement, allowing for adjustments to his monthly

child support obligation based on cost of living increases (hereinafter the COLA

provision), failed to comply with Domestic Relations Law 240(1-b)(h). The annual increases in the child support obligation permitted under the COLA provision represented potential deviations from the basic child support obligation and, therefore, can be interpreted as providing for an "opting out" of the CSSA guidelines.

Since the separation agreement failed to state the parties' reasons for deviating from

the CSSA guidelines with respect to the potential COLA increases, the COLA provision violated Domestic Relations Law 240(1-b)(h) and should have been set aside.

Error to Award Child Support Amount Which Includes a Shelter Allowance and to Direct

Husband to Reimburse Wife for Portion of Carrying Charges for Marital Residence.

In Curatola v Curatola, --- N.Y.S.2d ----, 2007 WL 2729779 (N.Y.A.D. 2 Dept.) Supreme

Court, awarded the wife a divorce, directed the husband to pay child support of $2,107 per month and child support arrears, distributed 60% of the equity in the marital residence to the wife and 40% of the equity to the husband, and directed the husband to pay $39,732 to the wife's counsel. The Appellate Division held that Supreme Court improperly calculated the husband's monthly income when it based its calculations, in

part, on the rental income the husband received from subletting his studio space,

without deducting from that rental income the amount the husband paid to his landlord in base rent for the studio space. It remitted the matter to the Supreme Court for a new determination as to the husband's monthly income, as well as the appropriate child support and concomitant child support arrears based on such income. It also

held that Supreme Court erred in directing the husband to pay child support of $2,107

per month, which sum included the provision of a shelter allowance, while also directing him to reimburse his wife for 40% of the carrying charges for the marital residence. Such an award resulted in the payment a double shelter allowance. In order to arrive at a just and appropriate award, the Supreme Court should have subtracted the fixed carrying charges attributable to the marital residence, i.e., the mortgage payments and real estate taxes, from the parties' gross income before applying the statutory percentages. However, Supreme Court providently exercised its discretion by deducting $39,732 for the wife's counsel fees from the husband's distributive award of 40% of the equity in the marital residence because the husband's obstructionist tactics unnecessarily prolonged the litigation.

Sweat Equity Does Not Entitle Husband to Greater Share of Home Where Wife

Contributed as Mother and Worked Outside Home

In Homkey-Hawkins v Hawkins, 839 N.Y.S.2d 849, 2007 N.Y. Slip Op. 06004 (3d

Dept.,2007) Supreme Court valued two contiguous parcels of property titled in both of the parties names as of the date of trial and distributed them equally. The properties consisted of an 8.5-acre parcel on which the marital residence was constructed and over 16 acres on an adjoining vacant lot. Supreme Court valued the subject parcels by adopting appraisals prepared closer in time to the October 2005 trial, determined that

each parcel was marital property with the equity to be divided equally (subject to a

$17,000 credit for defendant's use of separate property to purchase one of the lots) and awarded plaintiff approximately $15,590 in counsel fees. The Appellate Division affirmed. Plaintiff had two sets of appraisals prepared. The Appellate Division found that the increase in the value of the two properties between April 2004 and May 2005 was due solely to market forces. Under these circumstances, Supreme Court did not abuse its discretion in finding the later date to be the appropriate valuation date. It also found that defendant failed to met his burden of demonstrating that he was entitled to a separate property credit for funds expended to construct the marital residence. After the parties married, defendant placed plaintiff's name on his checking account and the two thereafter maintained one such joint account of which plaintiff was the primary custodian, writing most of the checks and ensuring that it was balanced. The parties pooled all of their money and earnings into this joint account, including defendant's separate savings, to pay all expenses, including those associated with the construction of their new home. The Court pointed out that the transfer of separate property into a joint account raises a presumption that the funds are marital property. Defendant failed to overcome this presumption by demonstrating by clear and convincing proof

that the joint account was established for convenience only. His testimony made clear

that he considered his marriage to be a lifelong commitment and he never even considered separating his premarital funds. Thus, Supreme Court properly determined that all funds so commingled were marital funds and that defendant was not entitled to a separate property credit for same. The Appellate Division was not persuaded that defendant was entitled to a greater share of the equity in the property on which the marital residence was situated owing to his sweat equity in constructing it. The defendant, who earned a living as a construction manager, spent most of his free time during one particular year working on the residence and/or managing the work that he subcontracted on it. Plaintiff, who also worked outside the home, was therefore left with all child-rearing responsibilities for their young son and all daily and weekly household chores necessary to maintain their existing home. Under these

circumstances, there was no abuse of discretion in Supreme Court's decision to equally divide the equity in this property.

Must Show Good Faith Effort to Obtain Employment or Impaired Earning Capacity For

Downward Modification

In Fowler v Rivera, --- N.Y.S.2d ----, 2007 WL 1559973 (N.Y.A.D. 2 Dept.) the Appellate

Division held that Family Court properly denied the father's petition for a downward modification of his child support obligation. A parent seeking downward modification of a child support obligation has the burden of establishing a change in circumstance In order to meet that burden, a party seeking a downward modification based on a loss of employment must submit evidence showing a good-faith effort to obtain employment commensurate with that party's earning capacity or, alternatively, must establish that his or her previously established earning capacity has been impaired. The conclusory

allegations of the father, a self-employed owner of a heretofore lucrative closely-held corporation, were not sufficient to establish that he diligently searched for comparable means of earning an income.

September 17, 2007

Service of Trial Subpoena on Attorney Permitted as of January 1, 2008

CPLR 2303-a has been enacted to reduce the need for service of trial subpoenas on a party or person within the party's control. It provides that where the attendance at trial of a party or person within the party's control can be compelled by a trial subpoena, that subpoena may be served by delivery in accordance with CPLR 2103 (b) to the party's attorney of record. CPLR 2303 allows for service of a subpoena in the same manner as all other papers which are served by one attorney on another pursuant to CPLR. 2103. This provision only modifies the method of service of the subpoena. It does not change the requirement for a fee to be provided with the subpoena. Laws of 2007, Chapter 192, Effective January 1, 2008.

Fine for Violating Subpoena Increases to $150 as of January 1, 2008

CPLR 2308(a) was amended to increase the maximum penalty for disobeying a judicial subpoena from $50 to $150. Laws of 2007, Chapter 205, Approved July 3, 2007 and effective January 1, 2008.

Proper to Grant Extension of Time to Serve Summons After Traverse Hearing Finds Service Not Effected

In Yamamoto v Yamamoto, --- N.Y.S.2d ----, 2007 WL 2445200 (N.Y.A.D. 1 Dept.) the Supreme Court denied plaintiff's request that service of the summons and complaint on defendant be permitted by personal delivery to his attorneys but granted her motion for an extension of time to serve the summons and complaint and permitted her to apply for reimbursement of attorney fees and costs to defray the expense of effectuating service on defendant in Japan, subject to reallocation at trial, from the escrowed proceeds of the sale of the marital home. Thereafter, Supreme Court granted defendant's motion to confirm the Referee's report to the extent that the Referee found defendant had not been personally served and granted plaintiff's motion to extend her time to serve defendant, in accordance with the prior order. The Appellate Division affirmed the orders. It held that Supreme Court did not improvidently exercise its discretion in granting plaintiff an extension of time to serve defendant, pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 UST 361 [1965] ). Although it found that defendant had not been properly served, given plaintiff's demonstration of reasonably diligent attempts to serve the defendnat within the 120-day period after filing the summons with notice (CPLR 306-b), her reasonably prompt request for the extension, and the absence of prejudice to defendant, who had long had notice of plaintiff's claims the extension was warranted in the interest of justice. In view of the procedures in place for effectuating service upon defendant in Japan, and the absence of any evidence that service in that manner was "impracticable," the court properly denied plaintiff's request, pursuant to CPLR 308(5), for an order directing that service on defendant be effectuated by personal delivery of process upon his attorneys. Given defendant's alleged removal to Japan and his alleged failure to provide any support for his infant daughter, who allegedly lived in Manhattan with her mother, the court providently granted plaintiff leave to apply for funds to defray the additional expense of effectuating personal service upon defendant in Japan pursuant to the Hague Convention on the Service Abroad. Defendant, who appeared and testified at the traverse hearing and, according to plaintiff, allegedly maintains an apartment in Manhattan, may, as suggested by the IAS court, avoid any more delay and expense in having this marital and child-support dispute resolved by authorizing his New York attorney to accept service of process on his behalf.

Unauthorized Ex Parte Conversatons May Be Basis to Disqualify Court Appointed Evaluator.

In Reback v Reback, 41 A.D.3d 814, 839 N.Y.S.2d 516 (2d Dept.,2007) Supreme Court appointed a neutral financial evaluator to consider the value of the parties' assets (i.e., the plaintiff's real estate license and the defendant's businesses). Pursuant to that order, prior to the completion of the evaluator's report, ex parte communications were prohibited except that a party could advise the evaluator in writing about assets he or she thought the other spouse owned. The evaluator was directed to communicate with the parties in writing with copies to counsel for both sides or by conference call. The Appellate Division found that ex parte conversations between the court appointed evaluator and the plaintiff and her counsel were not authorized by the order appointing the evaluator and therefore were improper. It held that the question of whether the impropriety was sufficient to disqualify the evaluator depends on the nature of the conversations. If, as the plaintiff contended, the conversations related solely to ministerial matters, the impropriety would not be sufficient to justify disqualification of the evaluator. It was inappropriate to place the burden of proof as to the nature of those conversations on the defendant There should have been a hearing to determine whether the nature of those conversations would justify disqualification of the evaluator.

Hearing Should Be Held Where Agreement Appears to Be So One-sided and Unfair That No Rational Person Exercising Common Sense Would Make it

In O’Malley v O’Malley, --- N.Y.S.2d ----, 2007 WL 1631130 (N.Y.A.D. 2 Dept.) after nearly 23 years of marriage, the husband and the wife entered into a postnuptial agreement pursuant to which the husband, inter alia, surrendered his interest in the marital residence as a tenant by the entirety, any rights to equitable distribution of his interest in the marital residence as marital property in the event the parties divorced, and any rights to inherit from the wife. In exchange, the wife agreed to pay the husband $50,000 from a retirement account in 2015, when she could withdraw that sum without penalty. The agreement was prepared by the wife's counsel. The husband claimed he had no independent counsel. Within three months of the execution of the agreement, the wife commenced an action for a divorce. The husband counterclaimed for a divorce and, he moved, inter alia, to vacate the parties' postnuptial agreement and to rescind the transfer of the deed to the marital residence from the parties as tenants by the entirety to the wife individually on the grounds, of fraud, overreaching, lack of consideration, and unconscionability. In support of his contentions, he asserted that the parties' equity in the marital residence was at least $580,000, and that he was being asked to surrender his interest in the marital residence in consideration for the future receipt of the principal sum of only $50,000. The husband further noted that the agreement did not contain a reciprocal waiver by the wife of her rights to inherit from him. In addition, he contended that the wife promised not to seek a divorce if he signed the agreement, but breached that promise when she commenced this divorce action within three months of the execution of the agreement. The Supreme Court denied the husband's motion without a hearing. The Appellate Division reversed and remanded for a hearing to determine if the agreement was unconsicionable. It held that although postnuptial agreements are generally subject to ordinary principles of contract law , the parties, as husband and wife, have a fiduciary relationship to each other. "To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching" (Christian v. Christian, 42 NY2d at 72). A motion to set aside an agreement between spouses may be denied without a hearing if the agreement is fair on its face. It could not be said that the agreement was fair on its face. It appeared from the record that the husband had received no benefit from the agreement-other than a promise to receive $50,000 years hence, which in all likelihood he would have been entitled to as part of his equitable share of marital property . It also appeared that he relinquished a primary asset of the marriage, along with his inheritance rights, without a reciprocal waiver of inheritance rights by the wife.

September 3, 2007

Effective September 1, 2007 Counter-Order or Judgment Must be Submitted with Marked-up Copy

22 NYCRR 202.48 (c)(2) of the Uniform Rules For Trial Courts, which deals with the submission of proposed orders and counter-orders, has been amended effective September 1, 2007. It now requires that “ Any proposed counter-order or judgment shall be submitted with a copy clearly marked to delineate each proposed change to the order or judgment to which objection is made.”

Maintenance and Child Support Reduced Where Husband’s Income Dropped Substantially

In Kahn v Oshin-Kahn,--- N.Y.S.2d ----, 2007 WL 2199037 (N.Y.A.D. 1 Dept.) the parties' 2001 judgment of divorce, entered in 2001, awarded defendant wife annual maintenance of $96,000 (for five years ending July 31, 2006) and annual child support of $48,800. These awards were based on, among other things, a finding that, at the time of the judgment, plaintiff husband, under his employment agreement in effect at the time, had a guaranteed annual draw of $408,600 against his commissions as a sales agent for a financial printing firm. The $408,600 figure did not include the value of the perquisites of plaintiff's position imputable to him as income. The judgment also required plaintiff to pay 80% of certain add-on child support expenses, including the costs of private school, summer camp, and child care (the last item being required to enable defendant to reenter the workforce). Plaintiff had cross moved for a downward modification of his maintenance and child support obligations, based on an alleged substantial change in circumstances warranting such relief pursuant to Domestic Relations Law 236(B)(9)(b). Plaintiff claimed that his income had declined substantially since entry of the judgment of divorce due to a general downturn in the financial printing industry since the terrorist attacks of September 11, 2001. After a hearing, the motion court found, inter alia, that plaintiff's annual income had fallen to $200,000 and that he owed his employer $600,000 for draws received in excess of commissions earned. Based on these findings, the court reduced plaintiff's annual maintenance obligation to $30,000 and his annual child support obligation to $25,000, in each case with effect retroactive to November 21, 2002, and reduced plaintiff's share of add-on child support expenses to 50%. Defendant appealed. The Appellate Division agreed with the motion court that plaintiff had carried his burden of proving that some reduction of his maintenance and child support obligations was in order (citing O'Brien v. McCann, 249 A.D.2d 92 [1998] ), but did not believe that the existing record supported the amounts of the reductions the court granted. It modified to vacate the finding as to plaintiff's income and the downward modifications of his obligations based thereon, and remanded for further proceedings to more accurately determine plaintiff's income during the relevant period and to recompute the appropriate reductions of his obligations.

Unauthorized Ex Parte Conversations May Be Basis to Disqualify Court Appointed Evaluator.

In Reback v Reback, 41 A.D.3d 814, 839 N.Y.S.2d 516 (2d Dept.,2007) by order dated July 16, 2004, Supreme Court appointed a neutral financial evaluator to consider the value of the parties' assets (i.e., the plaintiff's real estate license and the defendant's businesses). Pursuant to that order, prior to the completion of the evaluator's report, ex parte communications were prohibited except that a party could advise the evaluator in writing about assets he or she thought the other spouse owned. The evaluator was directed to communicate with the parties in writing with copies to counsel for both sides or by conference call. The evaluator was authorized to prepare a draft report and serve it on counsel for both sides. In a letter dated October 27, 2005, to the attorneys for both parties, the evaluator noted that preparation of the report with respect to the defendant husband's mortgage activities and his business Nuvillas Realty was completed and the material "may result in judicial referrals to governmental, regulatory, and/or professional bodies for their consideration." The evaluator offered to send the parties a copy of a "draft for settlement purposes only" and to work with the parties toward a settlement. He stated that if he did not hear from the parties by November 1, 2005, he would contact the court to ask for advice on how to proceed "while [our] fees are outstanding." The defendant moved to disqualify the evaluator, claiming the letter was extortion to insure that the evaluator's fee was paid. The defendant also accused the evaluator of engaging in ex parte telephone conversations with the plaintiff, noting that telephone conversations from the plaintiff and her counsel were listed on the evaluator's bill. Counsel for the plaintiff claimed that it was common practice for financial evaluators to engage in settlement negotiations. She further stated that the ex parte telephone conversations between herself and the evaluator, and her client and the evaluator, related to the payment of the evaluator's fees and scheduling the evaluator's testimony at the trial. The evaluator submitted an affidavit stating that the ex parte telephone communications were ministerial, concerning scheduling and fee invoices. No affidavit was submitted by the plaintiff herself. Supreme Court denied the motion, to disqualify the evaluator, noting that the appointment order authorized submission of a draft report to the parties before the submission of a final report to the court. With respect to the ex parte communications, the court found that the defendant husband "has offered no proof that the conversations involved any subjects other than the ministerial matters" identified by the plaintiff's counsel and the evaluator. The Appellate Division held that the letter dated October 27, 2005, did not violate the terms of the order appointing the evaluator, which specifically permitted submission of a draft report to the parties before submission of a final report to the court. The order appointing the evaluator also authorized withholding "delivery of the final report until such time as any outstanding" fees were paid. Therefore, the letter dated October 27, 2005, was not a basis to disqualify the evaluator. However, the ex parte conversations between the evaluator and the plaintiff and her counsel were not authorized by the order appointing the evaluator and therefore were improper. The question of whether the impropriety was sufficient to disqualify the evaluator depends on the nature of the conversations. If, as the plaintiff contends, the conversations

related solely to ministerial matters, the impropriety would not be sufficient to justify disqualification of the evaluator. However, the nature of those conversations was exclusively within the knowledge of the evaluator, the plaintiff, and her counsel. Thus, it was inappropriate to place the burden of proof as to the nature of those conversations on the defendant There should have been a hearing to determine whether the nature of those conversations would justify disqualification of the evaluator.

Oral Stipulation Not Reduced to Writing Not Valid In Fourth Department

In Tomei v Tomei, 39 A.D.3d 1149, 834 N.Y.S.2d 781 (4th Dept, 2007) the parties placed an oral stipulation of settlement on the record in 1996 that provided for the distribution of the marital property, including defendant's pension benefits. Neither party executed the stipulation. Two years later, Supreme Court issued a judgment of divorce and a qualified domestic relations order (QDRO), dividing defendant's pension benefits pursuant to the formula set forth in Majauskas v. Majauskas, 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15. The record did not indicate that the QDRO was served on defendant or that it was filed at that time. When the QDRO was filed with the pension plan administrator in 2002, it was rejected as nonqualifying. The court granted plaintiff's motion to correct and resettle the judgment of divorce and, granted plaintiff's motion to amend the QDRO and denied defendant's cross motion to vacate the QDRO. The court issued an amended QDRO that made an upward adjustment of plaintiff's monthly payments for a period of 64 months as the result of pension benefit overpayments to defendant. The Appellate Division held that Domestic Relations Law s 236(B)(3) provides that "[a]n 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." Because the unacknowledged oral stipulation of the parties failed to meet the statutory requirements, it was ineffective with respect to the pension benefits, and the court thus was required to distribute them (citing 236[B][5][a] ). Because that did not occur, it reversed the order and remitted the matter to Supreme Court for distribution of defendant's pension benefits. (Citing Hanford v. Hanford, 91 A.D.2d 829, 830, 458 N.Y.S.2d 418; Giambattista v. Giambattista, 89 A.D.2d 1057, 1058, 454 N.Y.S.2d 762).

August 16, 2007

Domestic Relations Law 250 Enacted Effective July 3, 2007

In Scheuer v. Scheuer, 308 NY 447 (1955) the Court of Appeals held that that the statute of limitations is not tolled merely because the parties were husband and wife. That rule was consistently applied in actions to set aside prenuptual agreements where the six year statute of limitations, in CPLR 213(2), on actions on a contract obligation or liability express or implied applied. In Bloomfield v. Bloomfield, 97 N.Y.2d 188, 192-193, 738 N.Y.S.2d 650, 764 N.E.2d 950 [2001] the Court of Appeals held that CPLR 213 (2) did not apply in an action for a divorce where the defendant raised the parties 30 year old prenuptual agreement as a defense to equitable distribution because the “... particular argument arises from, and directly relates to, plaintiff's claim that the agreement precludes equitable distribution of his assets”. It held that claims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by the Statute of Limitations, even though an independent action by defendant might have been time-barred at the time the action was commenced (citing CPLR 203 [d))]. Since actions to set aside a prenuptual or post-nuptual agreement are still barred by the 6 year statute of limitations (see DeMille v. DeMille, 774 N.Y.S.2d 156, 158, 5 A.D.3d 428, 429 (2 Dept. 2004) this has affected and can affect many spouses detrimentally. Because most parties would not contest the validity or terms of a prenuptial agreement or agreements made during the marriage while their marriage is intact Domestic Relations Law 250 was enacted to remedy this situation. See NY Legis Memo 125 (2007) Domestic Relations Law 250 is intended to toll the statute of limitations for causes of actions and defenses related to prenuptial and post-nuptual (“opting-out”) agreements until both parties have made appearances in a matrimonial action. It enacts a three year statute of limitations for commencing an action or proceeding or for claiming a defense that arises from an agreement made pursuant to DRL 236 [B][3] entered into prior to a marriage, or during the marriage, but prior to the service of process in a matrimonial action or proceeding. The statute of limitations is tolled until process has been served in a “matrimonial action or proceeding”, or the death of one of the parties. DRL 250 does not apply to a separation agreement or an agreement made during the pendency of a matrimonial action or in settlement of a matrimonial action. The provisions of DRL 250 are not to be construed to create any new causes of action or defenses for the parties to the agreement. In addition they do not apply to prenuptial agreements where the commencement of an action on the agreement was barred under the CPLR in effect immediately prior to July 3, 2007, its effective date. See NY Legis Memo 125 (2007)

Domestic Relations Law 177 Enacted Effective November 1, 2007

Domestic Relations Law 177 becomes effective November 1, 2007. Subdivision 1 provides that provide that prior to accepting any agreement between the parties in an action for a divorce, the judge is required to ensure that the agreement contains a provision relating to the health care coverage of each individual. The agreement must either provide for the future coverage of the individual, or state that the individual is aware that he or she will no longer be covered by his or her spouse's health insurance plan. Every agreement accepted by the court must contain the following statement, signed by each party, to ensure that the provisions of this subdivision are adhered to:

" I, (spouse), fully understand that upon the entrance of this divorce

agreement, I may no longer be allowed to receive health coverage under

my former spouse's health insurance plan. I may be entitled to purchase

health insurance on my own through a COBRA option, if available, other-

wise I may be required to secure my own health insurance.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_

(Spouse's signature) (Date)"

If, prior to accepting an agreement and entering the judgement thereon, the judge determines that the provisions

of DRL 177 have not been met, the judge must require the parties to comply with the this section and may grant a thirty day continuance to afford the parties an opportunity to procure their own health insurance coverage.

Subdivision 2 provides that before rendering a decision in an action for divorce, the judge must ensure that he or she notifies both parties that once the judgement is entered, a person may or may not be eligible to be covered under his or her spouse's health insurance plan, depending on the terms of the plan. Laws of 2007, Ch 412.

Absent Evidence of a Different Value Not An Abuse of Discretion to Direct Real Property Be Listed For Sale at Assessed Value

In Stephens v Stephens, 838 N.Y.S.2d 743 (4th Dept., 2007) Plaintiff contended on appeal that Supreme Court abused its discretion in directing that a parcel of property owned by the parties be listed for sale at the assessed value or at another value agreed upon by the parties, and the proceeds divided. The Appellate Division rejected that contention finding that Plaintiff failed to present reliable evidence of a different value for the property and, absent some evidence that the list price set by the court is unreasonable or other credible evidence showing that a different list price is warranted, it should not be disturbed (citing Harmon v. Harmon, 173 A.D.2d 98, 107, 578 N.Y.S.2d 897). It also held that the court did not abuse its discretion in directing that the list price be reduced incrementally until the property is sold.

Where Combined Parental Income Is Well in Excess of $80,000, it Is Proper to Consider and Base the Award upon the Child's Actual Reasonable Needs

In Matter of Michelle M. --- N.Y.S.2d ----, 2007 WL 1953685 (N.Y.A.D. 4 Dept.) the Support Magistrate calculated each party's share of the combined parental income and addressed the factors under Family Court Act s 413(1)(f) and found evidence in the record relevant to all factors except those listed in subdivisions (4), (8) and (9). The Support Magistrate found that all the combined parental income in excess of $80,000 should be considered in calculating "the just and appropriate child support" and applied the CSSA percentage to all the combined parental income. The Appellate Division concluded that this was error. Under the statute and case law, the $80,000 figure serves as a presumptive cap, and the court has discretion to limit the parents' respective pro rata child support obligations to the first $80,000 in combined parental income. The court also has the authority to calculate and award child support based upon all or part of the combined parental income, even to the extent that it exceeds $80,000 .The court's obligation, in that event, is to articulate a basis for applying the CSSA percentage to all or part of the parental income beyond $80,000. In cases such as this, where the combined parental income is well in excess of $80,000, it is proper to consider and base the award upon the child's " 'actual reasonable needs' " (Anonymous v. Anonymous, 222 A.D.2d 305, 306). Although children must generally be permitted to share in a noncustodial parent's enhanced standard of living and a court is not permitted to make an award based solely on their actual needs, we may consider the child's needs in determining an award of child support on income exceeding the $80,000 cap. (Matter of Mitchell v. Mitchell, 264 A.D.2d 535, 540, lv denied 94 N.Y.2d 754). There was no evidence supporting the determination that the father's appropriate share of child support was over $2,000 per month. Therefore, the Appellate Divison modified the order, and remitted the matter to Family Court to recalculate the father's child support obligation by applying the CSSA percentage to one half of the combined parental income in excess of $80,000.

Social Security Benefits May Be Considered in Determining If Child Support Is Unjust or Inappropriate.

In Matter of Weymouth v Mullin, --- N.Y.S.2d ----, 2007 WL 2002320 (N.Y.A.D. 3 Dept.), the Appellate Division pointed out that Social Security benefits received by a child are "designed to supplement existing resources, and are not intended to displace the obligation of the parent to support his or her child" (citing Matter of Graby v. Graby, 87 N.Y.2d 605, 611 [1996]). Instead, they constitute financial resources of the child to be considered only after the presumptively correct amount of basic child support has been calculated and only for the purpose of determining if the amount is unjust or inappropriate.

August 1, 2007

To Avoid "Double Counting," Seed Money from Marital Funds to Help One of the Parties Create a New Business Should Not Be Reimbursed During Distribution If the Value of That Business Is Equitably Distributed

In Pulver v Pulver, --- N.Y.S.2d ----, 2007 WL 1499069 (N.Y.A.D. 3 Dept.) the Appellate Division held that Supreme Court improperly directed plaintiff to pay defendant 50% of the $40,000 in marital property used to start his business, Lockwood Financial Services. In order to avoid "double counting," seed money voluntarily contributed from marital funds to help one of the parties create a new business should not be reimbursed during distribution if the value of that business is equitably distributed. Thus, as defendant received a 50% share of plaintiff's business in equitable distribution, the court erred in directing plaintiff to repay defendant $20,000, i.e., half of the $40,000 of marital property used to start his business.

Not An Abuse of Discretion To Order Payout of Distributive Award Without Interest.

In Dewitt v Sheiness, --- N.Y.S.2d ----, 2007 WL 2050788 (N.Y.A.D. 3 Dept.) the Appellate Division found no abuse of discretion in Supreme Court ordering the equitable distribution award to be paid in three yearly installments without interest. When equitable distribution is appropriate but impractical or burdensome the court may order a distributive award payable in installments. The liquidity of the assets and the ability of the party to pay are proper considerations when fashioning such an award. The only marital property to be distributed was the value of the improvement made to plaintiff's home. Considering plaintiff's lack of liquid assets and limited income, permitting plaintiff to pay defendant over a three-year period without interest was an appropriate exercise of the court's discretion. The Appellate Division held that the denial of maintenance to defendant was not an abuse of discretion. Her request for that relief was not clear since in her "statement of proposed disposition" she indicated that she was not seeking maintenance.

Orders Reversed Without Appeal Where Minutes Can Not Be Reconstructed

In Rivera v Echavarria, --- N.Y.S.2d ----, 2007 WL 2050797 (N.Y.A.D. 3 Dept.) the petitioner appealed from two orders of the Family Court which, after a hearing held on January 18, 2005, dismissed his petitions alleging violation of an order of visitation and seeking modification of an order of support. By decision and order on motion dated October 25, 2005, the Appellate Division granted the petitioner's motion for a reconstruction hearing with respect to the minutes of the hearing held on January 18, 2005, and referred the matter to the Family Court, for a reconstruction hearing. By order dated June 13, 2006, the Family Court, indicated that the hearing of January 18, 2005, could not be reconstructed. The Appellate Division held that under the circumstances the petitioner was entitled to reversal of the orders, and a new hearing and determination of the petitions.

Where Change of Circumstance Not Contemplated it Is Not Necessary to Prove Party No Longer Able to Meet Child's Needs, Only That Changes Resulted in Significant Increase of Needs Which Renders Agreement Unfair

In Matter of Sidoti v Sidoti, --- N.Y.S.2d ----, 2007 WL 1628423 (N.Y.A.D. 3 Dept.) the parties 2001 separation agreement which was incorporated but not merged into their September 2001 judgment of divorce provided for joint legal custody with petitioner as primary custodian. The parties agreed to opt out of the provisions of the Child Support Standards Act limiting respondent's monthly child support obligation to $2,433. Respondent, who at the time of the agreement had annual income of $207,000, also agreed to maintain health insurance for the children and pay a pro rata share of any unreimbursed medical expenses, amounting to 100% thereof inasmuch as petitioner was not employed. In November 2002, approximately a year after the divorce was finalized, the parties' youngest daughter was diagnosed with autism, a learning and developmental disability. In September 2003, petitioner filed a petition seeking a modification of respondent's child support obligations inasmuch as the child's needs had unexpectedly increased due to her diagnosis. The Support Magistrate increased respondent's child support obligation to $3,011 in accordance with the CSSA. The Third Department affirmed. It found that the basis for modifying the terms of the separation agreement was that there had been an unanticipated and unreasonable change in circumstances. To that end, "[i]f the situation has changed to a degree that could not have been contemplated by the parties when they entered into the agreement, it is not necessary to prove that the petitioning party is no longer able to meet the child's needs, but only that the changes have, in fact, resulted in a significant increase in those needs which render the terms of the agreement unfair" (Matter of Schroder v. Schroder, 205 A.D.2d 986, 988 [1994]; see Matter of Boden v. Boden, 42 N.Y.2d 210, 213 [1977] ). The Appellate Division held that the youngest daughter's diagnosis of autism, which the developmental pediatrician explained as "severely involved" and "not a mild case of autism," constituted an unforeseen change in circumstances not anticipated by the parties at the time the separation agreement was signed. . As a result of this child's developmental delays associated with autism, the record established that she required extensive therapy and a structured environment. Testimony supported the importance of effectively implementing and reinforcing her therapy needs at home, which necessitated the purchase of various toys similar to those used by her therapists. Although petitioner was able to furnish some of these items, she indicated that she could not afford other more expensive items such as a computer, physio balls and foam steps used during the child's therapy sessions. In addition, petitioner had previously modified the child's diet to include potentially beneficial, although more expensive, "health" foods; however, again there was proof that petitioner could no longer afford such items. Although petitioner was employed part time at the child's day care center, the record indicated that her ability to work outside the home was difficult and, according to the developmental pediatrician, could be detrimental to the child's best interests. There was no reason to disturb Family Court's finding that petitioner met her burden of establishing that the child's needs increased due to the unanticipated diagnosis of autism thereby rendering the provisions of the agreement opting out of the CSSA to be unfair. The Court held that petitioner was entitled to a modification of child support "without first demonstrating her inability to [financially] meet [the child's] increased support needs".

Spouse Not Responsible Where Asset Declines in Value Through No Fault of Spouse

In Reiff v Reiff, 836 N.Y.S.2d 119 (1st Dept., 2007) the Appellate Division held that where an asset declines in value through no fault of one of the spouses, that spouse should not be held responsible for the loss.

Not An Abuse of Discretion to Strike Answer and Issue Preclusion Order For Contumacious Conduct Designed to Obstruct and Delay Progress of Disclosure

In Casey v Casey, 39 A.D.3d 579, 835 N.Y.S.2d 277,(2d Dept 2007) the Supreme Court struck the husbands answer pursuant to CPLR 3126 as a sanction for his failure to comply with disclosure orders, and after an inquest, directed the equitable distribution of certain marital assets to the plaintiff. The Appellate Division held that Supreme Court providently struck the defendant's answer. The drastic remedy of striking an answer requires a showing that a defendant's failure to comply with a disclosure order was the result of willful and contumacious conduct. The willful and contumacious character of a party's conduct can be inferred from the repeated failures to comply with court-ordered discovery, coupled with inadequate explanations for these defaults. Further, the nature and degree of the penalty to be imposed pursuant to CPLR 3126 against a party who refuses to comply with court-ordered discovery is a matter within the discretion of the court. The defendant engaged in a pattern of conduct over a period of time which evidenced an intent to willfully and contumaciously obstruct and delay the progress of disclosure. Moreover, he failed to proffer any reasonable excuse for his default in complying with the court's discovery orders. Accordingly, under the circumstances, the striking of the defendant's answer and the preclusion of the defendant from presenting evidence or testimony at trial relating to financial issues was a provident exercise of the Supreme Court's discretion.

July 26, 2012

Service of Notice of Motion and Cross Motion

Civil Practice Law and Rules 2214 provides that a person making a motion must give his adversary at least eight days advance notice of a motion. The notice of motion must have annexed to it copies of the supporting affidavit, or affidavits, affirmation or affirmations and exhibits.

Where the notice of motion is personally delivered to the other attorney, or other party, eight days advance notice of motion is all that is required. However, if you serve the notice of motion by mail, CPLR 2103 (b)(2) provides that “ where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period”. Therefore, you must add five days to the time to answer the motion, so that thirteen days advance notice of motion is required to be given. Where service of the motion papers is by overnight delivery service CPLR 2103 (b)(6) provides that “where a period of time prescribed by law is measured from the service of a paper and service is by overnight delivery, one business day shall be added to the prescribed period”. Therefore, you must add one “business day” , where service is by overnight delivery service, so that at least nine days advance notice of motion is required.

When a notice of motion is served giving the eight days notice of motion, CPLR 2214 (b) provides that answering papers must be served on the moving party at least two days before the return date of the motion.

New Notice of Motion and Cross Motion Service Provisions Effective July 3, 2007

Prior to July 3, 2007 CPLR 2214 (b) had provided that a demand could be made for the service of answering affidavits at least 7 days before the return date of the motion by serving the notice of motion at least 12 days before the return date and including such a demand in the notice of motion. At the same time CPLR 2215 provided that the notice of cross motion could be served 3 days in advance of the return date of the motion. It did not matter whether or not the additional four days time was given. Many attorneys would serve the notice of cross motion by mail, which would not always be received by their adversary before the return date of the motion. The party serving the cross-motion could mail it and the time between mailing and delivery was time lost to the party who had to respond.

CPLR 2214 (b) was amended effective July 3, 2007 to allow both parties to have adequate time to prepare their papers. It now provides that where a notice of motion is served at least 16 days before the return date of the motion it may demand that answering affidavits as well as any notice of cross-motion, with supporting papers, if any, be served at least 7 days before the return date of the motion.

CPLR 2214 (b) provides:

(b) Time for service of notice and affidavits. A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before such time. Answering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least seven days before such time if a notice of motion served at least sixteen days before such time so demands; whereupon any reply or responding affidavits shall be served at least one day before such time.

See Laws of 2007, Chapter 185, Section 1, Approved and effective July 3, 2007. (Section 3. provides: This act shall take effect immediately; provided, however, that this act shall apply to a notice of motion served on or after the date on which this act shall have become a law.”)

CPLR 2215 was also amended effective July 3, 2007 to require that any notice of cross-motion, with supporting papers, if any, must be served at least 7 days before the return date of the motion if a notice of motion served at least 16 days before the return date so demands. If the notice of cross motion and any supporting papers are served by mail they must be served three days earlier than as prescribed in CPLR 2103(b) and if they are served by overnight delivery service, they must be served one business day earlier than as prescribed in CPLR 2103 (b).

CPLR 2215 provides:

Rule 2215. Relief demanded by other than moving party. At least three days prior to the time at which the motion is noticed to be heard, or seven days prior to such time if demand is properly made pursuant to subdivision (b) of rule 2214, a party may serve upon the moving party a notice of cross-motion demanding relief, with or without supporting papers; provided, however, that: (a) if such notice and any supporting papers are served by mailing, as provided in paragraph two of subdivision (b) of rule 2103, they shall be served three days earlier than as prescribed in this rule; and (b) if served by overnight delivery, as provided in paragraph six of subdivision (b) of rule 2103, they shall be served one day earlier than as described in this rule. Relief in the alternative or of several different types may be demanded; relief need not be responsive to that demanded by the moving party.

See Laws of 2007, Chapter 185, Section 2, approved and effective July 3, 2007. (“3. This act shall take effect immediately; provided, however, that this act shall apply to a notice of motion served on or after the date on which this act shall have become a law.”)

Note: General Construction Law § 19 provides that "a calendar day includes a time from midnight to midnight." Calculating the number of days from within which or after or before which an act is authorized or required to be done, means the number of calendar days exclusive of the calendar day from which the reckoning is made. If the period is a period of two days, Saturday, Sunday or a public holiday must be excluded from the reckoning if it is an intervening day between the day from which the reckoning is made and the last day of the period. In computing any specified period of time from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned must be excluded in making the reckoning. See GCL § 20

When any period of time within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, the act may be done on the next succeeding business day and if the period ends at a specified hour, the act may be done at or before the same hour of the next succeeding business day. However where a period of time specified by contract ends on a Saturday, Sunday or a public holiday, the extension of such period is governed by General Construction Law §25. See GCL § 25-a.

July 16, 2007

Second Department Holds Doctrine of Estoppel Does Not Create Standing to Seek Visitation with Nonbiological Child, Ignoring its Decision in Jean Maby H. v. Joseph H 246 AD2d 282 (2d Dept., 1998)

In Burgess v Ash, N.Y.S.2d ----, 2007 WL 1632424 (N.Y.A.D. 2 Dept.) the petitioner, a former boyfriend of the subject child's biological mother, brought a petition against Anthony Ash, the child's legal guardian and biological uncle (respondent), seeking unsupervised visitation with the child. Pursuant to a consent order, the petitioner had been awarded monthly, supervised visitation with the child at the YWCA. Increased visitation was dependent upon further agreement between the parties. The respondent moved to dismiss the petition and vacate the consent order on the ground that the petitioner, as a biological stranger to the child, lacked standing. In opposition, the petitioner claimed that he had established a parent-child relationship with the child and that the doctrine of equitable estoppel precluded the respondent from denying visitation. The Family Court denied the respondent's motion, but ordered a hearing to determine whether the petitioner had standing to seek visitation. The Appellate Divison held that the existing consent order, standing alone, did not give the petitioner standing to seek expanded visitation. Family Court properly determined that the petitioner, "who is neither an adoptive nor a biological parent" of the subject child, "lacks standing to seek visitation and cannot rely on the doctrine of equitable estoppel to establish [his] status as a de facto or psychological parent".Thus, Family Court properly dismissed the modification petition.

Court Entitled to Impute Income to Defendant Based on His Pre-divorce Profit Margin

In Irene v Irene, --- N.Y.S.2d ----, 2007 WL 1652014 (N.Y.A.D. 4 Dept.) the Appellate Division rejected the contention of defendant in this divorce action that, because Supreme Court made no finding that he voluntarily reduced his income to avoid paying child support, the court erred in imputing any income to him. Trial courts thus possess considerable discretion to impute income in fashioning a child support award and a court is not required to find that a parent deliberately reduced his or her income to avoid a child support obligation before imputing income to that parent. It held that the Court properly imputed income in the amount of $61,432 to defendant for the purpose of calculating his child support obligation. The testimony of plaintiff's expert established that the figures on defendant's 2004 tax return were unreliable, and the court was entitled to impute the amount of $61,432 to defendant based on his predivorce profit margin, after apparently applying a discount based on defendant's economic distress.

Error to Award Share of Pension Where Income Impermissibly “Double-counted”

In Tedesco v Tedesco, --- N.Y.S.2d ----, 2007 WL 1653043 (N.Y.A.D. 4 Dept.) the Appellate Division held that Supreme Court erred in awarding plaintiff her share of defendant's military pension pursuant to Majauskas v. Majauskas (61 N.Y.2d 481) from

the date of commencement of the action until the date of the Referee's report. In doing so, the court impermissibly double-counted the income from defendant's military pension because the court previously had considered that income in ordering defendant, by way of temporary orders, to maintain the marital residence for the benefit of plaintiff and the parties' children and to provide plaintiff with funds for household expenses and fuel expenses for her vehicle.

Distributive Award Reduced Where No Evidence Defendant Sacrificed Educational or Employment Opportunities

In Ochs v Ochs, --- N.Y.S.2d ----, 2007 WL 1559832 (N.Y.A.D. 2 Dept.) Supreme Court awarded the defendant 50% of the value of the husbands law degree and license as enhanced earnings. The Appellate Division reduced this to 25% of the value of the plaintiff's law degree. It held that defendant, who supported the plaintiff during his last year and a half of law school, was entitled to a share of the enhanced earning capability represented by the plaintiff's law degree and license. However, as the record did not indicate that, by so doing, the defendant sacrificed any educational or employment opportunities, the defendant should have been awarded 25% of the plaintiff's enhanced earnings.

Failure to Appear at Custody Hearing Is Not a Default When Represented by Counsel. Default Custody Award Not Permitted Without Sufficient Evidence or Full Evidentary Hearing.

In Matter of David AA v Maryann AA, --- N.Y.S.2d ----, 2007 WL 1653043 (N.Y.A.D. 4 Dept.) the Appellate Division held that Family Court erred in granting petitioner's motion for a default order awarding sole legal custody of the parties' child to petitioner. Respondent's failure to appear at the hearing on the petition does not automatically constitute a default, particularly where, as here, respondent did appear by her assigned counsel who objected to petitioner's default motion and who, given the opportunity, could have proceeded to a hearing and defended her absent client. Moreover, unless there is sufficient evidence before the court to enable it to undertake a comprehensive independent review of the child's best interests, a determination of a custody matter should only be made after a full evidentiary hearing.

Separation Agreement Cannot Be Set Aside on Motion

In Reiter v Reiter ,39 A.D.3d 616, 835 N.Y.S.2d 240,(2d Dept.,2007) the Appellate Division pointed out that :”a separation agreement is a contract; as such it cannot be annulled by motion" . Thus, a challenge to a stipulation of settlement, which is incorporated but not merged into a judgment of divorce, must be made by plenary action, and not by motion. As the plaintiff sought to modify the stipulation of settlement by motion rather than by plenary action Supreme Court properly denied her request for relief.

No Jurisdiction Under UCCJEA To Modify Visitation Where Wife and Child No Longer Live in New York

In Zippo v Zippo, --- N.Y.S.2d ----, 2007 WL 1628337 (N.Y.A.D. 3 Dept.) the parties stipulated to a February 2000 Family Court order providing petitioner with three days of visitation with the parties' child each year at the correctional facility where petitioner was incarcerated. That summer, respondent and the child relocated to California, where they since resided, returning to New York once each year to provide petitioner with his three days of visitation. On June 22, 2006, petitioner commenced violation and modification proceedings. Determining that it no longer had jurisdiction over the parties' custody disputes, Family Court dismissed the petitions. The Appellate Division pointed out that Domestic Relations Law 76-a provides, in pertinent part, that jurisdiction of a custody matter continues until "a court of this state determines that neither the

child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and

personal relationships" (Domestic Relations Law ss 76-a [1][a] ). Respondent and the child had not lived in New York since the summer of 2000, they returned here only for a three-day visit each year and New York is not the child's home state. Nor was there any allegation of evidence available in this state concerning the child's care, protection, training and personal relationships. Family Court's determination that it lacked jurisdiction was fully supported by the record.

Marital Residence Generally considered Passive Asset Valued as of Date of Trial

In Newman v Newman, 825 N.Y.S.2d 714 (2d Dept, 2007) the Appellate Division pointed out that a marital residence is generally considered a passive asset which is valued as of the date of the trial. This is especially the case where the dramatic increase in the value of real property is attributable to market forces rather than the contributions of either party. It held that in calculating the distributive award, in light of the fact that the defendant was given a credit for the value of his separate property, the plaintiff was entitled to a credit for the defendant's pre-existing debt on that property, which became the marital residence.

July 2, 2007

Court of Appeals Holds That Adoptive Mother Who Surrenders Child Liable For Child Support.

In Matter of Greene County Department of Social Services o/b/o Ward v Ward, --- N.E.2d ----, 2007 WL 1672315 (N.Y.) Dawn Ward, an unmarried registered nurse, adopted a special needs child on June 20, 2002. He was born prematurely at 27 weeks. Although Jeffrey tested positive for cocaine and syphilis at birth, Ms. Ward was informed that his mother had not habitually used drugs and alcohol during her pregnancy, and that Jeffrey was a "quiet, gentle and pleasant child." Jeffrey was placed with Ms. Ward on May 3, 2001. At the time of placement, he was three years old, weighed 25 pounds, drank from a bottle, was non-verbal, and had been diagnosed with mild cerebral palsy and asthma. Ms. Ward enrolled Jeffrey in an early intervention program and he underwent surgeries to improve his swallowing and breathing capabilities. His emotional and mental development was delayed. In 2001 and 2002, Jeffrey exhibited increasingly aggressive behavior. He began eating sand and

grass, biting, licking and spitting at adults, and exhibiting bouts of uncontrolled yelling. By October 2002, Jeffrey's behavior had deteriorated even further. He regressed in toileting, dressing, and eating. His behavior at daycare now included

head-banging, hitting and kicking other children and throwing chairs and objects. In February 2003, he was diagnosed with pervasive developmental disorder. Jeffrey's play therapist advised Ms. Ward that Jeffrey had significant neurological issues

resulting from exposure to drugs and alcohol in utero. Another psychiatrist diagnosed him with attachment disorder, obsessive-compulsive disorder and autism. Jeffrey's behavior did not improve. He injured both himself and Ms. Ward during the summer of 2003, and had frequent bouts of uncontrollable behavior. On September 2, 2003, Ms. Ward went to the Department of Social Services and asked for a temporary relinquishment of parental rights. When DSS refused to accept a temporary relinquishment, Ms. Ward decided that returning Jeffrey to her home would pose too great a risk to his and her safety, and permanently surrendered her parental rights before a Family Court judge. In 2004 a support magistrate found her liable for child support as the adoptive parent of Jeffrey from the date of surrender. Family Court charged Ms. Ward with "$133.54 weekly child support commencing February 4, 2005 and $10,015.50 arrears from September 2, 2003 through January 28, 2005. The Appellate Division affirmed. In the Court of Appeals Ms. Ward contended that she should be exempt from the child support obligation as the single "parent" of a "child born out of wedlock" and that in the alternative DSS should be equitably estopped from enforcing the support order. It disagreed. It pointed out that an adoptive parent assumes all of the liabilities of a biological parent. Upon voluntary surrender, a parent retains the obligation to provide financial support for a child until he or she is adopted or turns twenty-one. Although the Social Services Law carves out a limited exception from this support requirement for children born out of wedlock to unwed mothers (see SSL 398[6][f]; 18 NYCRR 422.4), this exception did not apply to Ms. Ward. As Jeffrey was not "begotten and born" to her, she did not qualify as the "mother of a child born" out of lawful matrimony (FCA 512). Like the Appellate Division, the Court acknowledged the apparent harsh result in this highly unusual case, but could not conclude that the doctrine of estoppel was applicable against the State.

Reprehensible and Highly Offensive Behavior Is Not Necessarily Sufficient to Establish Cruelty

In Gross v Gross, 836 N.Y.S.2d 166 (1st Dept.,2007) the Appellate Division reversed on the law a judgment of divorce granted to the wife on the ground of cruel and inhuman treatment. The Court pointed out that plaintiff was asked at trial whether defendant had ever "physically force[d] himself on [her] sexually." In response, plaintiff testified that "I would have to say yes. It's only one time that, really where he hurt me." Apparently by way of explanation, plaintiff went on to state that defendant "[r]ammed [her] up against the wall" in the bathroom of their residence. Plaintiff did not elaborate about what she meant in stating that defendant had "force[d] himself on [her] sexually." The Court found that in its vagueness and generality, this testimony could include conduct ranging from the criminal (e.g., forcible rape) to the merely obnoxious. Plaintiff offered no evidence that she had sustained any injuries as a result of this incident and testified on cross-examination that she did not suffer any physical injuries as a result of the incident. Plaintiff also testified that defendant, on many occasions, "physically grabbed [her]." When asked to describe how defendant "grabbed" her, plaintiff stated: "[h]e'll grab me, he'll pull me down the hall, he'll block me so I can't leave the room, throw me on the bed, push me against the wall." No testimony was elicited from plaintiff that she sustained any injuries as a result of defendant's conduct. The Court held that reprehensible and highly offensive behavior is not necessarily sufficient to establish cruel-and-inhuman-treatment. Plaintiff's uncorroborated testimony regarding unwanted physical contact was vague and general, and no evidence was adduced from plaintiff regarding the effects, if any, of defendant's conduct on her physical or mental well-being. Plaintiff denied suffering any injuries as a result of the incident which occurred in the bathroom. She presented no evidence regarding the effects, if any, on her mental well-being of defendant's conduct in entering the bathroom of their residence while plaintiff was showering. While a party seeking a divorce on the ground of cruel and inhuman treatment is not required to produce medical evidence demonstrating the adverse effects of the defendant's behavior, the absence of such evidence may be relevant. The absence of medical evidence was particularly telling in light of plaintiff's failure to offer any other evidence tending to demonstrate that defendant's conduct was "harmful to the plaintiff's physical or mental health and makes cohabitation unsafe or improper" . The Court felt that it was left to speculate as to the effects, if any, of defendant's conduct on plaintiff's physical and mental well-being. Moreover, other evidence militated against the conclusion that plaintiff satisfied the substantial burden the law imposes upon her. The parties were married for 37 years, eight months at the time of trial, a marriage of long duration requiring a high degree of proof of cruel and inhuman treatment; the parties continued to reside together in the marital residence through the trial; and the parties were able to talk to each other in a civilized manner, have dinner together every night, go out for meals and to the movies and attend social functions. The evidence failed to demonstrate, with a high degree of proof, that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as to render it unsafe or improper for the plaintiff to cohabit with the defendant".

No Authority to Issue Medical Execution in Absence of Determination That Health Insurance Benefits Are Available

In Matter of Oneida County Department of Social Services, on Behalf of Heidi S. V Paul S., --- N.Y.S.2d ----, 2007 WL 1652167 (N.Y.A.D. 4 Dept.) the Support Magistrate's order set forth that health insurance "is not available and affordable at this time." Petitioner filed an objection contending that the Family Court Act and the Domestic Relations Law both require support orders to contain language directing any legally responsible relative to provide health insurance benefits when such coverage becomes available if such coverage is not presently available. Family Court determined that, although petitioner was correct that the language with respect to health insurance benefits was mandatory, the decision whether benefits were available, i.e., reasonable in cost, should be made by the court, and the Support Magistrate had determined that health insurance benefits were not available. The court granted the objection to the extent of providing that the parties shall notify petitioner "in writing regarding any change in health insurance benefits available to them." The court also ordered that petitioner "shall not issue a medical execution without a determination made by a court of competent jurisdiction that the health insurance benefits are 'available' " within the meaning of Family Court Act s 416(d)(2). The Appellate Division rejected Petitioner’s argument that the court erred in limiting petitioner's authority to issue a medical execution pursuant to CPLR 5241(b)(2)(I). CPLR 5241(b)(2)(I) provides that, "[w]here the court orders the debtor to provide health insurance benefits for specified dependents, an execution for medical support enforcement may ... be issued by the support collection unit." Pursuant to Family Court Act 416(h), the court shall direct the legally responsible relative to enroll the eligible dependents to receive health insurance benefits "[w]here the court determines that health insurance benefits are available" ( 416[c], [d][2] ). " 'Available health insurance benefits' [are] any health insurance benefits that are reasonable in cost and that are reasonably accessible to the person on whose behalf the petition is brought" (416[d][2] ). The Support Magistrate determined that health insurance benefits were not available, and respondent was not ordered to provide such benefits. Thus, the prerequisite for the issuance of a medical execution, i.e., an order directing a debtor to provide health insurance benefits (see CPLR 5241[b][2][I] ), was not met. Therefore, the court properly determined that petitioner lacked authority pursuant to CPLR 5241(b)(2)(I) to issue a medical execution in the absence of a determination by the court that health insurance benefits are available.

June 18, 2007

Lump Sum Child Support Award of $92,480 Upheld Where Father Received Personal Injury Settlement

In Walker v Gilbert, --- N.Y.S.2d ----, 2007 WL 1216203 (N.Y.A.D. 3 Dept.) the Appellate Division pointed out that a lump-sum payment received by a parent in a tort action is not excluded from consideration in determining child support. One approach where a parent receives a nonrecurring large sum of money is to increase the weekly (or other periodic payment) support obligation by applying a reasonable rate of return to the funds received and imputing that amount as income. This may be a preferred approach in most situations involving a lump-sum settlement. However, directing the payment of a portion of the nonrecurring sum received is not precluded by the statute and may be appropriate under some circumstances. Family Court set forth in detail the compelling reasons for its approach in this case, (it awarded a lump sum of ($92,480 which was 17% of the net amount received as a personal injury award) including, among others, that "the child had extraordinary and heart wrenching multiple medical complications which are becoming more acute with time," "the [m]other has had to dedicate virtually her entire life to the care of the child," and "the [f]ather has totally abandoned his moral obligation and parental responsibilities owed to his son, leaving his son's complete care in the hands of the [m]other." Moreover, it

was readily apparent to Family Court that respondent was rapidly dissipating the entire settlement without any regard to his child.

Contempt For Violation of Stipulation Not Approved By Court Must Be Reversed

In Ullah v Entezari-Ullah,--- N.Y.S.2d ----, 2007 WL 1246919 (N.Y.A.D. 1 Dept.) the Appellate Division reversed on the law an order which adjudged plaintiff husband in civil contempt for failing to comply with an August 2005 interim order to pay

outstanding mortgage arrears and tuition and sentenced him to 15 days in jail if he failed to purge the contempt. The parties, each represented by counsel, entered into a stipulation of settlement to be incorporated but not merged in any subsequent divorce decree. The stipulation provided that the parties intended it "to constitute an agreement pursuant to Domestic Relations Law Section 236, Part B 3" and "to be in lieu of each of their respective rights, pursuant to all aspects of" that statute. The stipulation further provided that it could not be amended or deemed amended "except by an agreement in writing duly subscribed and acknowledged with the same formality as this Agreement," in which each party's signature was duly notarized. The judgment of divorce, accompanied by the stipulation, was filed on May 12, 2004. Thereafter, on June 16, 2004, the parties entered into what they had considered a modification of the stipulation, containing an affirmation signed by the husband, witnessed and notarized, asserting that he had neither income nor access to any income or assets, and in fact had a negative net worth. The modification did not contain the wife's signature and did not reflect that either side was represented by counsel. On or about July 8, 2005, the wife moved, inter alia, to enforce the stipulation and the purported modification agreement. The motion court refused to vacate the stipulation and determined that the wife's only avenue of redress was to enforce it. A hearing on the wife's motion to enforce the stipulation was commenced on August 15, 2005, but was adjourned to September 19 to afford the parties an opportunity to submit documentary evidence. On August 19, the court issued an interim order to "meet the immediate needs" of the wife and the children. In so ruling, the court relied upon provisions of the parties' stipulation and the modification thereto. On September 19, 2005, the wife moved for an order of contempt for the husband's failure to comply with the August 19 interim order. In an order dated December 2, 2005, the court determined that the husband was in civil contempt of the August 2005 order based on his admitted noncompliance. The Appellate Division held that a respondent in a civil contempt proceeding facing the possibility of the imposition of a term of incarceration, however short, is entitled to the assignment of counsel upon a finding of indigence. Here, the record was silent as to whether the husband was, as he was entitled to be, advised of his right to counsel during the contempt proceeding. It is the court's responsibility to advise such a respondent of the right to counsel of his own choosing, or assigned counsel where appropriate, before the commencement of a hearing or other proceedings. The matter was remanded for a new hearing on the contempt motion and a determination as to whether the husband had his own counsel or qualified for the appointment of assigned counsel thereat. The Court also found that there was merit to the husband's argument that the hearing court erred in finding him in contempt for failing to pay the mortgage and common charge arrears on both apartments pursuant to the August 2005 interim order since it was based on the June 2004 modification, which was invalid because it was never judicially authorized. A divorce decree may be modified with respect to spousal support only in the manner provided by statute. No agreement by the parties has any effect on the decree unless made effective by judicial approval. While the husband did not appeal the August 2005 interim order, upon which the finding of contempt was based, public policy dictates that judicial authorization be obtained before courts give recognition to modified matrimonial agreements, especially where, as here, a party agrees to more stringent obligations than those in the original agreement.

Valuation Methodology of Nurse Practitioner License Proper Even though Wife in Work Force Many Years

In Spreitzer v Spreitzer, --- N.Y.S.2d ----, 2007 WL 1439434 (N.Y.A.D. 2 Dept.) the parties were married in 1982. The defendant, who was a registered nurse, graduated from Pace University in 1994, and acquired a Masters of Science Degree and a nurse practitioner license. She held part-time position as a nurse practitioner in a private medical office since 1998. The Appellate Division held that the trial court properly calculated the enhanced earning capacity conferred by the defendant's degree and license by comparing the expected lifetime earnings of a registered nurse with the expected lifetime earnings of a licensed nurse practitioner, and reducing this sum to its present value. Although the defendant had already embarked on her career and acquired a history of actual earnings the court providently exercised its discretion in rejecting her testimony that she was unable to secure full-time employment. The trial court properly awarded the plaintiff 20% of the value of the degree and license constituting the enhanced earning capacity achieved by the defendant during the marriage, based upon his substantial economic as well as noneconomic contributions to the attainment of that enhanced earning capacity . The defendant's contention that the trial court erroneously imputed income of $78,000 to her for the purpose of calculating her child support obligation was without merit. In determining a party's child support obligation, "a court need not rely upon the party's account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential". Here, the court properly imputed an annual income to the defendant since the evidence at trial demonstrated that she was capable of earning $78,000 a year based on her degree, her nurse practitioner license, the facts adduced at trial, and the testimony of the expert who valued her degree and license.. The record supported the determination of the court that the defendant's earning potential exceeded her actual income reported on her 2004 income tax return. The award to the wife of an attorney's fee in the sum of $12,600, and direction to both parties to maintain medical coverage for the children were affirmed.

Court Must Take Husbands Financial Resources into Account in Fixing Maintenance

In Sevdinoglou v Sevdinoglou --- N.Y.S.2d ----, 2007 WL 1501831 (N.Y.A.D. 2 Dept.) Supreme Court awarded the plaintiff maintenance of $2,225 per month for 36 months or until the plaintiff's death, remarriage, or cohabitation with a member of

the opposite sex pursuant to Domestic Relations Law 248 and counsel fees in the sum of $14,140. The Appellate Division modified the judgment and reduced the amount of the award to $1,500 per month. Supreme Court improvidently exercised its discretion in failing to take into account the husband's financial circumstances in fashioning the maintenance award.

Court May Direct Party to Submit to Counseling as a Component of Visitation

In Thompson v Yu-Thompson, --- N.Y.S.2d ----, 2007 WL 1631494 (N.Y.A.D. 2 Dept.) the Appellate Division held that while a court may not order counseling as a condition of future visitation or re-application for visitation rights, it may direct a party to submit to counseling as a component of visitation and that the court also has the authority to order counseling for the child .

June 1, 2007

Motion Granting Judgment Abandoned For Failure to Comply with 22 NYCRR 202.48.L law office failure does not constitute "good cause" for Delay .

In Farkas v Farkas, --- N.Y.S.2d ----, 2007 WL 1246924 (N.Y.A.D. 1 Dept.) the First Department reversed on the law an Order and judgment awarding plaintiff $750,000 with interest from August 6, 2003, vacated the judgment and dismissed as abandoned the claim underlying the judgment. It pointed out that the Court of Appeals has recently made it clear that "statutory time frames– like court-ordered time frames--are not options, they are requirements, to be taken seriously by the parties" (citing Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725, 726 [2004] [citation omitted], following Brill v. City of New York, 2 NY3d 648 [2004] ). Thus, where a statute or court rule prescribes a limited time frame in which to take a procedural step in litigation, and states that a party's failure to act within that time frame will be excused only upon a showing of "good cause," such a showing requires demonstrating, as the dissent put it, "more ... than [the] merit ... [of] the underlying application and a lack of prejudice to the other party." This principle applied in this case, in which plaintiff failed to comply with the 60-day time frame for the submission of a judgment to the court for signature (Uniform Rules for Trial Cts [22 NYCRR] 202.48[a], [b] ). Because plaintiff has failed to show good cause for her failure to comply with the time frame set forth in the Uniform Rules, it reversed and vacated the judgment. Although the order granting plaintiff's application for judgment was entered on October 17, 2000, it was not until May 2, 2005--four and a half years later--that plaintiff finally served defendant with a notice of settlement and a proposed judgment. Defendant opposed entry of the proposed judgment, arguing that it was untimely under 22 NYCRR 202.48(a), more than 60 days having passed since entry of the order directing settlement of the judgment. Therefore, defendant argued, the action should be deemed abandoned pursuant to 22 NYCRR 202.48(b), since plaintiff had not shown "good cause" for the delay. The court, without making any finding on the "good cause" issue, signed the judgment submitted by plaintiff without material amendment. Plaintiff's failure to comply with the clear mandate of the Uniform Rules was not justified either by the lack of prejudice to defendant from the late submission of the judgment or by the merit of the claim on which the judgment is based (cf. Brill, 2 NY3d at 652 ["good cause" for a late summary judgment motion under CPLR 3212(a) "requires a showing of good cause for the delay in making the motion--a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, nonprejudicial filings, however tardy"] ). Plaintiff's failure to timely submit a judgment was simply an instance of law office failure. Plaintiff's counsel essentially admitted as much. In reply to defendant's opposition to the belated submission of the judgment, plaintiff's counsel concluded that "any failure to timely submit the Order [sic ] for settlement is based on an oversight by the firm filing." In view of Brill and its progeny law office failure clearly does not constitute "good cause" for delay within the meaning of 22 NYCRR 202.48(b). The more contemporary Brill and Miceli decisions indicate that courts are now expected to take a stricter approach to the enforcement of litigation deadlines. [Saxe, J.P. and Malone, J. dissented ]

Visitation Schedule that deprives Custodial Parent of Significant Quality Time with Child is Excessive.

In Patrick v Farris, --- N.Y.S.2d ----, 2007 WL 1217861 (N.Y.A.D. 2 Dept.) the Appellate Division held that the extent to which the noncustodial parent may exercise parenting time is a matter committed to the sound discretion of the hearing court, to be determined on the basis of the best interests of the child ... consistent with the concurrent right of the child and the noncustodial parent ... to meaningful time together. A visitation schedule that deprives the custodial parent of any significant quality time with the child is, however, excessive.

Court Must Provide For the Disposition of All Property In Final Judgment of Dissolution

In Dellafiora v Dellafiora,--- N.Y.S.2d ----, 2007 WL 926785 (N.Y.A.D. 2 Dept.) the Appellate Division held that improvidently exercised its discretion in not awarding the wife a 50% interest in two properties and that the trial court erred in failing to "provide for the disposition thereof". The wife correctly contended that she would only be able to realize her interest in the property located in Highland Mills, where the plaintiff husband resided, if the property was sold or if the husband purchased her interest. The same applied to the wife's interest in the property located in Cornwall, which could not be realized unless the property was sold or the husband purchased her interest. It remitted to the Supreme Court for further proceedings, including a hearing, if necessary, to determine and provide for the appropriate distribution of these two properties.

Improper to Impute Income to Wife Out of Work Force For Extended Period of Time.

In Walter v Walter,--- N.Y.S.2d ----, 2007 WL 852120 (N.Y.A.D. 2 Dept.) the Appellate Division held that the Supreme Court improvidently exercised its discretion in confirming the referee's determination to limit the plaintiff's award of $4000 a month spousal maintenance to a period of five years, retroactive to the date of commencement of the action. The evidence presented at the hearing revealed that the plaintiff was the primary caretaker of the parties' three children, and that she stopped working shortly before the birth of the parties' second child in 1995 in order to become a stay-at-home mother. It extended the award of maintenance by an additional three years to afford the plaintiff, who had been out of the work force for an extended period of time, and was the primary caretaker of the parties' children, a sufficient opportunity to become self-supporting. The Appellate Division held that under the circumstances of this case, the court should not have confirmed the referee's determination to impute an annual income of $40,000 per year to the plaintiff for purposes of calculating child support under the CSSA. Although the court may impute income based upon a party's past income or demonstrated earning potential given the extended period of time during which the plaintiff has been out of the work force, and the necessity of affording her an additional period of time to become self-supporting, it was improper to impute income to her. It modified the judgment to increase the child support award from $2900 a month to $3,625 per month.

Supreme Court Erred in Determining Defendant Not Entitled to Seek Enforcement of the Federal Affidavit of Support

In Moody v Soronkina, \_\_- N.Y.S.2d ----, 2007 WL 294218 (N.Y.A.D. 4 Dept.) Defendant was a Ukranian national who emigrated to the United States in order to marry plaintiff. The parties were married in the United States in June 1999 and in July 1999 plaintiff executed a feder al affidavit of support, Form I-864, in which he agreed, inter alia, to support defendant at or above 125% of the federal poverty line until the occurrence of a qualifying terminating event. The Appellate Division found that the the statute expressly permits the sponsored immigrant to bring an action for enforcement of the affidavit of support against the sponsor in any federal or state court . The enforceability of the affidavit terminates when, inter alia, the sponsored immigrant "has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act [42 USC 01 et seq.]" (8 USC 1183a [a][3][A][I] ). It concluded that the court erred in determining that defendant was not entitled to seek enforcement of the federal affidavit of support on the grounds that the statute was for public benefit only and did not afford defendant a private cause of action.

Limited Award of Maintenance to Disabled Wife Who Could Be Self-Supporting

In Mora v Mora, --- N.Y.S.2d ----, 2007 WL 1218017 (N.Y.A.D. 2 Dept.) the Appellate Division held that . Supreme Court did not improvidently exercise its discretion in determining, upon consideration of all the unique facts of the case, that the husband's obligation to pay maintenance terminated three years after the date of the pendente lite order, or on May 31, 2005. "It is axiomatic that the amount and duration of maintenance is a matter committed to the sound discretion of the trial court and every case must be determined on its unique facts" . In declining to award the wife prospective maintenance beyond that date, the court properly considered, inter alia, the wife's capacity to earn a living as a computer specialist despite her disability, that she had been awarded maintenance during the pendency of the action, and that the husband was responsible for the support of the parties' two children of whom he had custody, and that his income was insufficient for him to provide for his own and their needs without assistance from his mother. It affirmed the counsel fee award of $2000.

May 16, 2007

Improper to Award Compound Interest on Distributive Award and to Fail to Give Credit For Temporary Child Support

In Miklos v Miklos, --- N.Y.S.2d ----, 2007 WL 1218025 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court erred in failing to award the plaintiff maintenance retroactive to the date the application was first made, with credit to the defendant for any temporary maintenance payments made. Furthermore, although the Supreme Court properly awarded the plaintiff retroactive child support, the court failed to credit the defendant for any amount of temporary child support already paid even though the making of such payments was reflected in the defendant's statement of net worth contained in his submissions. The plaintiff was not entitled to an award of past interest on any maintenance or child support arrears. Domestic Relations Law 244 provides that a judgment "shall provide for the payment of interest on the amount of any arrears if the default was wilful, in that the obligated spouse knowingly, consciously and voluntarily disregarded the obligation under a lawful order." Supreme Court did not find that the defendant's arrears were a product of a wilful default. However, to the extent the Supreme Court directed that arrears be paid in installments, the plaintiff was entitled to interest on the unpaid outstanding balances at the statutory rate (see CPLR 5004). The Supreme Court improperly awarded compound interest of 1.5% per month, which is at least twice the permissible statutory rate of 9% per annum, on any untimely equitable distributive award payments.

Denial of Fair Trial Warrants Reversal of Divorce Judgment

In Shagoury v Shagoury, --- N.Y.S.2d ----, 2007 WL 1016997 (N.Y.A.D. 2 Dept.) the Appellate Division reversed a judgment which, after a nonjury trial, inter alia, granted the plaintiff wife a divorce on the ground of cruel and inhuman treatment. A new trial was required because the trial court impermissibly and repeatedly precluded the husband from eliciting relevant testimony in his defense, as well as in support of the factual allegations contained in his counterclaim, and thereby deprived him of a fair trial.

Property Acquired During Marriage Presumed to Be Marital Property.

In Massimi v Massimi, --- N.Y.S.2d ----, 2006 WL 3525742 (N.Y.A.D. 2 Dept.) Supreme Court, equitably distributed the parties' marital property and directed the husband to pay child support in the sum of $500 per week. The Appellate Division found that plaintiff commingled certain separate funds with marital funds and assets and failed to trace the source of the funds with sufficient particularity to rebut the presumption that they were marital property. Consequently, to the extent that the plaintiff applied marital funds to his separately titled property, the defendant was entitled to an equitable distribution of the values thereof. Likewise, the defendant was entitled to recoup her equitable share of the marital funds used to reduce the indebtedness and pay for improvements to the marital abode. She also was entitled to an equitable share of the appreciation in value of the marital residence due to the evidence of indirect nonfinancial contributions to the household. The evidence demonstrated that certain other contested assets were commingled with, or funded at least in part by, marital funds. The trial court, therefore, erred in failing to award the defendant an equitable distributive share of such assets. While the defendant would also be entitled to an equitable share of Remy Real Estate Corporation the record lacked adequate proof as to its value and, hence, no award could be made. The Appellate Division agreed with the trial court's determination of the plaintiff's child support obligation based upon the standard of living the child would have enjoyed had the parties' marriage not dissolved, along with it’s own consideration of the plaintiff's financial resources and the parties' disparate incomes.

Lottery Winnings Are Marital Property. Shelter Costs Must Be Deducted From Child Support Obligation

In Damon v Damon, 823 N.Y.S.2d 540 (2d Dept. 2006) the Appellate Division held that Supreme Court properly concluded that the defendant's lottery prize was marital property subject to equitable distribution. Moreover, as the award was "predominately the result of fortuitous circumstances and not the result of either spouse's toil or labor," the contributions to the marriage of each party have little relevance to the manner in which the lottery jackpot should be distributed. Accordingly, the court did not improvidently exercise its discretion in awarding the plaintiff 25% of the lottery winnings deemed to be her share of the marital property. It agreed with the defendant that the court erred in failing to ascertain and deduct from his child support obligation the shelter costs incurred by the defendant in providing housing for the plaintiff and minor children. Shelter costs, like food and clothing, inherent in the basic child support obligation and, thus, the statute does not contemplate the cost of providing the child's shelter as an extraordinary expense to be added to the support obligation. It remitted to the Supreme Court to recalculate the amount of child support and child support arrears, taking into account the shelter costs incurred by the defendant in providing housing to the plaintiff and the minor children.

Trial Court Not Required to Consider Tax Consequence of Sale of Assets Where No Evidence Sale of Assets Expected

In Hamroff v Hamroff, 826 N.Y.S.2d 389 (2d Dept.,2006) the defendant -wife worked throughout the 14 year marriage, in the businesses incorporated immediately prior to the marriage, in which the plaintiff served as Chief Executive Officer. For much of that time, the defendant received no compensation. In 1999 she was fired by the plaintiff, who then commenced this action for a divorce. The Appellate Division held that the trial court properly awarded the defendant maintenance of $500 per week until she reaches the age of 65. The trial court also properly awarded the defendant 40% of the appreciated value of the businesses which were marital property in light of her direct and indirect contributions to their success. The award of 3% post-judgment interest on the distributive award, which could have been as high as 9%, was a proper exercise of the trial court's discretion. The trial court was not required to consider the tax consequence of the sale of assets where there was no evidence that sale of any assets was expected. The plaintiff's notice of appeal specified that the appeal was limited to certain portions of the judgment. Thus, issues raised in the plaintiff's brief relating to other portions of the judgment were not properly before the court.

Supreme Court Properly Distributed Assets Under Circumstances of Case

In Altieri v Altieri, --- N.Y.S.2d ----, 2006 WL 3798874 (N.Y.A.D. 3 Dept.) the Appellate Division rejected the defendant’s argument that Supreme Court erred in awarding plaintiff a liquid asset in the form of the marital residence while awarding him a nonliquid asset in the form of his 401k plan. It held that while courts should ordinarily avoid methods of property division which provide one spouse with immediate enjoyment of assets and relegate the other spouse to a potentially long and uncertain wait before access to the equity in the assets is realized, that principle was not violated here. Although defendant will be required to pay income tax on any withdrawals from his 401k account, based on his age he is entitled to make withdrawals without penalties, and had done so several times prior to commencement of this action. As he failed to prove the nonliquidity of that asset, it was properly awarded as an offset against his portion of the marital residence awarded to plaintiff. It also held that Supreme Court did not err by not adjusting the distributions from defendant's 401k account for tax consequences, because defendant did not prove the tax impact of those withdrawals. Were plaintiff to liquidate the realty, she would incur costs for repairs, counsel fees and broker fees. Under the circumstances of this case, considering plaintiff's attachment to the marital home, defendant's actions in secreting assets during the marriage, his failure to disclose significant assets in his financial disclosure statement and his incredible testimony concerning the use of certain assets, it was equitable to balance the distribution of the marital residence to plaintiff against the distribution of the 401k plan to defendant. Supreme Court also did not abuse its discretion in awarding plaintiff credits for amounts that defendant withdrew from marital assets, cash that defendant secreted in the home and did not claim in his statement of net worth and money in accounts that defendant closed, all while matrimonial actions were contemplated or pending.

May 1, 2007

Nondurational Maintenance Awarded in 30 Year Marriage For Partially Self-Supporting Wife

In Kammerer v. Kammerer, 2007 WL 926564 --- N.Y.S.2d ----, 2007 WL 926564 (N.Y.A.D. 2 Dept.) after 30 years of marriage, the former wife commenced an action for a divorce in 1998. The parties entered into a stipulation providing for the equitable distribution of the marital residence, the defendant former husband's businesses, and commercial real estate. The Appellate Division held that considering all of the factors relevant in determining maintenance, including the amount of marital assets awarded to the wife, and her ability to become partially self-supporting, the award to her of nondurational maintenance in the sum of $800 per week was a provident exercise of the trial court's discretion. The wife's testimony with respect to her health problems was not corroborated by expert testimony, and did not establish that she was incapable of securing employment. Rather, the evidence indicated that she was capable of working. Considering the wife's means and ability to secure employment, the trial court's refusal to compel the husband to provide health insurance for her was a provident exercise of discretion.

Child Support Awarded Where Efforts to Seek Employment Insufficient

In Hodges v Hodges--- N.Y.S.2d ----, 2006 WL 3526824 (N.Y.A.D. 2 Dept.), the Appellate Division noted that a court may deviate from directing a noncustodial parent to pay his or her share of the basic child support obligation if it finds that amount to be "unjust or inappropriate" but disagreed with Supreme Court's determination that was would be "unjust and inappropriate" even though the plaintiff was presently unemployed. In its decision dated June 16, 2004, the Supreme Court noted that within two months of the parties' separation, the plaintiff obtained employment for two years as a security screener at an airport. After she lost that job due to changing governmental regulations, she began to collect unemployment benefits and performed some hospital security work on a per diem basis as well as catering on an "as needed" basis. Her efforts to seek other employment were insufficient in that they were limited to checking newspapers advertisements for jobs in the security field. Notwithstanding the plaintiff's inability to find such work, she admittedly did not seek employment or education in any other field, nor did she register with any employment agency in the security field or otherwise. Supreme Court also found that the health problems described by the plaintiff did not restrict her activities in any way or diminish her ability to work. Supreme Court imputed income to the plaintiff in the sum of $20,000, of which $4,800 annually, or $400 monthly, would be the plaintiff's share under the CSSA, it relieved her of her statutory obligation thereunder and directed her to pay child support in the sum of $25 monthly. It also deferred payment of the plaintiff's pro rata share of unreimbursed medical, dental, pharmaceutical, or mental health expenses for a period of two years. The Appellate Division held that since there was no indication in the record that the plaintiff could not work or otherwise provide financial resources to support her children, there was no basis to depart from the application of the prescribed statutory percentage or to defer her contribution to the children's unreimbursed medical expenses.

Proper to Deny Maintenance Where No Effort By Wife to Transition Back into Work Force

In Arnone v Arnone, --- N.Y.S.2d ----, 2007 WL 174394 (N.Y.A.D. 3 Dept.) the parties married in 1980 and had two children, born in 1982 and 1985. This divorce action was commenced in 1997, but was not actively pursued until 2000 when an attempted reconciliation disintegrated. Prior to the 2003 trial, the children resided with plaintiff, who provided their financial support. Supreme Court determined, among other things, that the marital property consisted of the parties' residence, the various personal property located there, a 1982 Camaro, and a portion of plaintiff's state retirement benefit. The court distributed to defendant the residence (valued at $172,000), all personal property at the residence (except a few specifically named items), and the Camaro. Plaintiff was permitted to keep his state pension of about $13,000 per year. Supreme Court directed that defendant would keep her pension; however, she had none. Various bank accounts were determined to be separate property and thus not subject to equitable distribution. The court terminated temporary maintenance as of the date of the judgment of divorce, and awarded no further maintenance. Defendant's request for counsel fees was denied. Plaintiff remained solely financially responsible for the one child who was not yet emancipated. The Appellate Division found that the parties were married the entire time that plaintiff was employed full time with the state. He was injured on that job and later received a state retirement benefit. This injury, and injuries he received while serving with the United States Marines in Vietnam, left him totally disabled. He received about $58,000 per year from the combination of Veteran's disability, Social Security disability and workers' compensation. Defendant made no claim as to these payments, which compensated plaintiff for his personal injuries. During the marriage, defendant held only part-time jobs, her annual earnings did not exceed $12,000, she was not working at the time of the trial, and her medical coverage ceased with the divorce. Defendant was the primary caretaker of the children when they were young, and plaintiff assumed those obligations in their late teenage years, including all support and college expenses. Defendant suffered some infirmities and had unsuccessfully attempted to obtain Social Security disability benefits, but Supreme Court was not convinced that her condition prevented her from working. The court held that her probable financial condition would improve following the divorce and plaintiff's financial condition would remain unchanged. At the time of trial, plaintiff was 56 years old and defendant was 53. It modified the judgment to provide that defendant should receive 50% of plaintiff's state pension, which was $13,326 per year in 2002. The Appellate Division affirmed the denial of maintenance. It found that although defendant had a limited work history, she obtained a college degree while married. Significantly, during the several years prior to the divorce when the marriage was deteriorating (and when she assumed no obligation to provide housing or support to the children and was receiving temporary maintenance in the amount of $1,000 per month from August 8, 2001 until that order was terminated on August 30, 2005), she made no apparent effort to transition back into the work force. Defendant relied on her alleged infirmities as a reason for her lack of initiative in seeking employment. Supreme Court, however, rejected this excuse and it found no reason to disregard the court's credibility determination.

Court Properly Imputed Income and Applied Straight Percentage Based upon Standard of Living That the Parties' Children Would Have Enjoyed

In Devries v Devries, --- N.Y.S.2d ----, 2006 WL 3803411 (N.Y.A.D. 2 Dept.) Supreme Court awarded the wife child support of $1,702.75 per week, maintenance of $697 per week for a period of 10 years, 30% of the plaintiff's business, equitable distribution in the sum of $814,110.50, denied her motion for an attorney's fee, and applied the Child Support Standards Act to the husbands income in excess of $80,000. The Appellate Division held that the court properly imputed income to the plaintiff since the evidence showed that he earned and spent well in excess of the income reported on his tax return. The court, applying the straight percentage, properly considered $300,000 of the plaintiff's imputed gross income in determining basic child support. The court providently exercised its discretion in calculating child support against $300,000 of the plaintiff's imputed income based upon the standard of living that the parties' children would have enjoyed had the marriage not dissolved, and upon the parties' disparate financial circumstances. As the defendant proffered no evidence that either the plaintiff or DeVries Concrete, Inc., had any ownership interest certain New Paltz property and there was conflicting evidence regarding whether the plaintiff made any monetary investment in the New Paltz property, and if so, how much money was involved, the Supreme Court erred in including this property in the distributive award. The Appellate Division held that on the peculiar facts and circumstances of this case, including the defendant's receipt of 70% of the nonbusiness marital assets (not including the New Paltz property), the payment to the defendant of the sum of $200,000 in equitable distribution up front, and the award of interest on the distributive balance calculated at the legal rate, the defendant was not entitled to any portion of the value of the plaintiff's business, M. DeVries Concrete, Inc.

April 16, 2007

Family Court Has Discretion to Grant Post Termination Contact with Biological Parent

In Matter of Kahlil S.,35 A.D.3d 1164, 830 N.Y.S.2d 625 (4th Dept.,2007) the Appellate Division held that Family Court had discretion to determine whether some form of post termination contact with the biological parent was in the best interests of the child, abrogating Matter of Kenneth D., 32 A.D.3d 1237, 821 N.Y.S.2d 698, Matter of Livingston County Dept. of Social Servs. v. Tracy T., 16 A.D.3d 1133, 792 N.Y.S.2d 273. It recognized that the termination of the parental rights of a biological parent results in an abrupt and complete cessation of contact between a child and the parent, and that "psychological harm ... may possibly result from severing the bonds between a child and his or her biological

parent, particularly where the child is older and has strong emotional attachments to the birth family. It concluded that, in the event that parental rights are terminated after a finding that the parent is unable by reason of mental illness or mental retardation to provide proper and adequate care for his or her child or after a finding of permanent neglect, Family Court may, in those cases in which the court deems it appropriate, exercise its discretion in determining whether some form of post termination contact with the biological parent is in the best interests of the child. It noted that in determining the best interests of the children, the court may consider, inter alia, the ages of the children, the bond between respondent and the children, and the likelihood that the children will be adopted.

Child Support Awarded Where Efforts to Seek Employment Insufficient

In Hodges v Hodges--- N.Y.S.2d ----, 2006 WL 3526824 (N.Y.A.D. 2 Dept.), the Appellate Division noted that a court may deviate from directing a noncustodial parent to pay his or her share of the basic child support obligation if it finds that amount to be "unjust or inappropriate" but disagreed with Supreme Court's determination that was would be "unjust and inappropriate" even though the plaintiff was presently unemployed.In its decision dated June 16, 2004, the Supreme Court noted that within two months of the parties' separation, the plaintiff obtained employment for two years as a security screener at an airport. After she lost that job due to changing governmental regulations, she began to collect unemployment benefits and performed some hospital security work on a per diem basis as well as catering on an "as needed" basis. Her efforts to seek other employment were insufficient in that they were limited to checking newspapers advertisements for jobs in the security field. Notwithstanding the plaintiff's inability to find such work, she admittedly did not seek employment or education in any other field, nor did she register with any employment agency in the security field or otherwise. Supreme Court also found that the health problems described by the plaintiff did not restrict her activities in any way or diminish her ability to work. Supreme Court imputed income to the plaintiff in the sum of $20,000, of which $4,800 annually, or $400 monthly, would be the plaintiff's share under the CSSA, it relieved her of her statutory obligation thereunder and directed her to pay child support in the sum of $25 monthly. It also deferred payment of the plaintiff's pro rata share of unreimbursed medical, dental, pharmaceutical, or mental health expenses for a period of two years. The Appellate Division held that since there was no indication in the record that the plaintiff could not work or otherwise provide financial resources to support her children, there was no basis to depart from the application of the prescribed statutory percentage or to defer her contribution to the children's unreimbursed medical expenses.

Award of Maintenance Not Determined by Actual Earnings, but by Earning Capacity. Husband Properly Awarded 25% of Marital Assets

In Arrigo v Arrigo, --- N.Y.S.2d ----, 2007 WL 926881 (N.Y.A.D. 2 Dept.) the Appellate Division held that Contrary to the husband's contention, the Supreme Court did not err in awarding him only a 25% share of the marital assets. Equitable distribution does not necessarily mean equal distribution, and it was evident that the Supreme Court properly considered the relevant statutory factors in fashioning the distribution. The marriage was of relatively short duration, both parties were relatively young and healthy, there were no children, and the husband's financial contributions to the marriage were minimal. Supreme Court properly denied him an award of maintenance. The marriage was relatively short, and both parties were relatively young and healthy. Although the husband earned substantially less income than the wife, he had three college degrees. An award of maintenance is not determined by actual earnings, but rather by earning capacity. The husband quit many jobs of his own volition, despite the wife's wishes that he maintain steady employment. Furthermore, he received a distributive award of 25% of the marital assets. Thus, the court properly denied him an award of maintenance.

Not error to refuse to award equitable share pension without Proof of Value

In Seckler-Roode v Roode, 36 A.D.3d 889, 830 N.Y.S.2d 211 (2d Dept.,2007) the Appellate Division held that Supreme Court did not err in declining to award the defendant an equitable share of the value of the plaintiff's pension. Generally, that

portion of the value of a pension which accrues during the marriage constitutes marital property subject to equitable distribution. Here, however, the defendant failed to meet his burden of proving the value of the plaintiff's pension, offering no proof at all as to its value.

Depositions Not Permitted in Custody Disputes and Deposition of Expert Not Favored.

In Nimkoff v Nimkoff, 36 A.D.3d 498, 830 N.Y.S.2d 27 (1st Dept.,2007) the Appellate Division, First Department, affirmed an order which granted motions by the court-appointed forensic evaluator Schaul and by plaintiff wife to vacate the defendant husband's notice of deposition and quash his subpoena for pre-trial disclosure by Schaul. It held that defendant was given ample opportunity to cross-examine the evaluator as to any bias in favor of mothers in custody proceedings. The circumstances did not suggest the need for a departure from the general rule that depositions are not permitted in custody disputes. Furthermore, deposing of expert witnesses is generally discouraged. The order directing production of Dr. Schaul's data file for review three business days prior to trial was appropriate.

Broad Disclosure Justified Where Closely Held Corporation Owned by Spouse. Special Circumstance Rule Still Applicable to Non-Party Depositions.

In Reich v Reich, 36 A.D.3d 506, 830 N.Y.S.2d 29 the Appellate Division held that the documents and records sought by defendant wife from Hercules Corp. were appropriate to a characterization and valuation of Hercules, a closely held corporation in which plaintiff husband was a 2.5% shareholder. Under the Equitable Distribution Law, broad pretrial disclosure which enables both spouses to obtain necessary information regarding the value and nature of the marital assets is critical if the trial court is to properly distribute the marital assets. This searching exploration is more than justified in the case of close corporations, the ownership of which is in the hands of a small number of stockholders and for which there is little objective evidence of fair market value. Defendant wife will have to bear the costs of any document production. The Appellate Division modified to quash the notice of deposition served upon Alfred May. Defendant had not shown that the information sought from him was not obtainable from other sources (citing Dioguardi v. St. John's Riverside Hosp., 144 A.D.2d 333, 533 N.Y.S.2d 915 [1988] ), particularly since appellants had evidently agreed that they would make him available for deposition.

April 1, 2007

Income Imputed to Husband Who Manipulated Corporate Expenses

In Yarinsky v Yarinsky --- N.Y.S.2d ----, 2007 WL 108475 (N.Y.A.D. 3 Dept.) the Appellate Division held that Courts have considerable discretion in fashioning a child support award; when assessing a parent's income from which to determine his or her child support obligation, a court should consider factors such as the parent's "gross (total) income as ... reported in the most recent federal income tax return", as well as additional income from sources other than employment and a parent's past income . Further, a court may impute income based upon a parent's prior employment experience and future earning capacity in light of his or her educational background. Notably, when a party's or an expert's account of his or her finances is not believable, a court is justified in finding an income higher than that claimed . Upon its review of the record the Appellate Division concluded that the Support Magistrate acted within his discretion in focusing on the 2003 federal tax returns of the parties and the husbands solely owned subchapter S corporation, as they were the most recent at the time of the hearing. Further, each item of income attributed to the husband for child support purposes--which totaled$189,547-- was supported in the record. It was clear that--in anticipation of an eventual full plenary hearing on child support--the husband made a number of financial decisions which effectively reduced the amount of the corporate nonemployment income received by him in 2003; the most glaring were his December 2003 decisions to purchase a new corporate vehicle for his personal use ($31,356) and to upgrade his office computer system ($15,070.16) thereby reducing the 2003 excess corporate profit--payable as income to him as sole shareholder of the corporation--by $46,426. Accordingly, it imputed $40,426 in additional 2003

income to the husband's share of the combined parental income.

Waiver of Referee Transcript Constitutes Waiver of Argument on Appeal

In Lee v Solimano, --- N.Y.S.2d ----, 2006 WL 3290469 (N.Y.A.D. 1 Dept.) the Appellate Division held that the defendant, who asserted in the trial court that there was no need to submit to the court the transcript of the hearing conducted before the Special Referee, waived the argument that the court should not have confirmed the Special Referee's report without having before it a complete transcript of the underlying hearing.

Where Both Parties Failed to Submit Proof Proper to Award Each Party His Own Assets Without a Distributive Award

In Berliner v Berliner, --- N.Y.S.2d ----, 2006 WL 2964202 (N.Y.A.D. 2 Dept.) Supreme Court distributed the parties' property, awarded the wife basic child support in the sum of $663.37 per month, directed her to pay 85.64% of unreimbursed health care, educational, and child care expenses of the children and limited the former husband's contribution to such expenses to 14.36%, and incorporated a provision of an order dated October 28, 2004, which imposed a "SUNY 'cap' " on the former husband's contributions to college expenses. The Appellate Division found the former husband was properly precluded from introducing any evidence in support of his claims to equitable distribution in light of his refusal to comply with proper discovery demands. The sole evidence submitted by the former wife in support of her claim for equitable distribution was an appraisal report by the court-appointed appraiser which noted that the former husband started working at his law practice in 1980, seven years prior to the marriage in 1987 and determined that the value of the practice was $76,141 as of December 31, 2001, without determining its value as of the date of the marriage. Supreme Court found that since the plaintiff's law practice was commenced prior to the marriage, it constituted separate property. No evidence was submitted as to its appreciation, if any, during the marriage, and whether the former wife's direct or indirect efforts contributed to any appreciation. No evidence was submitted as to retirement investments or pensions. Under the circumstances of this case, where both parties were sophisticated in business affairs and held substantial assets, yet failed to submit proof in support of their claims, Supreme Court properly determined that it was equitable to award each party his or her own assets without fashioning a distributive award. Supreme Court concluded that the former husband's annual income was $73,791 based on the "Recomputed Normalized Income" set forth in the appraisal of the former husband's law practice, and the former wife's annual income was $440,000. The former wife did not call the appraiser as a witness at the trial. After the Supreme Court reached its determination as to child support in the order dated October 28, 2004, the former wife sought reargument based upon an affidavit of the appraiser stating that the former husband's average annual "Recomputed Normalized Income" of $73,791 set forth in the appraisal of the value of his law practice included only excess earnings and not the former husband's reasonable compensation for his services to the practice. The appraiser estimated that former husband's total average annual income amounted to $158,424. Supreme Court granted the former wife's motion for reargument but adhered to the original determination on the ground that the court did not misapprehend the trial evidence. The information provided in the appraiser's affidavit was not presented at the trial and no reasonable justification was offered for failing to do so. That determination was a provident exercise of discretion. However, Supreme Court improperly imposed a so-called "SUNY 'cap' " on the former husband's contribution to the children's college expenses, limiting his contribution to what it would be if the children attend public New York State colleges. There was no basis in this record for so doing, especially in view of the fact that the children attended private boarding secondary school.

Credit For Military Service is Separate Property

In DeLapp v DeLapp, 829 N.Y.S.2d 381(4th Dept.,2007) the Appellate Division held that Supreme Court should have granted that part of plaintiff's motion seeking to vacate and amend the Qualified Domestic Relations Order (QDRO) to reflect that he was solely entitled to the increase in pension benefits attributable to his purchase of three additional years of credit for military service (see Retirement and Social Security Law 1000). Plaintiff's three years of military service preceded the marriage and the purchase of credit was made following the divorce. Thus, the increase in plaintiff's pension benefit attributable to that credit was plaintiff's separate property.

Parties Who Submit Incomplete Record Must Suffer Consequences on Appeal

In Cherry v Cherry, 824 N.Y.S.2d 701, 2006 N.Y. Slip Op. 08357 (4th Dept.,2006) the defendant contended on appeal that Supreme Court erred in directing him to select a certain retirement benefit and that he did not agree to a retirement benefit that would provide for payments to plaintiff in the event that he predeceased her. Those contentions were not reviewable by the Appellate Court because defendant failed to include in the record on appeal the order that allegedly directed him to select that benefit, the motion papers seeking that relief, or any evidence concerning the parties' alleged agreement. Defendant, "as the appellant, submitted this appeal on an incomplete record and must suffer the consequences".

Error to Include Maintenance Award as Income in Computing Child Support. Award Reversed Where Unjust and Inappropriate

In Shapiro v Shapiro, --- N.Y.S.2d ----, 2006 WL 3628826 (N.Y.A.D. 2 Dept.) the Appellate Division held that the trial court erroneously included the maintenance award as income in computing the wife’s basic child support obligation, and even with this correction, requiring the defendant to pay her pro rata share of the basic child support obligation, would be unjust and inappropriate under the circumstances of this case. Balancing the plaintiff's sole custody of the parties' children, as well as his superior financial position, against the lesser income and financial resources of the defendant who did not work for almost the entire length of the parties' 15-year marriage, an award of $25 per week to the plaintiff, instead of $585 a month, was "just and appropriate". Since it determined that the amount of child support presumptively due from the defendant under the statute is unjust and inappropriate, the defendant was not obligated to pay her pro rata share of the additional child support expenses listed in the judgment. The Court noted that certain of the parties' contentions had not been considered because they were improperly argued for the first time in the parties' respective reply briefs.

March 16, 2007

Dismissal of Appeal From Pendente Lite Order For Lack of Prosecution is Not Reviewable. DRL 253 (3 ) Complied with Where Husband Offers “Get” After “Heter”

In Seiger v Seiger, --- N.Y.S.2d ----, 2007 WL 465656 (N.Y.A.D. 2 Dept.) the parties both orthodox Jews, were married in 1972. They had two emancipated children. On December 4,1995, the wife left the marital residence. In 1997, the husband obtained a "heter" from a rabbinical court, which allowed him to remarry without first giving the wife a "get" (see Sieger v. Union of Orthodox Rabbis of U.S. & Can., 1 A.D.3d 180, 767 N.Y.S.2d 78). On March 2, 1998, the husband commenced

the action for a divorce. The Appellate Division held that contrary to the wife's contention, the judgment should not be reversed due to noncompliance with DRL 253(3), which provides that "[n]o final judgment of ... divorce shall ... be entered unless the plaintiff shall have filed and served a sworn statement: (I) that to the best of his or her knowledge, he or she has, prior to the entry of such final judgment, taken all steps solely within his or her power to remove all barriers to the defendant's remarriage following the ... divorce." The evidence revealed that the husband at various times after obtaining the "heter" was willing to give the wife a "get," or religious divorce, but that the wife refused to accept a "get" unless the husband disavowed statements he made concerning her in order to obtain the "heter." It was the wife's contention that the "heter" had the practical effect of preventing her remarriage even were she to receive a "get." The Appellate Division found that husband complied with DRL 253(3) inasmuch as he remained prepared to give his wife a religious divorce. The legislative intent of DRL 253(3) was principally to prevent the husband in the case of a Jewish divorce from using the denial of a "get" as a form of economic coercion in a civil divorce action. No such form of economic coercion was being exerted inasmuch as it was the wife who refused to accept a "get." Insofar as the wife claimed that the "heter" had the practical effect of preventing her remarriage, this court was without jurisdiction to consider this issue because to do so would require the court to review and interpret religious doctrine and resolve the parties' religious dispute, which the court is proscribed from doing under the First Amendment entanglement doctrine. Further, this court's jurisdiction to review the "heter" issue is specifically proscribed under DRL 253(9), which provides that "[n]othing in this section shall be construed to authorize any court to inquire into or determine any ecclesiastical or religious issue." The wife's contention that she was entitled to additional discovery and that the appraisals were tainted could have been raised on the wife's prior appeals from the orders of the same court

2004, denying her motions. Those appeals were dismissed for lack of prosecution. The dismissal of those appeals constituted an adjudication on the merits with respect to all issues which could have been raised, and the court declined to review those issues on this appeal.

Motion to Amend Divorce Judgment is Procedurally Improper Where Additional Relief Sought

In Claus v Claus, --- N.Y.S.2d ----, 2007 WL 465656 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court erred in granting the defendant's motion, made approximately 10 months after the entry of the judgment of divorce, to amend the judgment of divorce to award her credit for payments she made to reduce the principal balances of the first and second mortgages on the former marital residence. The defendant did not request that relief at the trial, nor was the issue litigated by the parties. The motion was also procedurally improper since amendment may only be used to correct a technical defect, mistake, or irregularity in a judgment or order and it may not be employed to affect a substantial right of a party. Since the motion sought an award of additional, discretionary relief the motion was improperly granted.

Change of Circumstances Standard Applies to Modification of Custody After a Bennett Determination

In Metcalf v Odums, --- N.Y.S.2d ----, 2006 WL 3802823 (N.Y.A.D. 2 Dept.) Family Court awarded custody of the children to the respondent maternal grandmother based on a finding that extraordinary circumstances existed and that such arrangement was in the best interests of the children (see generally Matter of Bennett v. Jeffreys, 40 N.Y.2d 543). That order was affirmed. In a proceeding to modify that order the Appellate Division held that "[O]nce the preferred status of the birth parent under Bennett (40 N.Y.2d 543) has been lost by a judicial determination of extraordinary circumstances, the appropriate standard in addressing the possible modification of the prior order is whether there has been a change of circumstances requiring a modification of custody to ensure the best interests of the child" (Matter of Guinta v. Doxtator, 20 AD3d 47, 51)

Oral Motion Denies Notice and Opportunity to Be Heard. Contempt Requires Compliance with Judiciary Law

In Xand Corporation V Reliable Systems Alternatives Corporation 35 A.D.3d 849, 827 N.Y.S.2d 269 (2d Dept.,2006) an action to recover damages for fraud in the inducement, the Supreme Court granted the defendant's oral application to hold the plaintiff in contempt of court and to strike the complaint for its failure to comply with a prior court order. The Appellate Division reversed holding that defendant's oral application to hold the plaintiff in contempt of court did not satisfy the statutory requirements for a contempt application. Pursuant to Judiciary Law 756, a contempt application must be in writing, must be made upon at least 10 days notice, and must contain on its face the statutory warning that "failure to appear in court may result in ... immediate arrest and imprisonment for contempt of court" . Since the defendant's oral application failed to comply with any of these procedural safeguards, the Supreme Court erred when it punished the plaintiff for contempt for failing to comply with its prior order. Furthermore, under the circumstances of this case, defendant's oral application to strike the complaint based upon the plaintiff's failure to comply with court-ordered discovery should have been denied in the absence of notice and an opportunity to be heard.

Proper to Award Attorneys Fees For Appeal to Oppose Affirmative Defense Based on Antenuptial Agreement

In Ventimiglia v Ventimiglia, --- N.Y.S.2d ----, 2007 WL 258481 (N.Y.A.D. 2 Dept. The Appellate Division affirmed an order which granted the plaintiff's motion pursuant to Domestic Relations Law 237 for an award of post-judgment attorneys' fees and

disbursements to the extent of awarding her the sum of $185,000. In a matrimonial action, any award of attorneys' fees should be based, inter alia, on the relative financial circumstances of the parties, the relative merit of their positions, and the tactics of a party in unnecessarily prolonging the litigation. These considerations also apply to an award of attorneys' fees for appellate litigation as well as to post-judgment proceedings. Here, when considering the plaintiff's motion for attorneys' fees in connection with the defense of the appeal from the judgment and the amended judgment, the court correctly found that the attorneys' fees were incurred to enable the plaintiff to oppose the affirmative defense based on the antenuptial agreement rather than to rescind the antenuptial agreement, an action in which fees would not be available.

Provision Enforced that Reconciliation Would Not Invalidate Agreement Unless Written Document Executed

In Aiello v Aiello, --- N.Y.S.2d ----, 2006 WL 3445435 (N.Y.A.D. 2 Dept.) the parties executed a separation agreement in 2000 which provided, inter alia, that all property "now owned by him or her ... or which may hereafter belong to" either party was free of any claim of the other, "with full power ... to dispose of the same ... as if he or she were unmarried" and that any reconciliation by the parties would not invalidate the agreement unless they executed a written document acknowledging their reconciliation and expressly indicating their intent to cancel it. In December 2001 the parties reconciled but did not acknowledge their reconciliation in writing. After their reconciliation ended an action for a divorce was commenced. The Appellate Division held Supreme Court not enforcing the agrement according to its terms.

March 1, 2007

Court of Appeals Holds Grandparent Visitation Law, DRL 72(1) is Constitutional

In the Matter of E.S. (Anonymous), v. P.D. (Anonymous), the Court of Appeals in an opinion by Judge Read held that section 72(1) of the Domestic Relations Law is constitutional in view of the United States Supreme Court's decision in Troxel v Granville (530 US 57 [2000]), both on its face and as applied. A.D.'s mother E.S. (grandmother), who lived in East Hampton, Long Island, was asked to move into the marital home in Huntington to care for her terminally ill daughter and the child. The Grandmother cleaned the house, shopped, cooked household meals and looked after the child when A.D.'s illness prevented her from doing so.

After A.D.'s death in March 1998, father invited the grandmother to stay on to help out with the then four-year-old child's care and household duties. They lived together amicably in the Huntington home for the ensuing three and one-half years. During that time, grandmother comforted, supported and cared for the motherless child. She got him ready for school, put him to bed, read with him, helped him with his homework, cooked his meals, laundered his clothes and drove him to school and to doctor's appointments and various activities, including gym class, karate class, bowling, soccer, Little League baseball and swimming class. She arranged and transported him to away-from-home or supervised at-home play dates; she took him to the public library and introduced him to the game of chess. By the fall of 2001, the relationship between grandmother and father had begun to sour. On February 24, 2002 the father demanded that grandmother move out of the home immediately. From April through December 2002, the father allowed sporadic visits, which were limited in length and tightly supervised, and occasional telephone calls. In January 2003, grandmother, who was 78 years old at the time, commenced the proceeding pursuant to Domestic Relations Law § 72 and Family Court Act § 651 for an order granting reasonable visitation with the child, who was then nine years old. The Father opposed the grandmother's request, and cross-moved for an order prohibiting grandmother from any contact whatsoever with the child.

Supreme Court granted judgment to grandmother, and ordered visitation according to a detailed schedule. Supreme Court concluded that "[a]lthough mindful of [father]'s right to rear [the child] as he sees fit, and of his stated concern that [grandmother] undermines his parental authority, the Court finds that he has failed to present any credible evidence warranting either the termination of the relationship between [grandmother] and [the child] or the imposition of restrictions on the right of visitation. Instead, the evidence in the record establishes the existence of a very close, loving relationship between [grandmother] and [the child], and that [the child]'s best interest is served by granting [grandmother] regular, unfettered visitation." The Appellate Division affirmed Supreme Court's judgment, but modified certain terms of the visitation schedule in deference to father's wishes, relying on Troxel. The Appellate Division rejected the father's argument that Supreme Court abused its discretion in awarding visitation to grandmother.

The Court of Appeals affirmed. Judge Read noted that Section 72(1) derogates from the common-law rule that "grandparents [have] no standing to assert rights of visitation against a custodial parent".The statute "rests on the humanitarian concern that [v]isits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild . . . which he cannot derive from any other relationship" (id. at 181 [internal quotation marks and citations omitted]). Section 72(1) "does not create an absolute or automatic right of visitation. Instead, the statute provides a procedural mechanism for grandparents to acquire standing to seek visitation with a minor grandchild". When grandparents seek visitation under section 72(1), the court must undertake a two-part inquiry. "First, [the court] must find standing based on death or equitable circumstances"; and "[i]f [the court] concludes that the grandparents have established the right to be heard, then it must determine if visitation is in the best interest of the grandchild" (Matter of Emanuel S., 78 NY2d at 181). She cautioned that the courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the child's best interests is a strong one. And while the problems created by parent-grandparent antagonism cannot be ignored, an acrimonious relationship is generally not sufficient cause to deny visitation.

Here, the grandmother had automatic standing under section 72(1) on account of A.D.'s death. Record evidence supported the determination of the courts below that visitation between grandmother and the child is in the child's best interest. The Appellate Division affirmed the trial court's findings of fact, and the Court of Appeals could not revisit them. In light of these factual findings, there was no reason to disturb the best-interest determination in this case.

The Father contended that Domestic Relations Law § 72(1) was facially unconstitutional in light of Troxel. Judge Read noted that the Washington statute at issue in Troxel permitted "'[a]ny person' to petition [the trial court] for visitation rights 'at any time,' and authorize[d] that court to grant such visitation rights whenever 'visitation may serve the best interest of the child'". The problem in Troxel was therefore not that the trial court intervened, but that it failed to employ "the traditional presumption that a fit parent will act in the best interest of his or her child" when it did. The trial court effectively applied a presumption in favor of grandparent visitation, placing on the parent "the burden of disproving that visitation would be in the best interest" of her children. Reasoning from Troxel, Judge Read court that section 72(1) was facially constitutional. Section 72(1) "can be, and has been, interpreted to accord deference to a parent's decision, although the statute itself does not specifically require such deference. Further, [section 72(1)] is drafted much more narrowly than the Washington statute [considered in Troxel]. If the United States Supreme Court did not declare the 'breathtakingly broad' Washington statute to be facially invalid, then certainly the more narrowly drafted New York statute is not unconstitutional on its face. In fact, the Court indicated that it would be hesitant to hold specific nonparental visitation statutes unconstitutional per se because 'much state-court adjudication in this context occurs on a case-by-case basis.' Troxel does not prohibit judicial intervention when a fit parent refuses visitation, but only requires that a court accord 'some special weight to the parent's own determination' when applying a nonparental visitation statute".(quoting Justice Altman in Matter of Hertz v Hertz, 291 AD2d 91).

The father also argued that section 72(1) was unconstitutionally applied in this case. The Court of Appeals disagreed. Unlike Troxel, the trial court here did not presuppose that grandparent visitation was warranted as the jumping-off point for factfinding and best-interest analysis. Instead, the court, emphasizing that it was "mindful" of father's parental prerogatives, employed the strong presumption that the parent's wishes represent the child's best interests, as our statute requires. While this presumption creates a high hurdle, the grandmother in this case surmounted it: from the time the child was almost four until he was seven, the grandmother was his surrogate, live-in mother. The court then properly went on to consider all of the many circumstances bearing upon whether it was in the child's best interest for his relationship with grandmother to continue -- e.g., the reasonableness of father's objections to grandmother's access to the child, her caregiving skills and attitude toward father, the law guardian's assessment, the child's wishes -- before making a judgment granting visitation.

Family Court Does Not Have the Authority to Issue Orders of Protection For Children until They Reached the Age of 18

In Matter of Sheena D, --- N.E.2d ----, 2007 WL 445296 (N.Y.), 2007 N.Y. Slip Op. 01193 the Court of Appeals held that in an Article 10 proceeding Family Court does not have the authority to issue orders of protection in favor of a respondent-father's children until they reached the age of 18, where the fact-finding dispositional order incorporating the orders of protection has no expiration date. The Court held that a dispositional order that has no expiration date, such as the one here placing the children in the custody of the mother with no requirement of supervision, cannot be accompanied by an order of protection with no time limit. To read the statute otherwise would contradict the purpose of the 1989 amendment--to limit the length of orders of protection in child protective proceedings and to provide for periodic court review.

Law of the Case Bars Re-litigation of Same Issue

In Cellamare v Lakeman, --- N.Y.S.2d ----, 2007 WL 259871 (N.Y.A.D. 2 Dept.) the Family Court stated specifically in its order that child support arrears owing to the mother were to be set at zero. That order was never reversed. The mother nonetheless petitioned the Family Court for an award of child support arrears. The Family Court held that the mother's request for arrears was barred by the law of the case. The Appellate Division affirmed. It held that an order violates the law of the case if it violates an order that is "conclusive on all Justices of coordinate jurisdiction".Indeed, "[i]t is fundamental that a Judge may not review or overrule an order of another Judge of co-ordinate jurisdiction in the same action or proceeding".

February 16, 2007

Equitable Estoppel Precludes Father From Challenging Filiation Order Where Child Relied on His Representations

In Matter of Gina L. v. David W., 34 A.D.3d 810, 826 N.Y.S.2d 338,(2d Dept.,2006) the Appellate Division held that Family Court properly denied the putative father's motion to vacate the order of filiation. The putative father claimed that the order should

be vacated, as a paternity test revealed that he was not the biological father of the subject child. The Court noted that the doctrine of equitable estoppel may be applied to preclude a parent from challenging an order of filiation. It is the child's best

interests which are of paramount concern. It held that where a child justifiably relies on the representations of a man that he is his or her father with the result that the child will be harmed by the man's denial of paternity, the man may be estopped from asserting that denial (citing Matter of Shondel J. v. Mark D., 7 N.Y.3d 320). Because the child is the party in whose favor estoppel was applied, the equities between the two adults were not involved here. The case turned exclusively on the best interests of the child and the court found that there can be no claim that the child was guilty of fraud or misrepresentation. The child's testimony, which was credited by the Family Court, demonstrated that she relied on the putative father's representations by accepting him as her father and treating him as such. The Family Court properly found that it would not be in her best interests to now allow the putative father to renounce paternity.

Childs Cell Phone Bill is Not An Educational and Recreational Expense

In Moss v Moss -- N.Y.S.2d ----, 2007 WL 102495 (N.Y.A.D. 2 Dept.), 2007 N.Y. Slip Op. 00281 the Appellate Division held that in calculating the arrears due under the portion of the pendente lite order which required the husband to pay the carrying

charges on the marital residence, it was error to include the cost of newspaper subscriptions, bottled water, heating filters, a new dishwasher, and long distance telephone calls. And, in calculating the arrears due under the portion of the pendente

lite order which required the husband to pay for the children's educational and recreational expenses, it was error to include the cost of the children's cell phone bills.

Error as a Matter of Law to Make Custody Order Based on Controverted Allegations Without Full Hearing. Law Guardian to Be Replaced For Incompetence.

In Williams v Williams, --- N.Y.S.2d ----, 2006 WL 3798938 (N.Y.A.D. 3 Dept.), a custody proceeding, on the first day of the hearing, the father was the only witness to testify. When the proceedings were adjourned for that day, the parties were in the

midst of his cross-examination by the mother's attorney and the Law Guardian had yet to cross-examine him. On the adjourned hearing date, the mother had traveling problems and was not present in court at its scheduled start time. Her attorney

informed Family Court that a bridge closure delayed the mother's arrival and that she was expected to arrive within approximately 30 minutes. Family Court acknowledged that the mother had also contacted the court that morning about her problems but advised the parties that it intended to proceed in her absence. The father's attorney stated that the father had no further proof and the mother's attorney advised the court that she did not feel it was appropriate to proceed in her client's absence. The Law Guardian voiced no objection to this procedure and did not request an opportunity to cross-examine the father or have the court conduct a Lincoln hearing. He reported that he had no witnesses, that the children seemed to be progressing well in the father's care and the father's home seemed appropriate. The Law Guardian acknowledged that he had never been to the mother's home and that the children missed her terribly, thus warranting visitation. The case was then closed and Family Court awarded the father sole custody with visitation to the mother. The only evidence relied upon by the

Court was the incomplete testimony of the father. The Appellate Division reversed on the law finding that Family Court erred in rendering a custody decision without a full hearing. It held that as a general rule, it is error as a matter of law to make an

order respecting custody based on controverted allegations without a full hearing. The total preclusion of proof by the mother was improper because she had a verified and legitimate explanation for being delayed on the adjourned date and because

such total preclusion "adversely affect[ed] the child[ren's] right to have issues affecting [their] best interest fully explored". Since the mother's attorney appeared on the adjourned date and explained her absence, Family Court's order was not entered

on default. The evidence was far from uncontroverted. The mother raised issues of the father's fitness, including his alleged verbal and physical abuse, bad temper and sporadic employment history. In the absence of a complete examination of the

father, any evidence from the mother and/or an in camera hearing with the children, Family Court "did not possess sufficient information to render an informed determination that was consistent with the child[ren's] best interests". The Appellate

Division was troubled by Family Court's approach to the award of temporary and permanent custody and directed that the hearing on remittal should be before another judge. Equally troubling was the Law Guardian's acquiescence in the procedure

and failure to conduct his own cross-examination of the father before rendering a recommendation advocating custody to him. The Law Guardian's analysis of the case was rendered without the benefit of a complete record and could not be fairly

characterized as "thorough” or "considered". The Appellate Court held that this particular Law Guardian should not be assigned upon remittal.

Absence of New Retainer Agreement upon Substitution after Dissolution of Partnership Did Not Constitute Noncompliance with 22 NYCRR 1400.3 in Light of Ratification of Retainer Agreement

In Gross v Gross--- N.Y.S.2d ----, 2006 WL 3803316 (N.Y.A.D. 2 Dept.) the plaintiff commenced an action for divorce through her former attorney, Kim Brennan Joyce, who, at that time, was a named partner a law firm which had since dissolved. After

the action was submitted to the Supreme Court for an inquest a stipulation was incorporated but not merged into the judgment.. The plaintiff agreed, pursuant to the stipulation, that she was responsible for her own attorney's fees and that:

"in the event any outstanding legal fees remain on [plaintiff's] behalf to Kim Brennan Joyce, Esq., same shall be satisfied from her proceeds from the sale of her one-half equity interest in the marital residence at the time of closing. In the event there

is a dispute as to any counsel fees outstanding, an amount sufficient to satisfy Kim Brennan Joyce, Esq.'s final bill shall be held by her in escrow pending a resolution of same ". In accordance with the stipulation at the closing on the sale of the

marital residence, the parties' attorneys executed an agreement pursuant to which each attorney held in escrow the sum of $140,713.05, representing 50% of the net proceeds of the sale of the marital residence, "without disbursement until further agreement of the parties or order of the court directing same ". Joyce moved to be relieved as counsel for the plaintiff, and to retain the sum of $53,191.61 in escrow subject to determination of the fee dispute committee or further court order. Joyce submitted her own affirmation in which she averred that she had sent the plaintiff bills for services rendered in the requisite time-frames under the rules governing matrimonial actions and that the plaintiff never disputed those bills, but rather, repeatedly assured Joyce that the bills would be paid from the proceeds of the action. Joyce further averred that the closing

proceeds were held in escrow "due to failure of the parties to agree on the disbursement of proceeds." The court granted the motion to the extent of permitting Joyce to retain the sum of $53,191.61 in her escrow account subject to a determination

by the fee dispute committee, and directing her to release the remaining sum held in escrow to the plaintiff. The Appellate Division affirmed. It held that Supreme Court properly determined that Joyce complied with the requirements of 22 NYCRR

1400.3 and 1400.5, It found that the plaintiff and the partnership entered into a retainer agreement, which was executed by the plaintiff and Joyce, on behalf of the partnership. Under the circumstances of this case, the absence of the execution and filing of a new retainer agreement upon her substitution as the attorney-of-record after the dissolution of the partnership did not constitute noncompliance with 22 NYCRR 1400.3 . The retainer agreement fully complied with the requirements of 22 NYCRR 1400.3. Joyce executed it for the partnership and made appearances for the plaintiff. The Appellate Division held that the plaintiff thereby ratified both Joyce's representation of her after the substitution and that the terms of the original retainer agreement were binding on them.

February 1, 2007

Court May Act Reasonably To Protect Child From Direct Access in Litigation.

In A.C. v D. R., --- N.Y.S.2d ----, 2007 WL 64088 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which enjoined defendant from attending her child's medical appointments, enjoined defendant from taking the child to consult with an attorney regarding custody issues, and enjoined the parties from discussing court proceedings or the current custody schedule with child. A prior order emphasized the court's concern that defendant continued to undermine plaintiff father's medical decision-making authority. It held that the court was not required to hold a hearing before imposing the injunctive sanctions in light of its already extensive experience with the case. It was clear, from the long and contentious history of this case, that the trial court acted reasonably to protect the child from direct involvement in the litigation.

New Trial Granted on Issues of Maintenance And Child Support Where Husband Had Heart Attack After the Decision

In Opperisano v Opperisano, --- N.Y.S.2d ----, 2006 WL 3734238 (N.Y.A.D. 2 Dept.) Supreme Court awarded the plaintiff maintenance of $65 per week for five years, granted the plaintiff a right of first refusal on the sale of the marital home at the valuation appraised as of August 29, 2003, awarded the plaintiff $2,860 in maintenance arrears, $13,395.23 in expenses on the marital home, and $7,344 in child support arrears and directed that the defendant pay the plaintiff one half of her credit card debt of $24,000 and denied the defendants motion for a new trial. The Appellate Division reversed the judgment insofar as appealed from, on the law, and granted the defendants motion pursuant to CPLR 4404(b) for a new trial and the matter is remitted to the Supreme Court, Queens County, for a new trial and thereafter for a new determination consistent herewith. It held that a court may modify a prior order or judgment of child support or maintenance payments upon a showing of "a substantial change in circumstance. In his affidavit and supporting papers filed on his motion, in effect, for a new trial, the husband made a prima facie showing that, after the first trial, he had been forced to retire and had been put on disability because of a heart attack and continuing heart disease and, consequently, had suffered a significant loss of income. This was sufficient to warrant a new trial and a new determination on the issues of maintenance and child support. The Court also held that Supreme Court also improvidently exercised its discretion in awarding the wife arrears in expenses of the marital home of $13,395 .23. No hearing was ever held to determine whether the husband owed arrears in expenses and, if so, how much he owed. Accordingly, this issue, too, must be determined after the new trial. Likewise, a hearing was required to determine whether the wife's credit card debt constituted marital debt. "It is well settled that expenses incurred after the commencement of a matrimonial action are the responsibility of the party who incurred them". The action was commenced in October 2002, yet a credit card bill dated October 1, 2003, was the only documentary evidence submitted in support of the wife's allegation that the debt represented the consolidation of marital debts. Therefore, absent a hearing, it was error to direct that the husband was responsible for one half of that debt. Lastly, the court improvidently exercised its discretion in granting the wife a right of first refusal in purchasing the husband's interest in the marital home, based on the value of the home as appraised two years earlier. In order to avoid the injustice to one spouse which could result from the appreciation in the valuation of the residence since the two-year-old appraisal relied on by the court, the marital home should either be sold at its fair market value at the time the sale is actually made or, if the wife chooses to buy out the husband's interest, the value of his interest should be determined based on a new appraisal to be conducted at the time of the new trial.

Hearsay Admissible In Custody Case Involving allegations of Abuse or Neglect

In Bernthon v Mattioli, --- N.Y.S.2d ----, 2006 WL 3436062 (N.Y.A.D. 3 Dept.) petitioner applied for modification of the custody arrangement based on allegations that, among other things, respondent had used the child as a decoy while shoplifting. Family Court agreed and awarded sole custody of the child to petitioner. On appeal respondent argued that Family Court improperly permitted petitioner and others to testify regarding hearsay statements made by the child. The Appellate disagreed. It held that it we applies the hearsay exception in Family Ct Act § 1046(a)(vi) in custody proceedings involving allegations of abuse or neglect of a child. While such statements must be corroborated by other evidence, Family Court has considerable discretion in determining whether the corroboration is sufficient. Here, the child's various statements of having been used to aid respondent's shoplifting were properly admitted, as they would support a finding of neglect. Although the child repeatedly refused to discuss respondent's conduct during the in camera interview, her reported statements were corroborated by other evidence, including an item of clothing that appeared consistent with the claim that security tags had been cut off by respondent and the child's atypical familiarity with shoplifting techniques and store security measures. Respondent inconsistently testified as to her shoplifting activities, both denying and then admitting a history of petit larceny. Thus, Family Court did not abuse its discretion in accepting the hearsay evidence and then basing its findings as to a change of circumstances and the best interests of the child upon that evidence.

No Appeal To Appellate Division From Family Court Criminal Contempt

In Kelly v Kelly, --- N.Y.S.2d ----, 2006 WL 3438605 (N.Y.A.D. 2 Dept.) the Appellate Division dismissed an appeal from an order of the Family Court which found the respondent in this support proceeding guilty of criminal contempt. It held that where, as here, the purported contempt was committed within the immediate view and presence of the court and was punished summarily review must be had under CPLR article 78 and not by way of direct appeal. Moreover, because the matter involved a Family Court Judge, the Appellate Division is without original jurisdiction to entertain it as a CPLR article 78 proceeding. Editors Note: The Article 78 proceeding must be brought in the Supreme Court.

Proper to Refuse to Allow Witness to Be Called Where no Relevant Testimony to Offer

In Bennett v McGorry, --- N.Y.S.2d ----, 2006 WL 3334995 (N.Y.A.D. 4 Dept.) plaintiff sought, inter alia, an order directing defendant to contribute to the college expenses of the parties' eldest daughter pursuant to the terms of the agreement. The Appellate Division held that the court properly exercised its discretion in refusing to permit the parties to call their eldest daughter as a witness, inasmuch as the daughter had no relevant testimony to offer on the matters at issue. (Citing, alia, Prince, Richardson on Evidence § 4-102 [Farrell 11th ed] ).

Denial of Fundamental Right to Be Heard Warrants Reversal of Order

In Beverly B v Rossannh B, --- N.Y.S.2d ----, 2006 WL 3314617 (N.Y.A.D. 1 Dept.) the Appellate Division reversed on the law an order which granted petitioner visitation with her granddaughter once every three months in Florida for two hours in a public place, and the matter was remanded for further proceedings before another referee. Petitioner commenced a special proceeding, pro se, pursuant to DRL 72, seeking visitation with the daughter of petitioner's incarcerated son. The Appellate Division noted that although there were numerous relevant factual disputes in the action, the Referee heard no formal testimony and received no documentary evidence. The mother's attorney, who lacked personal knowledge, made allegations regarding the safety of petitioner's residence and the adequacy of her supervision of the child, but petitioner was not allowed to testify or offer any other evidence to rebut, or even the opportunity to confront and cross-examine any adverse witnesses. The record was replete with instances in which the Referee refused to let petitioner speak, talked over her, and reprimanded her for trying to present her position. The court held that every party to a proceeding has a fundamental right to be heard. Since the fundamental right to be heard was not afforded petitioner, the order was vacated.

January 16, 2007

Court Has Right to Limit Speech with Children Upon Balance Competing Factors

In Matter of Powell v Blumenthal--- N.Y.S.2d ----, 2006 WL 3632115 (N.Y.A.D. 2 Dept.), the Appellate Division affirmed an order that prohibited the father from discussing any issues pertaining to his religion or philosophy with the children. It held that “ Upon a balancing of the competing interests, the Family Court providently exercised its discretion in restricting the father from discussing any issues pertaining to his religion or philosophy with the subject children, particularly where the Law Guardian supported that restriction (citing Stephanie L. Benjamin L., 158 Misc.2d 665, 667).

Improper Delegation of Authority to Child's Treating Clinician to Determine Visitation.

In Matter of Held v Gomez,--- N.Y.S.2d ----, 2006 WL 3633419, 2006 N.Y. Slip Op. 09467 (NYAD 2 Dept) the Family Court granted the husband's petition for sole custody of the parties' minor child and awarded the wife supervised bi-weekly visitation, to be continued unless and until recommended otherwise by the child's treating clinician. The Appellate Division modified the order by deleting the words "which shall continue unless and until recommended otherwise by the child's treating clinician (i.e., therapist)." The paragraph of the order constituted an improper delegation of authority by the Family Court to the child's treating clinician to determine future issues involving visitation.

No Credit For Voluntary Payments of Child Support

In Zhang v Kwok, --- N.Y.S.2d ----, 2006 WL 3525356, 2006 N.Y. Slip Op. 09242 (NYAD 2 Dept) the Appellate Division held that voluntary payments for the benefit of the parties' child and not pursuant to a court order may not be credited against the amounts due pursuant to the judgment of divorce (citing Horne v. Horne, 22 N.Y.2d 219, 224, 292 N.Y.S.2d 411, 239 N.E.2d 348).

Last Word to One Parent is Antithetical to Concept of Joint Custody

In Williams v Boger, --- N.Y.S.2d ----, 2006 WL 2971838 (N.Y.A.D. 3 Dept.)Family Court awarded the parties joint legal custody, with primary physical custody to petitioner and visitation to respondent. The order provided that "the parties are to consult one another on matters involving the health and education of their child and, in the event that they are unable to come to a joint decision, [petitioner] is to prevail." Although not raised by respondent on appeal the Appellate Division was troubled by this provision and modified the order on the law to strike it from the order. It held that:” Such a directive is, in our view, antithetical to the concept of joint legal custody. Morever, given the parties' history of cooperation, there simply is no basis upon which to award petitioner superior decision-making authority on such matters. Accordingly, that portion of Family Court's order cannot stand.”

Default Divorce Judgment Against Wife Upheld Even though She Had Drug Problem

In Wexler v Wexler, --- N.Y.S.2d ----, 2006 WL 3231947 (N.Y.A.D. 2 Dept.) during the child custody portion of the trial, the wife failed to appear on time for court proceedings on four separate dates and both she and her counsel failed to appear for

continued proceedings on December 20, 2002. On that day, the court granted the husband's motion for sole custody of the parties' two unemancipated children on the wife's default. On January 21, 2003, the court granted the wife's motion to vacate the default and warned her that it would not vacate any subsequent default. The wife then arrived late to court proceedings during child custody phase of the trial on January 24, 2003, February 3, 2003, and March 13, 2003. During the equitable distribution portion of the trial, the wife failed to appear for the court proceeding on April 8, 2003. She appeared late to the proceeding on April 10, 2003. On May 1, 2003, the wife again failed to appear for the scheduled court proceeding and the court granted the husband's application to hold the wife in default, striking her testimony. The court denied her subsequent motion to vacate her default. The Appellate Division affirmed. It held that although the judgment was entered upon the wife's default, appellate review of the denial of the wife's motion to vacate her default is not precluded since the appeal from the judgment brings up for review all matters that were the subject of contest before the Supreme Court. Although as a general rule in matrimonial cases the courts have adopted a liberal policy of vacating defaults, it is still incumbent upon the moving party to show a reasonable excuse for the default and the existence of a meritorious claim. While the wife appeared to be in need of in-patient drug treatment for a serious substance abuse problem on the basis of the overall record, her dereliction with regard to court appearances and obligations was so extensive that the court did not err in finding her in default during the equitable distribution portion of the trial and in later refusing to vacate the default. In awarding maintenance, the Supreme Court properly considered the wife's age and apparent drug addiction, the duration of the marriage, and the wife's lack of employment since before the marriage in finding that she was unlikely to become self-supporting. The Supreme Court providently exercised its discretion in awarding the sum of $650 per week in nondurational maintenance.

Unsubstantiated Conclusory allegations Insufficient to raise triable issue of fraud, duress, overreaching, or unconscionability

In Rubin v. Rubin, --- N.Y.S.2d ----, 2006 WL 3086360 (N.Y.A.D. 2 Dept.) the Appellate Division held that the defendant demonstrated his prima facie entitlement to summary judgment dismissing the wife’s cause of action for rescission of the parties' “stipulation and settlement agreement,” by submitting, inter alia, the agreement, which contained an express representation stating that it was not a product of fraud or duress and awarded the plaintiff generous maintenance and equitable distribution, based on the financial information made available to the plaintiff's independent accountant and legal counsel, who negotiated on the plaintiff's behalf over the course of several months. The plaintiff's evidence submitted in opposition was deficient, being devoid of specificity with respect to the defendant's alleged acts of fraud. The plaintiff submitted statements made by mental health professionals who treated her after the agreement was executed and who failed to establish that she experienced any incapacitating mental impairment at the time of execution of the agreement. She did not submit an affidavit from her former attorney or financial experts, indicating that the defendant failed to comply with demands for financial disclosure or that the defendant or his agents made any actual misrepresentations to them. The plaintiff offered the redacted portions of an unsworn memo of her former attorney dated the same date as the notarization of the plaintiff's execution of the agreement, but written four days prior to the defendant's execution of the agreement, itemizing certain alleged misrepresentations of the defendant and indicating the attorney's belief that the defendant was untrustworthy. This memo negated any potential factual issue since it unequivocally demonstrated that neither the plaintiff nor her former attorney relied on the representations made by the defendant in entering into the agreement. The memo also showed that the plaintiff could have revoked her acceptance of the agreement prior to its execution by the defendant. The plaintiff submitted the affidavit of a realtor to establish that the former marital residence was grossly undervalued, opining that when the property was appraised it was worth between $26,100,000 and $35,000,000 instead of $15,000,000, as set forth in the agreement. That affidavit consisted of a one-page estimate of the market value of the property and contained no information as to the methodology utilized in arriving at the appraised value. Even if the valuation was accurate, the plaintiff failed to allege that the true value was known by the defendant. The agreement stated that both parties had a right to appraise the property but both parties waived such right. The plaintiff failed to demonstrate how she was impeded from doing her own appraisal of the marital residence prior to entering into the agreement in question, and ignored the defendant's assertion, making it unrebutted, that the valuation figure agreed to by the parties was selected by the plaintiff and thereafter accepted by the defendant.

January 1, 2007

Agreement Set Aside Based upon Interrelated Nature of Economic Issues Addressed and Those Not Adequately Addressed

In Yoell-Mirel v Mirel, --- N.Y.S.2d ----, 2006 WL 3437558 (N.Y.A.D. 2 Dept.) the Appellate Division set aside the provisions of the parties' separation agreement relating to economic issues. The agreement was apparently drafted by the wife and signed by the parties without legal counsel. Supreme Court entered a judgment incorporating the terms of the agreement which related to economic issues, except for a provision concerning the marital home, which the Supreme Court determined denied the husband his interest in a significant marital asset without countervailing benefit. Supreme Court re-wrote that provision to provide the wife with a more limited interest in the marital home, and incorporated the re-written provision into the judgment. The Appellate Division held that Supreme Court erred in re-writing rather than setting aside the provision of the agreement concerning the marital home. It also held that Supreme Court erred in entering a judgment incorporating the provision of the agreement concerning child support since it neither complied with nor validly opted-out of the relevant statutory guidelines, and erred in incorporating the remaining portions of the agreement which related to economic issues and dismissing all other claims for relief as the agreement neither waived nor adequately addressed various significant economic issues. The court held that given the interrelated nature of the economic issues addressed by the provisions of the agreement and those not adequately addressed by the agreement, the whole of the agreement as it related to economic issues should have been set aside.

Complaint to Set Aside Agreement Dismissed. No Obligation to Disclose Value or Future Sale of Asset

In Kojovic v Goldman, --- N.Y.S.2d ----, 2006 WL 2975759 (N.Y.A.D. 1 Dept.), the parties were married in 1998 and divorced in 2004. There were no children. The husband was the chief executive officer of and a minority shareholder (7-8%) in a closely held corporation, Capital IQ, Inc. In her complaint the wife alleged that in May 2004 the husband commenced a divorce action in Dutchess County and she commenced her own action for divorce in New York County. The parties exchanged financial information including lists of assets and statements of net worth. The husband included in his disclosures his minority interest in Capital IQ. They affirmatively decided not to conduct further discovery. On August 5, 2004 they settled all issues incident to the divorce pursuant to a comprehensive settlement agreement that they negotiated with the assistance of their attorneys. Pursuant to the settlement, the wife received $1.15 million in cash, rehabilitative spousal support of $350,000 payable over four years, which she continued to receive, and certain other considerations. The husband retained his minority shareholder interest in Capital IQ. In addition to waiving an appraisal and valuation of the husband's minority interest in Capital IQ and the taking of his deposition, the wife stipulated in the agreement as follows: “Each party has made inquiry into the financial circumstances of the other and is sufficiently informed of the income, assets, and financial condition of the other.... The parties further acknowledge that the Husband has provided the Wife with additional information concerning his business interests, which information she has had independently reviewed by an accountant. The Wife acknowledges that she has the right of further inquiry including the taking of depositions and a forensic evaluation of the value of the Husband's shares of his business, Capital IQ, Inc., and knowingly waives the same.” On September 8, 2004, slightly more than one month after execution of the settlement agreement, Standard & Poor's entered into an agreement to acquire Capital IQ, which included the husband's 7-8% minority interest. Nine days later, S & P purchased Capital IQ for approximately $225 million, of which the husband received $18 million. The wife thereafter commenced an action for fraud, reformation, breach of contract and rescission of the settlement agreement, claiming that it was procured through fraud based on her husband's affirmative misrepresentations as to the non-liquidity of his Capital IQ shares. She asserted an obligation on the husband's part to have disclosed to her the value and potential sale of Capital IQ. She also contended that he knew of the imminent sale of Capital IQ at the time of the settlement, but concealed this information from her. The husband moved pursuant to CPLR 3211(a)(1) to dismiss. Supreme Court denied the motion, finding that the wife alleged an affirmative misrepresentation, upon the discovery of which she promptly brought this action. The Appellate Division reversed holding that the action was barred by precedents from it and other courts. It relied upon it’s decision in DiSalvo v. Graff (227 A.D.2d 298 [1996] ),where it held that a party may not challenge the validity of a settlement agreement based on a claim that she undervalued assets which, the record showed, were disclosed by her former spouse and known to her at the time. In DiSalvo, where the allegations were substantially similar to those here, the motion court found the former wife was aware, at the time of the settlement of the divorce action, that her husband was the founder and 50% shareholder of a privately held company. Under the terms of the settlement agreement, the wife in DiSalvo kept the couple's valuable shares of a publicly traded company while the husband retained his 50% interest in the closely held company. Six months later, the husband's company "went public" and his interest became worth millions of dollars. The wife commenced a fraud and rescission action to set aside the settlement agreement, claiming that the husband was aware of the privately held company's value at the time the settlement agreement was executed "and that it would 'go public' six months after the execution of the agreement" (N.Y.L.J, Aug. 4, 1995, at 22, col 5). The Appellate Division held that Plaintiff's claim was analogous. The DiSalvo motion court made no distinction between withholding information about valuation and withholding information that a sale is imminent. The plaintiff there alleged that her former husband had been aware of the company's value at the time of the settlement, and that it would "go public" six months later. Whether characterized as an issue of valuation or imminent sale, the court found the claim insufficient. Nor was there any difference, as the wife contended, between the allegation in DiSalvo that the husband knew the company would go public and the claim here that the husband knew a sale of Capital IQ was imminent. It was uncontroverted that the wife, highly educated and intelligent, with professional experience as a securities analyst, counseled by experienced matrimonial attorneys and an accountant she had retained to conduct an independent review, determined that she required no further information about Capital IQ. Moreover, by her own admission, the wife resisted her husband's first attempt at a quick divorce, which showed that she was under less pressure to rush to settlement than was the wife in DiSalvo. Thus, there was no basis, factually or legally, to distinguish DiSalvo from the instant case. The wife had only herself to blame for her failure to inquire further. Such failure is not, however, a basis upon which to vacate the settlement.

Under UIFSA New Support Order in New York is Not a Modification of Expired Connecticut Support Order

In Matter of Spencer v Spencer, --- N.Y.S.2d ----, 2006 WL 3627139 (N.Y.A.D. 3 Dept.), the parties, who divorced in 1995, had three children, Kipp (born in 1986), Tyler (born in 1988), and Kelly (born in 1992). Pursuant to a judgment entered in Connecticut, the Superior Court of Connecticut granted petitioner physical custody of the children and directed respondent to pay child support of $750 per week, $250 per child, until the children reached 18 years of age. Petitioner and the children moved to New York, and Respondent continued to reside in Connecticut. After Kipp reached age 18, petitioner commenced a proceeding seeking a new order of support, arguing that the Connecticut judgment had expired with respect to Kipp. A Support Magistrate granted the petition and ordered respondent to pay child support for Kipp in the amount of $350 per week, as well as 75% of unreimbursed medical expenses and college expenses, and awarded petitioner counsel fees. Family Court denied respondent's objections. The Appellate Division affirmed rejecting Respondent's argument that Family Court lacked subject matter jurisdiction to grant a new support order for Kipp under the Federal Full Faith and Credit for Child Support Orders Act ( 28 USC 1738B ) and the Uniform Interstate Family Support Act (Family Ct Act 580-101 et seq. Respondent characterized Family Court's support award as modifying the duration of the prior Connecticut judgment directing child support payments only until Kipp reached age 18, and asserted that New York courts lack the power to make any such modification because the requirements of FFCCSOA and UIFSA were not met. The Appellate Division found that Family Court did not modify the Connecticut judgment. Rather, the court recognized that modification is possible only during the life of an order and, because the Connecticut judgment had expired when Kipp reached age 18, there was no existing order to modify. It defined "modification" as "a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order". Because the Connecticut judgment had expired and Family Court had personal jurisdiction over respondent, Family Court had the authority to issue a new child support order for Kipp and to award counsel fees in connection with this proceeding.

December 16, 2006

Despite Public Policy First Department Allows Recoupment of Overpayments of Child Support Against “Add-ons”

In Coull v Rottman,--- N.Y.S.2d ----, 2006 WL 3513071 (N.Y.A.D. 1 Dept.), a modification proceeding in which the court reduced he amount of child support retroactive to the date of the application in 2003, the Appellate Division found that after applying his credits the father had overpaid child support by $15,483.71. On appeal he argued that he should be allowed to reduce his basic child support payment by $500 per month until this overpayment is recouped. The Appellate Division held that

public policy forbids this (citing Matter of Maksimydas v. Maksimydas, 275 A.D.2d 459, 461 [2000]; Baraby v. Baraby, 250 A.D.2d 201, 205-206 [1998] ). However, it held that, public policy did not forbid offsetting add-on expenses against an overpayment, and that he was entitled to a credit of $15,483.71 against future add-on expenses.

No Appeal From Family Court Order Without Objections

In Holliday v Holliday, --- N.Y.S.2d ----, 2006 WL 3525313 (N.Y.A.D. 2 Dept.) the Appellate Division held that no appeal lies from an order of a Support Magistrate where the appellant has not submitted objections to the order to a Family Court Judge.

Professional Reports Are Hearsay and Not Admissible Without Consent of the Parties

In Berrouet v Greaves, --- N.Y.S.2d ----, 2006 WL 3525378 (N.Y.A.D. 2 Dept.) the Appellate Division noted that Trial courts are accorded wide discretion in making evidentiary rulings and that the Family Court is governed specifically by Family Court Act 1046(b)(iii), which states that"[i]n a fact-finding hearing ... except as otherwise provided by this article, only competent, material and relevant evidence may be admitted." The court went on to state that “Professional reports constitute hearsay,

and therefore are not admissible without the consent of the parties.” (see Kesseler v. Kesseler, 10 N.Y.2d 445; Matter of Khan v. Dolly, 6 AD3d 437, 439; Wilson v. Wilson, 226 A.D.2d 711).”

Agreement Which is Not Fair and Reasonable When Entered Into and Unconscionable Set Aside

In Yoell-Mirel v Mirel, --- N.Y.S.2d ----, 2006 WL 3437558 (N.Y.A.D. 2 Dept.) the plaintiff-wife commenced an action for divorce and sought to incorporate the provisions of a 2003, separation agreement into the judgment. The agreement was apparently

drafted by the wife and signed by the parties without legal counsel. The husband argued, inter alia, that the portions of the agreement which related to economic issues were not fair and reasonable when entered into, and that it would be unconscionable to incorporate those portions of the agreement into the judgment. He asserted, the agreement neither waived nor adequately addressed various significant economic issues. After a hearing, the Supreme Court granted the wife a divorce, and entered a judgment incorporating the terms of the agreement which related to economic issues, except for a provision concerning the marital home, which it determined denied the husband his interest in a significant marital asset without countervailing benefit. Supreme Court re-wrote that provision to provide the wife with a more limited interest in the marital home, and incorporated the re-written provision into the judgment. The Supreme Court denied "all other claims for relief." The Appellate Division reversed so much of the judgment as incorporated the terms of the agreement which related to

economic issues, as re-written, and denied all other claims for relief. It held that Supreme Court erred in re-writing rather than setting aside the provision of the agreement concerning the marital home. It stated: “ This is not to say, however, that the

Supreme Court's resolution of the issue would not be appropriate under the Domestic Relations Law and the principles of equitable distribution. It also held that Supreme Court erred in entering a judgment incorporating the provision of the agreement concerning child support which neither complied with nor validly opted-out of the relevant statutory guidelines, and erred in incorporating the remaining portions of the agreement which related to economic issues and dismissing all other claims for relief. The agreement neither waived nor adequately addressed various significant economic issues. Given the interrelated nature of the economic issues addressed by the provisions of the agreement and those not adequately addressed by the agreement, the whole of the agreement as it related to economic issues should have been set aside. It remitted to the Supreme Court “ for a determination of the economic issues in accordance with the Domestic Relations Law and the principles of equitable distribution after the completion of discovery.”

In Fixing Child Support, in Paternity Proceeding Support Magistrate Should Consider Husbands Obligations to his Wife.

In Gina P.,v Stephen S., --- N.Y.S.2d ----, 2006 WL 2884315 (N.Y.A.D. 1 Dept.), a paternity and support proceeding, the Family Court adopted the findings of a Support Magistrate, who concluded that the father's annual income was $400,000 and that

the mother's was $100,000. The Appellate Division held that the Support Magistrate made a number of errors in concluding that Mr. S.'s yearly income was $400,000. The Magistrate improperly added to Mr. S.'s income $14,750 reported on Mr. S.'s

2002 tax return which was a repayment of a loan that Mr. S. made to Cape Classics Inc., a nonrecurring payment. Nonrecurring payments should be considered in calculating support obligations. In addition, certain Treasury bills reported on Mr. S.'s

tax return belonged to Mrs. S. and the Magistrate should not have included the $38,898 in interest from them to Mr. S. (Citing Matter of Weber v. Coffey, 230 A.D.2d 865 [1996] [error to impute the income of a spouse, not a parent to the child, in determining support obligation] ). Finally, the Support Magistrate should have considered both Mr. S.'s obligations to his wife, Mrs. S. (Citing see Family Court Act 412, 413[1][f][10]; Matter of Clovsky v. Henry J., 238 A.D.2d 670, 671- 672 [1997], lv dismissed 91 N.Y.2d 911 [1998] [spousal support is a factor to consider in determining child support obligation]; Commissioner of Social Servs. v. Ayala, 177 A.D.2d 403, 405 [1991] [same]; Matter of Steuben County Dept. of Social Servs. v James, 171 A.D.2d 1023 [1991] [same] ), and the tax consequences to Mr. S. The Support Magistrate failed to articulate, as required by the Child Support Standards Act (CSSA), why it deemed 10% of the combined parental income exceeding $80,000 to be an appropriate award. If the court determines not to apply the statutory percentage to the parties' income exceeding

$80,000, then it is required to articulate the basis for its deviation. In cases such as this one, where a combined parental income is well in excess of $80,000, it is proper to consider and base the award upon the child's 'actual reasonable needs'. While the Magistrate stated that she had taken the child's needs into consideration when setting the parents' support obligation at 10% of $320,000,she failed to lay out the basis of this conclusion. Further, a review of the record showed that based upon the payments which were documented (including those for the child's classes, clothes, books, toys, home entertainment, laundry, furniture, and expenses for birthday parties), the award of $3706.67 a month was much too high. The child care award of $425 per week for a 45-hour week, was inappropriate given Ms. P's testimony that she worked 25 to 30 hours per week out of her apartment. Family Court Act 413(1)(c)(4) provides for the non-custodial parent to pay his or her proportionate share of the child care expenses incurred by the custodial parent's work schedule. Thus, Mr. S. should be responsible for his share of child care for the time that Ms. P. is working. The Appellate Division noted that the Support Magistrate, when directing that Mr. S. obtain a $1,000,000 life insurance policy in favor of his daughter, relied upon Family Court Act 416(b) without further exposition. Article Four of the Family Court Act governs child support for the issue of married couples, while Article Five governs support for children born out of wedlock. Family Court Act 513 refers to 413, but it does not reference Family Court Act 416(b), which allows the court to order the non-custodial parent to obtain life insurance for the benefit of the child. The question of the constitutionality of the apparent disparity between children born in and out of wedlock was raised on appeal in defense of the Support Magistrate's ruling. As there was no proof of service on, or notice to the

attorney general pursuant to CPLR 1012[b][1] of a challenge to the constitutionality of Family Court Act 513 the issue was not properly before it.

December 1, 2006

No Counsel Fee Award Without New Retainer For Post Judgment Services

In Sherman v Sherman, --- N.Y.S.2d ----, 2006 WL 3377483 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order which denied the former wife’s motion for an attorney fee for post judgment services. It held that absent substantial compliance with 22 NYCRR 1400.3, which requires the execution and filing of a retainer agreement setting forth, inter alia, the terms of compensation and the nature of services to be rendered, an attorney may not recover a fee from an adversary spouse. By its own terms the retainer agreement between the wife and her attorney terminated upon entry of the judgment of divorce. The filing of a new retainer agreement in support of the subsequent motion for a post judgment attorney's fee, which purportedly ratified the former agreement, did not amount to substantial compliance with the matrimonial rules.

Family Court Lacks Subject Matter Jurisdiction to Set Aside Child Support Agreement Incorporated in Divorce Judgment

In Savini v Burgaleta, --- N.Y.S.2d ----, 2006 WL 3378238 (N.Y.A.D. 2 Dept.) the parties 1996 stipulation, was incorporated in and survived their judgment of divorce, and provided, that the father would "pay to the [mother] as and for child support 29 percent of his gross salary as defined under the Child Support Standards Act on a weekly basis calculated on actual income." In a later agreement dated April 1997, which was not incorporated into the judgment, the mother allegedly agreed, to accept the sum of $200 per week from the father as child support and not to commence any proceeding to recover the difference between that amount and the percentage of gross salary specified in the prior stipulation. In 2004, the mother commenced a family court proceeding to enforce the child support provisions. The father moved in Supreme Court to have the petition transferred to it and to have it dismissed based on the terms April 1997 agreement. Supreme Court determined that the April 19, 1997, agreement was not a valid modification agreement because it failed to comply with the provisions of DRL 240(1- b)(h) and denied the motion to transfer. Subsequently, the Support Magistrate, sua sponte, determined that "the prior Judgment of Divorce and the stipulations did not comply with the Child Support Standards Act" and considered the issue of child support de novo. The Appellate Division held that Family Court was without subject matter jurisdiction, in effect, to vacate as illegal so much of the judgment of divorce as directed the father to pay child support and, thereafter, to determine the issue of child support de novo. Family court is a court of limited jurisdiction. New York Constitution, article 6, §13(c) provides that the Family Court is vested with limited jurisdiction "to determine, with the same powers possessed by the [S]upreme [C]ourt, the following matters when referred to the [F]amily [C]ourt from the [S]upreme [C]ourt: ... in actions and proceedings for ... divorce, ... applications to fix temporary or permanent support ... or applications to enforce judgments and orders of support". Nowhere in the Constitution, in the Family Court Act, or in the judgment of divorce itself, is the Family Court empowered, in effect, to invalidate a stipulation incorporated into the judgment of divorce entered by the Supreme Court. Had either party questioned the legality of the stipulation, the issue should have been determined by the Supreme Court, which had issued the judgment in which the stipulation was incorporated.

Marital Assets Awarded Wife in Pre-Petition Divorce Action Where Judgment Not Entered are Assets of Bankrupt Estate

In Musso v Ostashko, --- F.3d ----, 2006 WL 3190285 (C.A.2 (N.Y.)) the Chapter 7 trustee filed an adversary complaint, seeking to avoid the debtor's former wife's interest in marital property and to have the property turned over to him. The former wife filed a counterclaim, asserting that the property was not property of the debtor's bankruptcy estate. The Bankruptcy Court denied the former wife's motion for summary judgment. The District Court, 333 B.R. 625, reversed and directed the bankruptcy court to enter judgment in favor of former wife. The Second Circuit Court of Appeals reversed. It held that under New York law, the marital assets in question, which were awarded to the debtor's wife in a pre-petition state-court matrimonial proceeding whose judgment was not docketed until after the filing of debtor's bankruptcy petition, were the property of debtor's bankruptcy estate. The bankruptcy court had ruled that, in New York, an equitable right to marital property does not arise until entry of the judgment awarding equitable distribution and, thus, the property must be included in the estate. On

appeal, the district court reversed, finding that the entry of the state court judgment is "ministerial" and, thus, the rights of the wife, Tanya Ostashko, vested upon rendering of the state court's "Decision After Inquest." The Court of Appeals, in vacating the decision of the district court held that:” Four relevant premises require this result. First, under New York law an equitable distribution award is a remedy, and the enforcement of that remedy is no different than the enforcement of any other judgment. Second, New York adheres to the bright line rule that the priority of judgment creditors is determined on the basis of the order in which judgments are docketed or executed. Third, 11 U.S.C. 544-the so-called "strong arm" provision of the Bankruptcy Code-gives the bankruptcy trustee the rights of a hypothetical perfected judgment lien creditor as of the petition date. Finally, while the Decision After Inquest determined the rights to the marital assets as between husband and wife, the decision did not purport to determine the rights to the assets as between Tanya Ostashko and all other judgment lien creditors. Based upon these considerations, and the undisputed fact that the matrimonial judgment was docketed after the filing of the Chapter 7 petition, we hold that the marital assets are part of the bankruptcy estate and subject to distribution in due course by the bankruptcy court.”

Maintenance Award For 10 Years Proper in 30 Year Marriage

In Saylor v Saylor, 32 A.D.3d 1358, 822 N.Y.S.2d 197(4th Dept.,2006) the judgment awarded plaintiff maintenance of $950 per month for a period of 9 ½ years or until plaintiff's remarriage or the death of either party, distributed certain marital assets and debt, and directed defendant to pay $6,750 toward plaintiff's counsel fees. The Appellate Division affirmed. The parties were married for 30 years, defendant was the primary breadwinner throughout the marriage, plaintiff stayed at home with the children or worked part-time for most of the marriage, thereby delaying her career prospects, and there was a large disparity in the incomes of the parties. The court did not abuse its discretion in ordering defendant to pay one half of plaintiff's credit card debt and in denying defendant's request to receive a credit for one half of a joint account liquidated by plaintiff to pay for the wedding of the parties' daughter. Given the relative financial circumstances of the parties and the relative merits of their positions before and at trial, the court did not abuse its discretion in ordering defendant to pay $6,750 toward plaintiff's counsel fees.

FCA 424-a Requires Disclosure That May Not Be Waived. Review of Objections is De Novo

In Stauffer v Stubs, --- N.Y.S.2d ----, 2006 WL 2446118 (N.Y. Fam. Ct.) Judge O’Conner of the Family Court refused to confirm the Support Magistrate's order reducing child support to $92 per week. The Court noted that FCA 424-a. provides in part that (a) in all support proceedings in family court, there shall be compulsory disclosure by both parties of their respective financial states,...No showing of special circumstances shall be required before such disclosure is ordered and such disclosure may not be waived by either party or by the court. A sworn statement of net worth shall be filed with the clerk of the court on a date to be fixed by the court, no later than ten days after the return date of the petition. ... All such sworn statements of net worth shall be accompanied by a current and representative paycheck stub and the most recently filed state and federal income tax returns including a copy of the W-2(s) wage and tax statement(s) submitted with the returns.....” The Family Court held that the failure to provide his tax return in 1999 as directed and required was a violation of the

compulsory financial disclosure law, The Findings of Fact stated that the father was given five days to produce his tax returns and financial affidavit and that his petition for modification would be dismissed if he did not do so. Accordingly, when he did not submit his tax return, his petition should have been dismissed , and it was error to grant it. The Support Magistrate had no authority to waive this tax return requirement. Although the mother’s attorney did not raise these arguments on the motion, he raised them on this objection procedure. The court noted that Family Court Act, 439[e] does not provide any standard for a Family Court Judge to apply when reviewing the Findings of Fact and Orders of a Family Court support magistrate, and stated that there apparently is no case law establishing such a standard. It held that the determination by a Family Court Judge on an objection can be and should be considered as a de novo application.

November 16, 2006

Cruelty Divorce Affirmed in 30 Year Marriage

In Freas v Freas, --- N.Y.S.2d ----, 2006 WL 2971758 (N.Y.A.D. 3 Dept.) the parties were married in October 1972 and had three emancipated children. The action was commenced in September 2003 and granted plaintiff a divorce and awarded her, maintenance and counsel fees. The Appellate Division affirmed. It found that Supreme Court heard undisputed testimony from plaintiff regarding both the treatment that she endured from defendant, as well as her reasons for suspecting an extramarital affair. The court noted that "defendant's lack of communication, isolation, name calling, controlling behavior and refusal to end his 'friendship' with [the alleged paramour] and to attend marriage counseling are all acts which demonstrate that continued cohabitation is improper." Supreme Court credited plaintiff's testimony that defendant's conduct caused her to increase her antidepressant medication and, ultimately, vacate the marital residence. It reviewed the testimony of defendant's alleged paramour, as well as that propounded by defendant which was limited to his employment and financial information. From the totality of the testimony, Supreme Court found defendant's conduct to amount to a "systematic pattern of emotional neglect." The Appellate Division found there was no abuse of discretion in the award of maintenance. In light of the disparity in income and the parties' future earning capacity, there is no abuse of discretion in the award of $450 per month in maintenance to plaintiff until she reaches the age of 62 Plaintiff stayed home, upon mutual agreement, to care for the children from 1974 until 1991 and, although she rejoined the work force in 1994, she stopped because of the injuries that she sustained in a car accident. By the time of trial, she was working part time, seeking full-time employment, which would yield an estimated income of approximately $17,000 per year. Defendant was grossing over $57,000 in 2002, decreasing to $38,891 at the time of trial because of a voluntary change in his work shift. Having studied welding, electric work and machine work, he also testified that he received additional income from odd jobs that he performed outside of his full-time employment. The court held that the award of counsel fees, $2,000 after trial and $1,000 for interim fees from the pendente lite order, was entirely reasonable considering the disparate financial circumstances of the parties.

VSF Benefits and COLAS Are Supplements and Enhancements to Already Existing Pension Benefits

In Pagliaro v Pagliaro, 31 A.D.3d 728, 821 N.Y.S.2d 602 (2d Dept.,2006) the parties 2003 judgment of divorce incorporated the terms and conditions of an amended 2003 separation agreement which provided that the plaintiff would share in the pension benefits of the defendant, a New York City Police officer. The judgment directed the settlement of a Qualified Domestic Relations Order. On February 22, 2005, the Supreme Court signed a QDRO which had been drafted by the defendant's attorney. It excluded any Variable Supplement Fund (VSF) benefits from the definition of "retirement allowance" and was silent as to cost of living adjustments (COLAs). The Appellate Division agreed with plaintiff’s argument that the Supreme Court erred in excluding from the QDRO the defendant's VSF benefits and COLAs payable in relation to his pension. (The defendant conceded on appeal that the plaintiff was entitled to an equitable share of pension-related COLAs). The Appellate Division held that the plaintiff was also entitled to an equitable share of VSF benefits. Pension rights earned during a marriage, prior to a separation agreement or matrimonial action, are marital property subject to equitable distribution. While certain assets created after the divorce do not constitute marital property, enhanced retirement income is marital property subject to equitable distribution, since a non-employee spouse is entitled to share in the pension of the employee spouse as it is ultimately determined.( Olivo v. Olivo, 82 N.Y.2d 202, 209-210, 604 N.Y.S.2d 23, 624 N.E.2d 151). As VSF benefits and

COLAs are merely supplements and enhancements to already existing pension benefits, the non-employee spouse is entitled to an equitable share. It rejected the defendant's argument that the plaintiff was not entitled to a share of the defendant's VSF because the Agreement did not specifically provide for such payments. It held that the defendant incorrectly relied upon cases which have held that parties must explicitly provide for an allocation of pre-retirement death benefits in a settlement/separation agreement in order for the non-employee spouse to receive an equitable share of those benefits ( see Kazel v. Kazel, 3 N.Y.3d 331, 334-335, 786 N.Y.S.2d 420, 819 N.E.2d 1036). Death benefits, unlike pension enhancements, are separate interests, independent of retirement benefits. Thus, in order for a non-employee spouse to be entitled to a share of the other spouse's death benefits, the parties must make specific provision for such entitlement in their marital agreement. It was not necessary for the Agreement to specifically provide for the plaintiff to receive an equitable share of the VSF benefits and COLAs, because they were merely supplements to the existing pension asset. The QDRO signed by the Supreme Court should have conformed with the Olivo principles to ensure that the plaintiff realized her right to share in the pension benefits as they are ultimately determined.

Presumption That Separate Funds Transmuted into Marital Property May Be Rebutted by Establishing Account Was Created Only as a Matter of Convenience

In Crescimanno v Crescimanno --- N.Y.S.2d ----, 2006 WL 2925340 (N.Y.A.D. 2 Dept.) the Appellate Division reversed the judgment on the law, and remitted to Supreme Court, Suffolk County, for the equitable distribution of the sum of $214,243.27, representing the amount awarded as a separate property credit. It noted that the proceeds from an action to recover damages for personal injuries are considered separate property. However, separate property t hat is commingled, for example, in a joint bank account, loses its character of separateness and a presumption arises that each party is entitled to a share of the funds (see Banking Law 675[b]). That presumption, may be overcome by clear and convincing evidence, either direct or circumstantial, that the account was created only as a matter of convenience The defendant opened a joint savings account with the plaintiff into which they deposited a check that was payable to both of them representing the proceeds from a settlement of the defendant's personal injury lawsuit. The next day, the defendant transferred the funds from that account into a joint checking account from which checks were drawn to satisfy certain marital debts, including a loan from the defendant's mother for the down payment on the marital residence and a private purchase money mortgage on that property. The defendant failed to rebut the presumption that the funds were transmuted into marital property by establishing that the account was created only as a matter of convenience without the intention of creating a beneficial interest . Thus, the funds did not retain the character of separate property. Accordingly, the defendant should not have received a property credit in the sum of $214,243.27.

Separate Property Became Marital Property When Defendant Deposited That Amount into Joint Checking Account and Used Amount Toward Purchase of Home

In Baker v Baker 32 A.D.3d 1275, 822 N.Y.S.2d 200 (4th Depot.,2006) the Appellate Division held that Supreme Court's distribution of the assets was reasonable except insofar as the court ordered that defendant receive $15,000 from the net proceeds of the sale of the home in which plaintiff was living, prior to an equal distribution of those net proceeds. Supreme Court determined that the $15,000 represented defendant's separate contribution towards the purchase of the home and defendant was therefore entitled "to recoup [that] sum ... as his separate property claim...." The Appellate Division concluded that the subject $15,000 was transformed into marital property when defendant deposited that amount into a joint checking account and ultimately used that amount toward the purchase of the home (citing Solomon v. Solomon, 307 A.D.2d 558, 763 N.Y.S.2d 141, lv. dismissed 1 N.Y.3d 546, 775 N.Y.S.2d 242, 807 N.E.2d 292; Sherman v. Sherman, 304 A.D.2d 744, 758 N.Y.S.2d 667). It modified the judgment to provide that the net proceeds from the sale of the home shall be distributed equally between the parties and otherwise affirmed.

New Court Rules For Parent Education & Awareness Program

Rules for The Parent Education and Awareness Program (22 NYCRR § 144.3.) were adopted on July 25, 2006. The program applies to all actions or proceedings that affect the interests of children under 18 years of age that is brought in Supreme Court or Family Court. The rules specify that an order to attend a parent education and awareness program may not delay the expeditious progress of the underlying proceeding, and that a parent who is a victim of domestic violence and for whom safety in traveling to or attending parent education is a concern may opt out of attendance by contacting a program administrator.

November 1, 2006

Equal Division of Marital Property Where Commingled Personal Injury Proceeds Transmutted into Marital Property

In Ruzicka v Ruzicka, --- N.Y.S.2d ----, 2006 WL 1839077 (N.Y.A.D. 3 Dept.), the wife challenged on Appeal the Supreme Court's decision to divide equally all marital assets, which equal division included the proceeds of an insurance settlement arising out of a car accident which, although involving both parties, resulted in serious injury to plaintiff only. The parties were married in May 1986, the accident occurred in June 1996 and this action was commenced in January 2004. Plaintiff conceded that all of the proceeds of this $240,000 settlement were commingled with marital funds and thus transmuted into marital property, but claimed that Supreme Court should have granted her a greater than one-half interest in these proceeds by awarding her full legal title to her current residence. Supreme Court ruled that this particular residence, valued at $205,000, was marital property to be sold with all net proceeds divided equally between the parties. Plaintiff was given the option of purchasing the property and paying defendant his equitable share thereof, namely, $102,500. `The Appellate Division was unpersuaded by plaintiff's claim that Supreme Court's equitable distribution award constituted an abuse of discretion. The Settlement proceeds were commingled with marital funds and thereafter spent on marital debt and numerous marital assets, including a vacant lot where the parties built a new home. While plaintiff suffered severe injuries from the automobile accident, the settlement, which was unallocated and made payable to both parties jointly, was able to exceed the $100,000 maximum insurance coverage for a single individual because defendant was also in the vehicle at the time. The parties collected $240,000 under the under insured/uninsured motorist coverage of their own automobile insurance policy. Had plaintiff been in the vehicle alone, the maximum benefit under this provision would have been $100,000. Because both parties were in the vehicle the maximum benefit was $300,000. Additionally, in light of the equal split of all marital property, defendant did not challenge the $2,100 per month he was obligated to pay plaintiff until she turns 65 years old. This obligation was initially for child support and spousal maintenance. Defendant agreed to continue this amount to plaintiff, in the nature of maintenance only, after their youngest child turns 22 years old. Plaintiff also collected $552 per month in Social Security disability and retirement benefits, and defendant was responsible for providing health insurance for her. Under these circumstances, Supreme Court's decision to split all marital property equally was fully supported by the record.

Distributive Award Disguised As Maintenance Dischargeable In Bankruptcy

In Re Duffy v Taback 2006 WL 1540542 (S.D.N.Y.) during the course of the marriage, Duffy obtained his medical degree. In 1994 Appellant Taback commenced an action for divorce and it came on for trial before the Honorable Fred Shapiro on June 27, 1997. On that date, with the participation of Justice Shapiro, the parties stipulated to a settlement of what the Bankruptcy Court found to be the single issue on which they went to trial, that of the equitable distribution of the value of the medical degree. The judgment of divorce stated in relevant part: ADJUDGED AND DECREED that the Defendant [Duffy] shall pay monthly spousal maintenance to the Plaintiff [Taback] commencing July 1, 1997 in the sum of $2,000 per month payable in monthly installments which shall be made on the first day of each month for the term of ten (10) consecutive years, which payment shall be non-dischargeable in bankruptcy and paid unconditionally to the Wife irrespective of her cohabitation or remarriage. In May 2002, Duffy admitted to several professional misconduct allegations and relinquished his license to practice medicine. The Bankruptcy Court held that the provision in the divorce judgment for ten-year payments designated "spousal maintenance" aggregating $240,000 constituted the settlement of a dispute between the parties concerning solely equitable distribution of the debtor's property interest in his medical license and practice. Since the dispute which was tried in the state court on June 27, 1997 concerned only equitable distribution, and since Taback made no claim for alimony/maintenance at or prior to the trial in the divorce action the liability to pay $240,000 over ten years although designated as "spousal maintenance" was not "actually in the nature of alimony, maintenance, or support" .. [and accordingly] cannot be deemed alimony, maintenance or support within the scope of Section 523(a)(5). The Court rejected Appellants argument that according to Zaera v. Raff, 93 B.R. 41 (Bankr.S.D.N.Y.1988) the monies at issue were, as a matter of law, in the nature of alimony and therefore not dischargeable under Section 523(a)(5) of the Bankruptcy Code. In Raff, the Bankruptcy Court relied on O'Brien v. O'Brien, 66 N.Y.2d 576, 584 (1985), and held that an award of a percentage of the value of a medical degree was in the nature of alimony and support and was non-dischargeable. To the extent that Zaera v. Raff, which held that a distributive award of the value of debtor's medical degree acquired during marriage is in the nature of non-dischargeable alimony and not marital property, intended to establish a bright line rule to that effect, the District Court declined to follow Raff. The Court did not find an intended bright line rule in Raff, but were it so to find, it would nevertheless not be bound thereby. The Bankruptcy Court found that on June 17, 1997, the parties settled their only actually remaining dispute pending before the state court, which was over the equitable distribution of Duffy's property interest in his medical degree, and they did not settle a claim over alimony or maintenance, as such a claim was never made. It found that the parties treated the distribution as spousal maintenance at the suggestion of Justice Shapiro in order to settle Taback's claim for equitable distribution in a way that Duffy's net cost would be reduced by way of federal income tax deductions. Despite the tax consequences reflecting alimony in this case, the term making the payments unconditional despite Taback's remarriage or cohabitation flies in the face of an intent to award alimony support.

Wife Entitled to Only 20% of Husbands Enhanced Earning Capacity

In Martinson v Martinson, --- N.Y.S.2d ----, 2006 WL 2789238 (N.Y.A.D. 4 Dept.) 2006 N.Y. Slip Op. 06957 the Appellate Division agreed with plaintiff that the court erred in awarding defendant 40% of the value of the marital portion of plaintiff's enhanced earning capacity arising from plaintiff's obtaining, during the marriage, a license to practice as a physician's assistant. In light of defendant's modest contribution to the attainment of plaintiff's license, it concluded that the court should have awarded defendant only 20% of the value of the marital portion of plaintiff's enhanced earning capacity and modified the judgment to provide that plaintiff pay defendant $21,472 for her share of plaintiff's enhanced earning capacity, with interest at the rate of 9% per annum from February 4, 2005, and remitted the matter to Supreme Court to determine the duration and minimum amount to be paid per month on that amount.

Error Not To Honor Parties Stipulation. Noncustodial Parent May Declare Child as Dependent

In Pachomski v Pachomski, --- N.Y.S.2d ----, 2006 WL 2742654 (N.Y.A.D. 2 Dept.), 2006 N.Y. Slip Op. 06840 the judgment awarded the plaintiff $80,082.35, representing 50% of the defendant's enhanced earnings capacity as a licensed teacher, permitted the plaintiff to claim tax exemptions for the parties' older child in odd years and their younger child in even years, and awarded the plaintiff credits in the sums of $1,200 for past rental income and $400 per month for future rental income beginning in November 2002 from an apartment in the marital residence. The Appellate Division held that Supreme Court improvidently exercised its discretion in determining the marital portion of the defendant's teaching license. To meet licensing requirements, the defendant was required, inter alia, to obtain a bachelor's degree and several additional teaching credits. When the parties were married in 1985, the defendant had already received her college degree. During the marriage, she completed the additional classes required for licensure and in 1998 she became licensed. In light of these circumstances, the court's decision to apply a 100% coverture factor in determining the marital portion of the teaching license was without proper support. While the record contained evidence to support a finding that some portion of the license constituted marital property subject to equitable distribution, since the plaintiff contributed both in economic and noneconomic terms to the defendant's attainment of the license, the evidence did not justify the court's use of a coverture factor of 100% .The matter was remitted for a new determination of the marital portion of the teaching license. The parties stipulated to allow the defendant to retain the past rental income from an apartment in the marital residence as payment for repairs made to the marital residence. The Appellate Division held that the court erred in awarding the plaintiff the sum of $1,200 of the past rental income rather than honoring the parties' stipulation. It also held that Supreme Court properly determined that the plaintiff was entitled to claim federal and state tax dependency exemptions for the parties' older child in odd years and their younger child in even years. Where a noncustodial parent meets all or a substantial part of a child's financial needs, a court may determine that the noncustodial parent is entitled to declare the child as a dependent. Both parents were wage earners, and each contributed toward the support of their two children.

October 16, 2006

Provision for Own Attorneys Fees For Collecting Law Firms Attorneys Fees Void

In Ween v Dow, (2006 NY Slip Op 07227) the Appellate Division, First Department, held that a provision in a retainer agreement, which holds the client liable for attorneys' fees incurred in the collection of fees generated under the retainer agreement, is void as against public policy. The retainer agreement provided, in part: "If client fails to pay for charges due under this agreement and the law firm takes legal action and is awarded such charges, client shall owe to law firm costs, expenses and attorneys' fees (including but not limited to the reasonable value of the law firm's own work) attributable to law firm's collection proceedings and/or action." The Court noted that even in the absence of fraud or undue influence, an agreement to pay a legal fee may be invalid if it appears that the attorney got the better of the bargain, unless he can show that the client was fully aware of the consequences and that there was no exploitation of the client's confidence in the attorney. It found that the very nature of the provision, which permits the recovery of attorneys' fees by the attorney should he prevail in a collection action, without a reciprocal allowance for attorneys' fees should the client prevail, to be fundamentally unfair and unreasonable. Aside from its lack of mutuality, the clause, even if not so designed, had the distinct potential for silencing a client's complaint about fees for fear of retaliation for the nonpayment of even unreasonable fees . For that reason the provision was unenforceable.

PreNuptial Agreement Must Be Considered in Property Distribution. Court Required To Set forth Child Care Factors

In Gilbert v Gilbert, --- N.Y.S.2d ----, 2006 WL 2257730 (N.Y.A.D. 2 Dept.) the parties prenuptial agreement provided that, in the event of a divorce, they would divide property held in joint names proportionately in the same ratio as their respective individual financial contributions to such asset." On July 29, 1991, the parties purchased the first marital residence. On December 7, 1998, the parties sold the first marital residence, and used all of the equity from the sale toward the purchase of the second marital residence. On September 20, 2002, the plaintiff commenced the action for a divorce and the parties agreed to sell the second marital residence. The Appellate Division held that the Supreme Court erred, as a matter of law, in considering the equity from the sale of the first marital residence as having been contributed towards the second marital residence equally by each party, since the equity from the sale of the first marital residence was traceable to the parties' separate property contributions toward the first marital residence. The equity from the sale of the first marital residence was not placed in a joint account or otherwise commingled with marital funds before it was applied toward the purchase of the second marital residence. Since the precise amount of the parties' individual contributions toward the first marital residence was not clear from the record, the matter was remitted for a new determination of this amount. It also held that Supreme Court erred in its child support determination. It was required to set forth the factors it considered with respect to its determination of the parties' child support and child care obligations--including, in the circumstances of this case, private school tuition and expenses for extracurricular activities and summer camp--on combined income in excess of $80,000. It was also required to relate the statutory factors to the ultimate facts on which it relied.

SCU Is Required to Issue Immediate Income Execution

In Matter of Franklin County Department of Social Services v Mandigo, --- N.Y.S.2d ----, 2006 WL 2433398 (N.Y.A.D. 3 Dept.) the Support Magistrate directed respondent to pay $512 biweekly in child support for three of his children who were receiving public assistance. The order directed the Support Collection Unit to calculate the amount of retroactive support, but ordered that no immediate income execution be issued by the SCU for current or past due support. The Appellate Division held that Child support orders for children receiving public assistance must direct payment to the SCU, which is required to issue an immediate income execution unless "the court finds and sets forth in writing the reasons that there is good cause not to require immediate income withholding". "[G]ood cause shall mean substantial harm to the debtor," but does not include the mere issuance of an income execution (Family Ct Act 440[1][b][1] ). The "good cause" found by the Support Magistrate here was that respondent was left with only $500 biweekly to support himself, after subtracting all amounts currently being deducted from his paycheck, including taxes, FICA, and current child support, as well as a pension plan loan repayment, amounts being garnished to pay a medical bill judgment, and presumably health insurance premiums and union dues. The Support Magistrate concluded that substantial harm would result to respondent due to the SCU's mandatory collection of past due support if an income execution were ordered. The Support Magistrate's conclusions were incorrect. In addition to deducting current support, regulations require the SCU to deduct an additional amount toward arrears, equal to the greater of $50 per week or one-half the support obligation.. Under the Support Magistrate's calculations, this would have resulted in an additional deduction of $256 biweekly from respondent's net pay of $500. Regulations provide safety valves in the SCU's calculation of additional deductions for arrears, however, including a limit on total deductions to 40% of disposable income and a prohibition on reducing the payor's income below the self-support reserve. The payor's "disposable income" is defined as "any amounts required by law to be withheld" (18 NYCRR 347.9[e][1][v]; see CPLR 5241[g]; 5242 [c] ), which would not include some of the items considered by the Support Magistrate. Additionally, the Legislature has determined that support income deductions have priority over any other levies or assignments of income. Support income executions are statutorily limited to a percentage of the payor's disposable income , and other statutes limit the total amount that can be deducted from a person's income. Because support income executions have priority, creditor garnishment is not permitted during any pay period in which the amount garnished for support exceeds the permissible statutory percentage for overall levies or assignments. Not having considered this legal priority, the Support Magistrate inappropriately subtracted other debts from respondent's annual salary of over $49,000 when deciding how much money he would have to support himself from each paycheck. The Appellate Division did not find substantial harm to respondent through the issuance of an income execution. Considering that such an income execution is subject to statutory and regulatory safeguards in the payor's favor, there was no good cause to disallow an income execution.

Support Ordered In Accordance With Agreement Where Income Impossible to Calculate

In Frazier v Penraat, --- N.Y.S.2d ----, 2006 WL 2728933 (N.Y.A.D. 1 Dept.) Respondent testified that her adjusted gross income for the years 2000, 2001 and 2002 was $66,268, $56,609, and $32,047, respectively. Petitioner testified that respondent often received cash payments through her business, which were not reported on respondent's tax returns and in 2000 or 2001, received between $60,000 and $100,000 in undeclared cash payments. Prior to the parties' separation, the children enjoyed a fairly high standard of living. The Support Magistrate found respondents testimony to be neither candid, nor fully credible. Petitioner, in the Magistrate's view, fared no better as he also found her testimony to be not fully credible, specifically noting that "[h]er testimony concerning the 'wads' of cash she observed sounded contrived and was not fully believable. The Magistrate determined that petitioner's income, for the purposes of calculating child support, was $78,522.08 and found that determining respondent's income "was problematic". The Magistrate concluded that neither parent could be deemed the custodial parent for purposes of the Child Support Standards Act since both parents had essentially the same income and shared custody equally, and, therefore, declined to enter an order of child support. The Magistrate, in a supplemental decision, stated that "none of [respondent's] testimony concerning her income was relied upon in reaching my factual determination regarding her income." Family Court agreed with the Magistrate that it was not possible to differentiate between the parties on the basis of their access to the children, but went on to calculate petitioner's adjusted gross income to be $79,316.74, which was within $1,000 of the figure arrived at by the Magistrate, and found that it was an abuse of discretion for the Magistrate to utilize respondent's tax returns in light of his conclusion that none of her testimony concerning her income was credible. Family Court utilized the figure respondent listed as her annual income on a car lease application in November 2001, which was $80,000, and after additional adjustments, concluded that respondent's adjusted gross income, for child support purposes, was $102,275.86. In light of the shared custody situation, it concluded that a strict application of the CSSA guidelines would be unjust and ordered respondent to pay monthly support of $958.33 retroactive to the date petitioner filed the petition. The Appellate Division reversed on the law. It perceived of no basis, in light of the Magistrate's credibility findings, for Family Court's decision to utilize the $80,000 figure respondent reported on her car loan application, while discounting respondent's tax returns due to lack of credibility. Since, based on the record, it was is not possible to calculate an appropriate award of support pursuant to the CSSA, the court held that find that the parties should comply with the terms of a mediation agreement, which, was executed after the events which purportedly devastated respondent's business. Respondent was directed to pay petitioner $600 per month, retroactive to the date of the filing of the petition.

October 2, 2006

Supreme Court Required to Appoint Counsel For Certain Indigent Litigants

Section 35 of the Judiciary Law was amended by Laws of 2006, Ch 538, effective August 16, 2006 to add a new subdivision 8 which requires supreme court to appoint counsel for indigent litigants in the same manner as family court is required to appoint such counsel. It provides that whenever supreme court shall exercise jurisdiction over a matter which the family court could have exercised jurisdiction had such action been commenced in family court, supreme court shall appoint counsel for indigent persons in the same manner as required by section 262 of the family court act. Family Court Act 262(a) provides which persons have the right to the assistance of counsel. When such person first appears in court, the judge must advise such person before proceeding that he or she has the right to be represented by counsel of his or her own choosing, of the right to have an adjournment to confer with counsel, and of the right to have counsel assigned by the court in any case where he or she is financially unable to obtain the same. Those persons who might appear before the Supreme Court, in a matrimonial action, for which the court is required to appoint counsel are the petitioner and the respondent in any proceeding under article eight of the act (family offenses); the parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such child, in any proceeding before the court in which the court has jurisdiction to determine such custody; any person in any proceeding before the court in which an order or other determination is being sought to hold such person in contempt of the court or in willful violation of a previous order of the court, except for a contempt which may be punished summarily under section seven hundred fifty-five of the judiciary law; (viii) the respondent in any proceeding under article five of this act in relation to the establishment of paternity. Ed Note: The failure to advise a party of the right to counsel and to an adjournment to obtain counsel before the court made any orders has been held to be reversible error. See generally Perez v Arebalo, 13 AD3d 85, 786 NYS2d 441(1st Dept. 2004) Patricia L. v Steven N. 119 AD2d 221 (2d Dept. 1986); Mahoney v Doring 256 AD2d 1112 (4th Dept.,1998)

Stipulation Does Not Foreclose Inquiry into Propriety of Attorneys' fee

In Campion v Campion, --- N.Y.S.2d ----, 2006 WL 2615131 (N.Y.A.D. 2 Dept.) the Appellate Division reversed an order which granted the motion of the former attorney for the plaintiff, to enter a money judgment in the sum of $31,615.40 against the plaintiff, and denied the plaintiff's cross motion to vacate the portion of a stipulation of settlement between the parties requiring her to pay an attorney's fee to him. In the course of negotiating the settlement of this matrimonial action, the attorney for the plaintiff-client obtained the client's consent to insert into the stipulation of settlement between the parties a provision requiring her to pay his fee, in the amount of $31,615.40, from certain marital property that she was to receive in equitable distribution. The stipulation was subsequently "so ordered" and incorporated, without being merged, into the judgment of divorce. The client subsequently refused to comply with the terms of the stipulation of settlement. The attorney then moved in the action to hold the client in contempt of court for her noncompliance with the stipulation of settlement or, among other things, for leave to enter a money judgment against the client. The client opposed the motion on the ground that the time for which she was charged was excessive. At the same time, she commenced a plenary action in the Supreme Court to set aside the fee provision in the stipulation of settlement. The Appellate Division held that Supreme Court erred in granting the motion for leave to enter a money judgment without considering the client's cross motion to vacate the portion of the stipulation of settlement requiring her to pay an attorney's fee. By moving in the matrimonial action for leave to enter a money judgment upon the ground that the client had defaulted, the attorney necessarily invoked the summary procedure established by Domestic Relations Law 244 for the enforcement of matrimonial obligations. Under the terms of that provision, a party against whom enforcement of an obligation other than child support is sought may seek relief from the obligation upon showing good cause. Here, such good cause was established, prima facie, by the attorney-client relationship between the attorney and the client at the time the client entered into the fee stipulation. "[I]t is well settled that the courts possess the traditional authority 'to supervise the charging of fees for legal services' pursuant to their 'inherent and statutory power to regulate the practice of law' " The existence of the stipulation did not foreclose the court from inquiring into the propriety of an attorneys' fee, even in the absence of undue influence or fraud.

Net Worth Statement Required Before Court Can Apportion Law Guardian Fees

In Frost v Goldberg, 818 N.Y.S.2d 533 (2d Dept.,2006) the Appellate Division held that Supreme Court improvidently exercised its discretion in confirming that portion of the Judicial Hearing Officer's report which recommended that the plaintiff reimburse the defendant the sum of $12,400 in fees paid by the defendant to the Law Guardian. Although such fees and related expenses are entrusted to the sound discretion of the court, they are nonetheless to be controlled by the equities of the case and the financial circumstances of the parties. The Judicial Hearing Officer failed to consider the financial circumstances of the parties. The defendant failed to file a current statement of net worth with his cross motion, as required by 22 NYCRR 202.16(k)(2). In addition, the plaintiff did not file a statement of net worth with the court. The matter was remitted to Supreme Court, for a hearing to consider the parties' relative financial positions, and for a new determination on the issue of reimbursement of fees paid to the Law Guardian . It directed that the new determination should be made only after receipt of a statement of net worth from both parties.

No Impediment to Distributing Present Value of Residential Apartments in name of Holding Company. Lifetime Maintenance Appropriate. Recoupment of Pendente Lite Award Indirectly Permitted.

In Pickard v Pickard, --- N.Y.S.2d ----, 2006 WL 2291170 (N.Y.A.D. 1 Dept.) the Appellate Division held that it was proper to adjust plaintiff's equitable distribution award to give defendant credit for excess temporary maintenance payment, [Ed. Note: the effect of which was to allow recoupment of the pendente lite award]. Lifetime maintenance of $3500 per month was appropriately awarded in view of the 23-year duration of the marriage, plaintiff's role in raising and educating the two children, her minimal job skills, her having been out of the workforce since 1977 and the parties' respective financial positions. However, defendant improperly received a 100% credit of $109,251 for maintenance payments and $6553 for homeowner's insurance for the marital apartment. Since these payments maintained the value of the marital residence and both parties benefitted from the sale of the residence, defendant should have received a 50% credit for these payments, i.e., $57,902, and it reduced plaintiff's credit for past temporary maintenance payments by that amount. The court also found that given the disparity in the parties' future earning capacity and plaintiff's bleak work prospects, defendant should pay for plaintiff's health insurance until she obtains a job with benefits or is eligible for medicare. The Appellate Division also held that the trial court erred in declining to distribute the present value of the parties' 25 % interest in KP Holdings. Instead it directed that this asset be divided on an "if, as and when" basis as the assets it holds are sold. KP Holdings was a New York limited liability company which owned 11occupied rent-controlled or rent-stabilized apartments. Defendant offered the testimony of an expert who appraised this asset and concluded that the present value of KP Holdings at the time of the valuation was $340,000. The parties' 25% share was valued at $55,000 after applying a "minority discount" to take into account the lesser market value of a minority interest; without that discount, the parties' interest was valued at $85,000. The Appellate Division noted that the trial court rejected the validity of this expert's valuation and concluded that the parties' interest in KP Holdings was "wholly speculative," thereby precluding accurate valuation and distribution of its present value, and requiring instead that any future distribution following a sale of a KP-owned apartment be split upon receipt. The Appellate Division held that the present value of this asset was no more speculative than that of any other asset with limited marketability; it may be properly determined by standard valuation techniques. Rather than rendering the asset's value too speculative to determine, the marketability limitation simply creates the need to apply discounting factors to the future value--exactly the procedure the expert here employed. Where the asset consists of residential apartments held in the name of a holding company, there is no impediment to determining and distributing a present value. Distribution of assets should not be left unresolved at the time of the divorce where it can be effectuated at that time, as can the parties' interest in KP Holdings. The Appellate Division held that under such circumstances, the court had the authority to appoint another expert (22 NYCRR 202.18) and direct further proceedings for purposes of a more accurate appraisal.

September 18, 2006

Despite Agreement Hearing Warranted on Husband’s Petition For Downward Modification of Child Support Where He Alleged Involuntary Substantial Decrease in Income

In Lonsdale v McEwen (2006 NY Slip Op 06313) (NYAD 1 Dept), a 3-2 opinion, the Appellate Division reversed an order of the Supreme Court which denied defendant's motion for downward modification of his child support obligation, and directed a hearing on defendant's petition. When the parties separation agreement was entered into in December of 2001, defendant's annual salary in that position was $1.3 million. The agreement provided that in the event of an involuntary substantial decrease in defendant's annual income to $600,000 or less, his annual, basic child support obligation would be $33,600 (payable in equal monthly installments) rather than $48,000. The agreement provided for an "adjustment" of his non-basic child support obligations if his income were to decrease by more than 50% of the amount of income he earned in 2000 (which apparently was in excess of $1 million). The defendant lost his high-paying position in October of 2002. In 2003, defendant was unemployed except for occasional jobs he was able to obtain, but received some $77,527 in income from a variety of sources (including capital gains, dividends, interest and pension payments, as well as earnings from the employment he obtained). He remained unemployed for most of 2004, but received some $34,750 in income over the first seven months of the year. As a result of the new employment he finally was able to secure in Florida, he expected to earn an additional $38,000 in the final months of 2004. Defendant expected to earn $200,000 in salary over the first year in his new job, with increases of $15,000 and $10,000 in the second and third years. It was undisputed that defendant did not voluntarily lose his high-paying position nor was there any basis for doubting that he diligently sought new employment. Defendant was entitled under the agreement to reductions in his support obligations. Defendant's non-basic child support obligations were substantial. In 2002 defendant paid $49,520 in non-basic child support, including $15,000 for tuition and $31,000 for child care. In 2003, defendant paid approximately $26,400 in non-basic child support, including $8,500 for tuition and $16,900 for child care. In the first nine months of 2004, defendant paid approximately $19,800 in non-basic child support. In support of his motion for a downward modification of his child support obligations, defendant relied on, inter alia, the loss of his high-paying position, the periods of unemployment and reduced income in 2003 and 2004 and the need to provide for his twin sons, born in September of 2003, following his remarriage in April of 2002. In addition, defendant alleged both that plaintiff, as an attorney for a major pharmaceutical company, likely earned more than he would in his new position, and that her financial assets had increased significantly while his had decreased significantly since the agreement was entered into in December of 2001. The majority noted that the dissent stated that "the loss of [the] long-standing lucrative position" defendant held "affords no basis for the relief" he seeks because "[t]hat circumstance . . . was specifically anticipated and addressed in the [separation] agreement." The majority held that this rationale was not alone sufficient to warrant denial of defendant's motion. If defendant either had failed to secure new employment or secured a new position that paid an annual salary less than the total amount of his annual support obligations, defendant could not rationally be denied relief on this ground. The only reasonable conclusion to be drawn was the obvious one: the parties to the agreement anticipated the loss of defendant's lucrative position but neither anticipated nor addressed either a prolonged period of unemployment or so huge a reduction in salary. The agreement provided for a reduction in annual child support "in the event the Husband suffers an involuntary substantial decrease in [his] income, as defined, so that such income is $600,000 or less" . But the phrase "or less" is too slender a peg upon which to hang the ponderous conclusion that the parties "specifically anticipated and addressed" all the potential consequences of the loss of defendant's position. Defendant's 84% salary reduction was substantial and the defendant was without any steady employment for nearly two years. Under these circumstances, Supreme Court erred as well in brushing aside defendant's claim of a "concomitant need" for a downward modification. In concluding that "payment of $2,800 per month is a reasonable child support amount" "given the fact that [defendant] is now earning $200,000 annually," Supreme Court ignored the substantial amounts of non-basic child support payments defendant was obligated to make and appeared to have not considered the after-tax burden of defendant's obligations. After the separation agreement was entered into defendant became responsible for the expenses of raising two children, his twin sons. Supreme Court rejected defendant's reliance on these expenses. Even assuming that defendant anticipated the birth of twins, Supreme Court erred just the same. The issue was whether these expenses were unanticipated at the time the parties entered into the separation agreement. Regardless of whether defendant could fairly be blamed for remarrying and raising children with his new spouse, his infant sons wer blameless and Supreme Court should not have been so dismissive of defendant's need to provide for them. The court stated that Defendant also was correct in asserting tha increases, if any, in plaintiff's salary would support his motion. Note: This may be the first decision applying Boden (42 NY2d 210) to a downward modification of a child suppoprt judgment. However, since DRL 236 [B][9]does not authorize the court to modify the agreement provisions downward, it would seem that any relief for defendant would be temporary.

Husband Lacked Standing to Seek Visitation with Wife’s Children

In Bank v White, 817 N.Y.S.2d 367 (2d Dept.,2006), the parties married and lived together with the Wife’s two children from September 1997 until their separation in June 2003. During the marriage, the plaintiff played a role in the daily upbringing of her children and served as a "father figure" in their lives. When the parties separated, the plaintiff moved to California and the defendant remained in New York with the children. By order to show cause the wife requested pendente lite maintenance and the husband cross-moved for visitation with the children. The Supreme Court denied the cross motion for lack of standing and the Appellate Division affirmed. It held that Supreme Court correctly denied the plaintiff's cross motion since he lacked standing to seek visitation with his wife's children (citing Matter of Alison D. v. Virginia M., 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27; Matter of Ronald FF. v. Cindy GG., 70 N.Y.2d 141, 517 N.Y.S.2d 932, 511 N.E.2d 75). The plaintiff failed to demonstrate that he had the requisite contacts or undertook any effort to maintain a relationship with the subject children since he left the marital residence and the cross motion was brought only in response to the wife's request for pendente lite maintenance. The Supreme Court correctly determined that application of the doctrine of equitable estoppel was not warranted in this case. Although equitable estoppel has been applied by the court to visitation disputes under compelling circumstances the Appellate Division declined to apply it under the facts of this case.

Where Parties' Respective Financial Circumstances About Equal Award of Attorney's Fee For Trial and Appeal Improvident.

In Penna v Penna 29 A.D.3d 970, 817 N.Y.S.2d 313, 2006 N.Y. Slip Op. 04262 (2d Dept.,2006) the Appellate Division noted that during this long-term marriage, the parties, both of whom were born in 1946, were employed and enjoyed a modest middle-class lifestyle. The principal asset of the marriage was the marital residence, improved by an apartment constructed in 1987 with $60,000 given to the parties by the plaintiff's mother. The plaintiff also inherited considerable funds during the marriage, the balance of which remained her separate property. It held that the $60,000 given by the plaintiff's mother to the parties during the marriage for the purpose of building her an apartment within the marital residence lost its character as separate property and became marital property. As such, it should have been distributed between the parties rather than allocated solely to the plaintiff. In light of the parties' ages and their lifestyle during the marriage, as well as their financial circumstances the Supreme Court should have awarded the plaintiff maintenance only until the plaintiff becomes eligible for full Social Security benefits at the age of 66, remarries, or dies. Given the plaintiff's present income, her doctor's testimony that she was capable of performing the functions required by her present employment, her reasonable needs, her separate property, and the defendant's financial circumstances, an award of maintenance in the sum of $125 per week was appropriate. It was clear from the decision after trial that the life insurance policy was intended to be $250,000, which was excessive. The Appellate Division held that it should be for an amount commensurate with the collective sum of the maintenance payments of $52,000, coterminous with the period of maintenance. In light of the parties' respective financial circumstances, which were about equal, the Supreme Court's award of an attorney's fee to the plaintiff for the trial and appeal was an improvident exercise of discretion.

September 1, 2006

First Department Allows Indirect Recoupment for Excess Pendente Lite Maintenance Payments

The general rule has been that a spouse is not entitled to restitution or recoupment of the payments made pursuant to a temporary maintenance or child support award. In Vigliotti v. Vigliotti, 260 A.D.2d 470, 688 N.Y.S.2d 198 (2d Dep't 1999), the Second Department held that ". . . the husband would not be entitled to restitution or recoupment of the payments made pursuant to the modified temporary maintenance award." See also Rodgers v Rodgers, 98 AD2d 386, 470 NYS2d 401 (2d Dept.,1983); Stone v Stone, 152 AD 2d 560, 543 NYS2d 489. (2d Dept.,1989), The Third Department has held where the final award of maintenance and child support is less than the amount of the pendente lite award it is error for the trial court to direct that its award should be retroactive and prospective and thus, in effect, modify downward the pendente lite order. Foxx v Foxx, 114 App Div 2d 605, 494 NYS2d 446 (3d Dept.,1985). It has noted that there is a strong public policy against restitution of support payments. Baraby v Baraby, 250 AD2d 201, 681 NYS2d 826 (3d Dept.,1986) . The Fourth Department has adhered to this rule. See O’Brien O’Brien, 195 AD2d 993, 601 NYS2d 895. (4th Dept.,1993). The First Department had adhered to this rule until recently. In Willets v. Willets, 247 A.D.2d 288, 668 N.Y.S.2d 623 (1st Dep't 1998) the First Department held that there could be no retroactive credit for overpayment of temporary maintenance attributable to a spouse’s return to work during the pendency of the action. See also Grossman v Ostrow, 33 AD2d 1006 (1st Dept, 1970). Nevertheless, in Pickard v Pickard (2006 NY Slip Op 06209) the First Department held that “It was also proper to adjust plaintiff's equitable distribution award to give defendant credit for excess temporary maintenance payments” (citing Galvano v Galvano, 303 AD2d 206 [2003]). In Galvano, supra, the same Appellate Division stated, with regard to the pendente lite award, that” “ If the award is found at trial to be excessive, the court can remedy the inequity by appropriate adjustment in the equitable distribution award \*\*(citing Gad v. Gad, 283 A.D.2d 200, 724 N.Y.S.2d 305).” In Gad v Gad, supra, the Court set forth its rationale for this rule when it affirmed, without citation to authority, an Order which directed defendant to pay $8000 a month for temporary maintenance: “Nowadays, if a pendente lite award is found at trial to be excessive, the court can remedy the inequity by appropriate adjustment in the equitable distribution award.”

Party Must Be Given Opportunity to Object to Report of Judicial Hearing Officer

In Jones v Jones --- N.Y.S.2d ----, 2006 WL 1913104 (N.Y.A.D. 3 Dept.) the parties entered into a stipulation of settlement, incorporated into a judgment of separation, resolving numerous issues pertaining to the equitable distribution of their marital property, in which the parties agreed that all real property of the marriage, including the marital residence, would be sold and the proceeds divided equally, after payment of mortgages and capital gains taxes. It further outlined each party's respective responsibilities for the carrying charges on each property and further provided that neither would borrow money against any of these parcels. Following the stipulation, the mortgage and tax obligations on three of these parcels, which were the financial obligation of defendant under the terms of the stipulation, continued to be in arrears. Less than one month after the stipulation, plaintiff borrowed money from a friend which resulted in a mortgage being executed in the friend's favor on one of the properties. Three other mortgages were executed in his favor one year later. In October 2003, upon learning of these post-stipulation mortgages (as well as another mortgage that had been executed in the friend's favor prior to the stipulation but allegedly unbeknownst to defendant), defendant moved for an accounting by plaintiff, as well as a contempt finding for her alleged willful violation of the stipulation. Supreme Court ordered plaintiff to provide defendant "with a full accounting ... of all monies which resulted in mortgages being executed by her in favor of said [friend] ... The cumulative total of which, as of August 1, 2003, was approximately $53,000.00." Thereafter, plaintiff brought a separate motion concerning the sale of the marital residence. Ultimately, a Judicial Hearing Officer was appointed "to hear and report" in the matter. A proceeding was scheduled for February 18, 2005. Prior to that time, the parties' attorneys were directed to outline their clients' respective position on each of the subject properties. No testimony was taken at this appearance nor was evidence admitted. The entire proceeding consisted of oral argument of counsel. Shortly after its conclusion, plaintiff's counsel submitted proposed findings of fact and conclusions of law to the Judicial Hearing Officer. Defendant objected on the ground that no hearing had been conducted on the extant orders to show cause. He further pointed out that he had never been provided with the ordered accounting by plaintiff. Despite these objections, the Judicial Hearing Officer submitted findings of fact and conclusions of law to Supreme Court, which the court adopted one day later. Defendant appealed from this order, as well as another order of Supreme Court which denied all then pending orders to show cause. The Appellate Division reversed the orders on the law holding that Supreme Court erred in adopting the Judicial Hearing Officer's findings without providing him an opportunity to object. A party must be given the opportunity of pointing out in what respects, if any, the Judicial Hearing Officer's report or his or her conduct of the proceedings is erroneous. Here, defendant was denied that right.

Money Judgement for Support Arrears Must Be Upon Application to Court

In Matter of Fixman v Fixman, --- N.Y.S.2d ----, 2006 WL 2005526 (N.Y.A.D. 2 Dept.) The Appellate Division held that the dismissal of the New York matrimonial action did not preclude the mother from seeking any arrears which may have accrued while the pendente lite order remained in effect, and that she could enforce the father's support obligation by seeking leave to enter a money judgment. However, Domestic Relations Law § 244 requires that a money judgment for support arrears be made "[u]pon application [to] the court," and here the support petition filed pursuant to the Uniform Interstate Family Support Act did not seek support arrears. Under these circumstances, the issue of whether arrears were due and owing pursuant to the pendente lite order was not properly before the Family Court.

Counsel Fee Permitted for Counsel Fee Application. Court May Not Sua Sponte Vacate Order Appealed From

In Matter Rospigliosi v Abbate, --- N.Y.S.2d ----, 2006 WL 2004413 (N.Y.A.D. 2 Dept.) the Appellate Division held that although awards for legal services provided in connection with a fee application should not be routinely expected or freely granted, such awards are committed to the sound discretion of the Family Court "to be exercised in appropriate cases, to further the objectives of litigational parity, and to prevent the more affluent spouse from wearing down or financially punishing the opposition by recalcitrance, or by prolonging the litigation" (citing O'Shea v. O'Shea, 93 N.Y.2d 187, 193). To the extent that Matter of Getman v. Getman (156 A.D.2d 686, 687) may be read to deprive the court of this discretion, it has, in effect, been overruled in this regard by O'Shea v. O'Shea, and should no longer be followed for that proposition. Inasmuch as the Family Court declined to reach the merits of the petitioners request for an award for an attorney's fee on the mistaken ground that it was without authority to award an attorney's fee incurred by the petitioner in prosecuting her fee application, it remitted the matter to the Family Court for a new determination with respect to that narrow issue. The Appellate Division noted that well after this appeal had been perfected, the Family Court, sua sponte, issued an order, which, inter alia, purported to vacate its order appealed from. This was improper. While it is true that, during the pendency of an appeal, the issuing court generally retains the power to clarify the order appealed from or to correct ministerial errors or irregularities contained therein that do not affect substantial rights of the parties, and that the issuing court generally retains the power to entertain and decide motions, even where the outcome of such motion practice may impact the pending appeal, the issuing court may not vacate, sua sponte, a prior order from which an appeal has been taken. If it were able to do so, the issuing court would, in effect, be insulating its subsequent order from appellate review as of right.

August 16, 2012

Amendments to Uniform Child Custody Jurisdiction and Enforcement Act

Laws of 2006, Ch 184, amended, effective July 26, 2006, the provisions of the Domestic Relations Law in relation to service of process, communications between courts and taking of testimony in proceedings under the uniform child custody jurisdiction and enforcement act. Domestic Relations Law, section 75-g, subdivisions 1 and 2, section 75-i, subdivision 1, section 75-j, subdivision 2, and section 77-h were amended. In addition the last sentence of CPLR 302(b) was amended to add: “and article five-B” of the family court act “and article five-A of the domestic relations law”. As a result of the amendment the last sentence now provides: “ The family court may exercise personal jurisdiction over a non-resident respondent to the extent provided in sections one hundred fifty-four and one thousand thirty-six and article five-B of the family court act and article five-A of the domestic relations law.”

Court May Not Delegate Its Authority to Fix a Visitation Schedule

In Matter of Feeney v. Castronuovo, --- N.Y.S.2d ----, 2006 WL 1913104 (N.Y.A.D. 3 Dept.) by stipulation incorporated into their divorce decree, petitioner and respondent shared joint legal and physical (alternating weeks) custody of their three children. In May 2004, due to the mother's abuse of alcohol, Family Court awarded temporary sole, legal and physical custody to the father, with supervised visitation to the mother. In September 2004, the parties resumed the alternate weekly physical custody schedule and the Family Court order was modified to require the mother to complete alcohol rehabilitation treatment and, until November 2004, to equip her automobile with a sensalock device that would prevent her from starting her car if her blood alcohol level was excessive. When, in February 2005, the mother was arrested for driving while intoxicated, the father sought further modification of the custodial arrangement. Following hearings, Family Court ordered joint legal custody with primary physical custody being awarded to the father. With respect to visitation, Family Court ordered in the second decretal paragraph: "Parenting time with the mother shall be at times and places as agreed under such circumstances and conditions as the father determines are necessary to protect the safety and general welfare of the children." The Appellate Division modified the order on the law holding that Family Courrred by improperly delegating to the father the court's responsibility to structure a visitation schedule. Despite Family Court's understandable concern that the mother could suffer a relapse at any time, unless visitation is inimical to the child's welfare, Family Court is required to structure a schedule which results in frequent and regular access by the noncustodial parent .The court's authority in this respect can no more be delegated to one of the parties than it can be to a child or to a therapist.

Limitations Statute Does Not Bar Challenge by Motion to Prenuptial Agreement. Exclusive Occupancy Awarded to Insure Safety

In Iuliano v Iuliano, --- N.Y.S.2d ----, 817 N.Y.S.2d 174 (3d Dept.,2006) plaintiff sought exclusive possession of the parties' marital residence and defendant cross-moved for the same relief and a declaration that the parties' prenuptial agreement executed on July 31, 1997, the day before they were married, was invalid. Following an evidentiary hearing, Supreme Court granted defendant exclusive possession of the marital residence, denied defendant's cross motion for rescission of the prenuptial agreement, and determined that the provisions thereof relating to separate assets were unconscionable. The Appellate Division affirmed. The extensive testimony demonstrated the existence of marital strife between the parties requiring an award of exclusive possession to insure the personal safety of the parties. In light of the disparate financial circumstances of the parties, the award of exclusive possession to defendant was proper. Supreme Court denied defendant's cross motion to set aside the prenuptial agreement on the ground that an action for rescission has a six-year statute of limitations and defendant's claim was now time barred. While a separate action for rescission is so governed, defendant is not time-barred from challenging the validity of the prenuptial agreement because this particular argument arises from, and directly relates to, plaintiff's claim that the agreement precludes equitable distribution of his assets. Claims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by the statute of limitations, even though an independent action by defendant might have been time-barred at the time the action was commenced. (Bloomfield v. Bloomfield, 97 N.Y.2d 188, 192-193, 738 N.Y.S.2d 650, 764 N.E.2d 950 [2001]; see CPLR 203[d] ). Thus, to this extent, defendant's claim survived.

Commingling Portion of Income Produced By Corpus Does Not Transmute Corpus Which Was Never commingled

In Chernoff v Chernoff, 2006 WL 1913018 (N.Y.A.D. 3 Dept) the Appellate Division held that Supreme Court “miscalculated child support in consideration of the standard of living of the child during the marriage and because defendant's income will "be considerably reduced by the equitable distribution award," it limited child support to 17% of the first $80,000 of defendant's income. The parties had combined parental income for child support purposes of at least $118,508. The statute requires the trial court to determine the amount of support on the combined income above $80,000 ( Domestic Relations Law § 240[1-b][c][3] ) by application of the subparagraph (f) factors "and/or the child support percentage." As the record was incomplete as to these factors and Supreme Court erroneously limited the child support calculation to the first $80,000 of defendant's income it remitted for recalculation of child support. The Appellate Division found that defendant entered the 19-year marriage owning, among other things, his residence on Long Island, three rental properties (Lazy Cow, Long Beach and a parking lot) and stocks inherited from his mother; the stocks and the Lazy Cow property were still titled in defendant's name; defendant sold the parking lot approximately six to eight years prior to the divorce action and received $150,000, which he invested in four mortgages in his own name; the Long Beach building was sold shortly after the divorce action was commenced and defendant received $200,000 which netted him a $160,000 increase over his 1979 $40,000 investment in this property; and defendant had deposited income received from these assets in four bank accounts, in his name alone, from which accounts he had frequently withdrawn funds that were then commingled with plaintiff's funds in a bank account from which the parties paid their expenses. Supreme Court held that because the income from these assets had been commingled and because plaintiff had contributed services as a wife and homemaker and defendant produced no paper trail for the $73,000 sum by which the mortgages exceeded the $150,000 sale price of the parking lot, these increases in value ($73,000 and $160,000) represented marital property and awarded plaintiff 50% of the four mortgages and 50% of the four bank accounts (total to plaintiff--$119,025.34). The Appellate Division reversed holding that this award was erroneous because commingling the corpus with marital funds transmutes the separate property into marital property for purposes of equitable distribution but commingling only a portion of the income produced by the corpus does not transmute the corpus which has never been commingled. Furthermore, the lack of a paper trail concerning the source of the funds invested in the four mortgages was not alone, fatal to defendant's claim. Defendant documented his claim that the proceeds from the sale of the parking lot were invested in the mortgages in his own name alone. The evidence showed no source other than defendant's separate property for these investments and plaintiff acknowledged this property to be defendant's separate property. The court also noted that "[w]hen a nontitled spouse's claim to appreciation in the other spouse's separate property is predicated solely on the nontitled spouse's indirect contributions, some nexus between the titled spouse's active efforts and the appreciation in the separate asset is required" (citing Hartog v. Hartog, 85 N.Y.2d 36, 46 [1995] ). There was not a scintilla of evidence that the increase in value of defendant's property was due to any effort on his part or to anything other than passive market forces. Plaintiff, as the nontitled spouse, bore the burden of proof on this issue. Finally, there were two main items of marital property, the marital residence and an apartment house that the parties owned through their corporation. The marital residence was acquired by the parties, as tenants in common, prior to the marriage. Each contributed separate funds to the purchase and defendant contributed additional separate funds to pay off the purchase money mortgage (a total of $46,000). In addition, defendant contributed $25,000 of separate funds to the purchase of the apartment house. Supreme Court found that defendant made a gift of these funds to plaintiff and denied him a separate property credit. The Appellate Division disagreed and find that the record supports defendant receiving a credit in those amounts in the equitable distribution of these assets.

August 1, 2006

New Court Rules For Depositions, Ex Parte Temporary Restraining Orders and Decisions

The Chief Administrator of the Courts has adopted new rules which will take effect on October 1, 2006 which are designed to prevent abuses in taking of depositions (22 NYCRR Part 221), limit the circumstances under which attorneys may obtain ex parte temporary restraining orders (22 NYCRR 202.7), and compel judges to comply with the rule which requires them to determine motions within 60 days after final submission.

No objections may be made at a deposition unless they are permitted under CPLR 3115 (b) [Errors which might be obviated if made known promptly], CPLR 3115 (c) [Disqualification of person taking deposition] or CPLR 3115 (d) [Competency of witnesses or admissibility of testimony] and would be waived if not interposed. In addition, the objections must be in compliance with CPLR 3115(e). The answer must be given and the deposition must proceed subject to the objections and subject to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR. Every objection made during a deposition must be stated succinctly and framed so as not to suggest an answer to the deponent. In addition, if the questioning attorney requests it, the objection must include a clear statement as to any defect in form or other basis of error or irregularity. A deponent is required to answer all questions at a deposition, except when it is necessary to preserve a privilege or right of confidentiality, (to enforce a limitation set forth in an order of a court, or when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney may not direct a deponent not to answer except under such circumstances or as provided in CPLR 3115. Any refusal to answer or direction not to answer must be accompanied by a succinct and clear statement of the basis therefor. Before interrupting a deposition, an attorney must 'clearly and succinctly' state the reason for intervening. An attorney may not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of the rules and, in such event, the reason for the communication must be stated for the record succinctly and clearly.

Another new rule (22 NYCRR 202.7) prevents a party from seeking an ex parte temporary restraining order absent a showing of significant prejudice. Under the rule, judges are barred from granting restraining orders unless a party demonstrates a significant reason why an adversary must not know of the application in advance. Where a party can not demonstrate significant prejudice to justify obtaining an ex parte order, the attorney’s must advise their adversaries of the time and place they will be asking for a restraining order. The rule does not specify how much advance notice will be required but provides that it must be 'sufficient' to allow opposition.

Section 202.8(h) of the Uniform Civil Rules for the Supreme and County Courts dealing with the Procedures for Pending Motions in the Supreme Court has been repealed and replaced with a new section 202.8(h) which now places the burden on the Court Administrators to notify a judge that 60 days has elapsed after final submission of a motion and there is no record that the motion has been resolved. The former rule placed the burden on the attorney for the movant to notify the judge by letter of this fact.

Child Support Award Unjust and Inappropriate

In Calian v Calian, 814 N.Y.S.2d 649 (2d Dept. 2006) the partes had joint custody of their three children. In their stipulation determining the issue of parental access to the children, the parties agreed that a comparison of the amount of time each parent had physical custody of the children would not be used in a future hearing determining child support. The Appellate Division noted that by so stipulating, the parties, in effect, agreed to employ a method which potentially would have yielded a child support award deviating from what the basic child support obligation would have been under the Child Support Standards Act. It found that the stipulation failed to include the provisions required, pursuant to Domestic Relations Law § 240(1)(b), (h), when a stipulation deviates from the basic child support obligation, and that the Supreme Court properly found the relevant provisions invalid and, in effect, set that part of the Stipulation aside and applied the CSSA to determine the issue of child support. While the mother correctly pointed out that the requisite language was included in the original divorce stipulation, that stipulation was superseded by an intervening order modifying the divorce judgment and stipulation to comply with the CSSA. Upon setting aside that part of the Stipulation that deviated from the CSSA, the court properly determined that the defendant was the primary custodial parent. The Court found that the basic child support obligation was unjust and inappropriate under the circumstances of the case, even after the Supreme Court capped the combined parental income at $80,000, and deleted the award of $4,640 per year substituting a provision directing the plaintiff to pay basic child support in the sum of $300 per year.

New York Loses Continuing Jurisdiction to Enforce Support Order Modified By Another State

In Catalano v. Catalano, 27 A.D.3d 734, 812 N.Y.S.2d 616, 2006 WL [2d Dept.2006] following the parties' divorce in 1990, the mother relocated with the children to New Jersey, while the father re-located to Florida. Orders of the Family Court in 1999, and 2000, directed the father to pay for the support of the parties' three children. In June 2002 the parties' older son relocated to Florida to reside with the father. An order of the New Jersey Superior Court in 2004, terminated the New York support orders with regard to that son effective June 2002. The Appellate Division held that where a child support order issued by a tribunal of this state is modified by a tribunal of another state pursuant to the Uniform Interstate Family Support Act, this state loses continuing exclusive jurisdiction with regard to prospective enforcement of the order .The Family Court found that, since the New Jersey order dated March 12, 2004, terminated the father's support obligation as to one of the children effective June 2002, the court lost continuing, exclusive jurisdiction over the enforcement of the prior New York orders as of June 2002. However, this state may enforce the order that was modified by another state's tribunal, as to amounts accruing before the out-of-state modification (see Family Ct. Act 580-205[c][1] ). The New Jersey order modifying the New York order was dated March 14, 2004, and the court erred in dismissing the violation petition to the extent it sought arrears which accrued before that date.

Key Facts Deemed Admitted Where Father Did Not Controvert Them in Affidavit.

In Matter of Giliya v. Warren, 2006 WL 1544517 (N.Y.A.D. 2 Dept.) affter the mother commenced a proceeding for an upward modification of the father's child support obligation, the parties entered into a stipulation of settlement which provided for the father to pay for certain educational needs of their child, and for the mother's application for an award of an attorney's fee to be determined upon submission of affidavits and documents, without a hearing. The Support Magistrate found that, although the mother's attorney had provided skillful representation that contributed to a successful resolution of the matter, the mother failed to provide adequate proof in support of her allegation that the father had substantial assets or to establish the true extent of her own income. The Appellate Division disagreed. It found that in support of her application, the mother submitted an affidavit and documentary evidence, including the first pages of relevant individual and corporate tax returns, which showed that she had a negative net worth and had not been steadily employed since mid-2001, while the father had a net worth of well over $500,000 and reported gross annual income of about $50,000. In opposition, the father did not deny the key facts alleged by the mother concerning the parties' respective financial circumstances, but contended that the mother's unemployment was voluntary and that her income prior to 2001 had been comparable to his own. The Appellate Division held that since the father did not controvert the key facts alleged in the application concerning the parties' financial circumstances, those facts are deemed admitted. It held that in view of the wide disparity in the parties' financial circumstances, the Family Court improvidently exercised its discretion in denying any award of an attorney's fee to the mother. Taking into account the amount already paid by the mother, if found that an award of an attorney's fee to the mother's counsel of $10,000, plus disbursements $2,852, was warranted.

July 17, 2006

New Uncontested Divorce Packet

 The Unified Court System’s has a new Uncontested Divorce Packet for New Yorkers seeking an uncontested divorce without the assistance of an attorney. The comprehensive new packet, announced May 6, 2006 by Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman, is designed to simplify the complex legal process for self-represented litigants seeking uncontested divorces that do not involve children. It features user-friendly graphics and design with plain language step-by-step instructions and practice forms. The Uncontested Divorce Packet was created by Administrative Judge for Matrimonial Matters Jacqueline W. Silbermann, in collaboration with Deputy Chief Administrative Judge for Justice Initiatives Juanita Bing Newton, after recognizing the need for a more user-friendly resource for the large number of self-represented litigants seeking uncontested divorces. The packet, which includes the instruction booklet with practice forms, and a set of the official court forms for filing the divorce, are available at no charge in the New York Supreme Court in every county. The packet can also be accessed online from www.nycourts.gov/litigants/divorce or www.nycourthelp.gov. A packet for uncontested divorces that involve children is under development.

Court of Appeals Adopts Doctrine of Equitable Estoppel

In Matter of Shondel J. v. Mark D., 40, the Court of Appeals affirmed the trial court and the Appellate Division, Second Department, in directing a man to pay child support for a child he did not father. The Court based its determination upon the doctrine of 'equity paternity,' or paternity by estoppel. The Court of Appeals focused on the best interests of the child, stating in an opinion by Judge Albert M. Rosenblatt for the 5-2 majority, that :. 'In allowing a court to declare paternity irrespective of biological fatherhood, the Legislature made a deliberate policy choice that speaks directly to the case before us,'. 'The potential damage to a child's psyche caused by suddenly ending established parental support need only be stated to be appreciated. Cutting off that support, whether emotional or financial, may leave the child in a worse position than if that support had never been given.' The Court of Appeals found that the Respondent had in every way held himself out to be the child's father, including buying her Christmas and birthday presents, referring to himself as 'daddy,' introducing her to his family, and regularly communicating with her. Judge George Bundy Smith dissented in an opinion joined by Judge Robert S. Smith. The dissent objected to the application of estoppel against a 'completely innocent litigant' who was misled by the child's mother. The mother swore in Family Court that she had not had sexual relations during the relevant time span with anyone other than Mark, an assertion that DNA analysis proved was a lie. They said the decision rewards people who make no effort to nurture or support a child who may be their own while penalizing people like Mark who immediately assumed responsibility.

Court of Appeals Holds New York State Constitution Does Not Grant Right to Marry to Same Sex Couples

In Hernandez v. Robles, 86, Samuels v. NYS Dept. of Health, 87, Kane v. Marsolais, 88, and Seymour v. Holcomb, 89, a 4-2 decision the Court of Appeals affirmed four Appellate Division decisions that had declined to extend the right to marry to same-sex couples. The opinion written by Judge Robert S. Smith found that a rational basis existed for the Legislature's decision to limit marriage to opposite-sex couples when it enacted the Domestic Relations Law in 1909, and whether same-sex marriage, as opposed to simply marriage itself, constitutes a fundamental right. He stated that there are at least two grounds that rationally support the limitation on marriage that the Legislature has enacted. First, the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Second, the Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.' Such rational grounds were sufficient to uphold the Appellate Division decisions, as the plaintiffs failed to establish grounds for a heightened level of scrutiny, such as a fundamental right under the state Constitution to same-sex marriage. Chief Judge Judith S. Kaye wrote a lengthy dissent, which was joined by Judge Carmen Beauchamp Ciparick.

Public Policy Enunciated in DRL § 237 Embodies Level Playing Field

In Kessler v. Kessler, 2004-04773, an action for a divorce and ancillary relief, the wife sought to rescind or reform a prenuptial agreement on the grounds, inter alia, that she entered it under duress and that it was unconscionable. Supreme Court denied her request but held that the portion of the agreement waiving the right to seek an award of attorney's fees for the equitable distribution portion of their divorce case was unconscionable and unenforceable in light of Domestic Relations Law §237(a). The Second Department affirmed, holding that DRL § 237 “embodies a public policy determination by the Legislature that matrimonial matters are best resolved by parties operating on a level playing field”. However, it indicated that “not every agreement waiving the right to seek an award of an attorney's fee should be set aside. Rather, careful and individualized scrutiny is called for. The determination as to whether or not a provision waiving the right to seek an award of an attorney's fee is enforceable must be made on a case-by-case basis after weighing the competing public policy interests in light of all relevant facts and circumstances both at the time the agreement was entered and at the time it is to be enforced. If, upon such an inquiry, the court determines that enforcement of the provision would preclude the non-monied spouse from carrying on or defending a matrimonial action or proceeding as justice requires, the provision may be held unenforceable. Also relevant to such a determination is the conduct of the parties over the course of the matrimonial action. Such a determination is frequently best made at the conclusion of the action. However, because an attorney's fee is authorized when needed to carry on or defend an action, it may be necessary to make such a determination at an earlier point in the litigation.” To the extent that such an award would otherwise be subject to the waiver contained in the prenuptial agreement, the Supreme Court, after careful and individualized scrutiny of the need for the same, may award the wife an attorney's fee as justice requires to enable her to carry on or defend issues of equitable distribution.

Here, the agreement provided that "each party shall have no right or claim against the other for support, alimony, attorney fees or costs." The Appellate Division found that there was a great disparity in the parties income and assets and the prenuptial agreement reflected no consideration given to the specific facts and circumstances of the parties as they related to an award of an attorney's fee. Although the wife came into the marriage with minimal assets compared to the husband, the agreement provided for a blanket waiver of the right to seek an award of an attorney's fee, regardless of the length of the marriage or what occurred therein. The agreement did not provide for any consideration to be given “at the time of the matrimonial action to the various issues relevant to an award of an attorney's fee, including, inter alia, the quantity and complexity of the issues to be litigated, and the relative means of the parties to do so”. The court noted that matters related to child support and child custody were not controlled by the agreement, nor were the fees incurred by the wife in her unsuccessful effort to rescind or reform the agreement, which are not compensable pursuant to DRL § 237. The court found that the matrimonial scales were skewed in favor of the husband's heavier wallet. The wealthier spouse should not be permitted, by the same agreement, to both opt out of the statutory scheme concerning an award of an attorney's fee and prevent an effective assessment of how important an award of an attorney's fee may be. Moreover, whether or not either party here has improperly prolonged the litigation, or created needless litigation, etc., should also be considered by the court in determining the amount, if any, of an award of an attorney's fee to the wife.

July 3, 2006

Wife Liable For half of Taxes Where She Shared Equally in Benefits of Failure to Pay

In Conway v Conway, 15 N.Y.S.2d 233 (2d Dept.,2006) an action for a divorce, the Supreme Court awarded the wife one-half of $71,273 representing her share of the plaintiff's business, directed her to pay one-half of the parties' tax obligation, and directed her to pay 75% of the plaintiff's attorney and expert fees. The Appellate Division affirmed. It held that the Supreme Court correctly determined that the defendant was liable for one-half of the parties' tax obligation arising out of the failure to pay proper income taxes during their marriage. Since the defendant shared equally in the benefits derived from the failure to pay, she had to share in the financial liability arising out of tax liability.

Improper to Alter Custodial Arrangement Automatically upon Happening of Specified Future Event

In Brzozowski v Brzozowski, --- N.Y.S.2d ----, 2006 WL 1643384 (N.Y.A.D. 2 Dept.) the mother appealed from an order of the Family Court, which , after a hearing, denied her petition to relocate with the child to Westport, Connecticut, and directed that in the event of her relocation with the child to Westport, Connecticut, the judgment of divorce and stipulation of settlement shall be modified so that physical custody is transferred to the father. The Appellate Division modified the order and vacated the direction that "[in] the event the mother relocates to Westport, Connecticut, then [physical] custody of the child .. shall belong with the father, forthwith." It held that this direction, while possibly never taking effect, impermissibly purported to alter the parties' custodial arrangement automatically upon the happening of a specified future event without taking into account the child's best interests at that time.

Oral Modification of Agreement Permitted Despite Contract Clause Prohibiting Oral Modification

In Healy v Williams, --- N.Y.S.2d ----, 2006 WL 1644138 (N.Y.A.D. 2 Dept.) the parties entered into a stipulation in 1992 pursuant to which the defendant father was to pay $243 per week for child support for their two children, subject to cost-of-living adjustments. The Stipulation included a proscription against oral modification of its terms. It awarded the plaintiff exclusive use and occupancy of the marital home until the occurrence of a terminating event. One of the enumerated terminating events was the plaintiff's cohabitation with an unrelated male for 30 consecutive days. In or prior to August 1993, the plaintiff resided with an unrelated male in the former marital residence (potentially triggering a terminating event). The trial court found that in September 1993, the parties orally agreed to suspend the defendant's obligation to pay child support of $243 per week and reduced the payment to $300 per month per child. The trial court credited the defendant's testimony that the plaintiff received consideration from the defendant based on his agreement to defer his right to terminate her exclusive use and occupancy and to compel the immediate sale of the marital premises. In 1996 the plaintiff, who had since remarried, purchased the defendant's equity in the marital premises for a sum that was considerably less than fair market value. The court accepted the defendant's testimony which established that he accepted the lesser sum because the plaintiff agreed to extinguish the balance due on the suspended child support obligation and to permanently fix his obligation at the sum of $300 per month per child. In 1997, the older child began to reside with the defendant. Thereafter, the defendant paid the plaintiff $300 per month for the one child residing with her. From May 2000 to July 2002, each check for $300 also contained the notation "child support balance 0." The plaintiff endorsed these checks during that two-year period, before this enforcement proceeding was commenced. The Appellate Division affirmed. It stated that as a general rule, where a contract has a provision which explicitly prohibits oral modification, such clause is afforded great deference. Where such a clause is present, one claiming that provisions of the agreement were orally modified can only prevail upon proof that there was an oral modification and that the performance of the modification was not merely executory, but had actually been performed in a manner which was unequivocally referable to that oral modification. It agreed with the trial court that the defendant met that burden. The Appellate Division found that the trial court properly credited the defendant's testimony over that of the plaintiff. According to the defendant's testimony, in exchange for the reduction of his child support obligation, he had twice waived his right, pursuant to the Stipulation, to force a sale of the marital home, and then agreed to a buyout payment that was little more than half the value of his interest in the house. Additionally the court heard proof that one of the children resided with the defendant, the agreed level of child support was accepted without objection for five years, and during a portion of this time written notations on the child support checks indicated that no balance was due on the defendant's child support obligation. This testimony was sufficient to support the court's conclusion that the defendant had provided valuable consideration in exchange for the modification. It supported a finding that there had been partial performance and, as the parties' conduct conformed to the terms of the alleged oral agreement, and the record did not indicate other motivations for either party's conduct, that the performance was unequivocally referable to the oral modification.

Hearing of Objections in Family Court is Equivalent of Appellate Review. Failure to Preserve Issue By Failing to Object.

In Matter of Musarra v Musarra, 28 A.D.3d 668, 814 N.Y.S.2d 657 (2d Dept,2006)the Support Magistrate found that the father's failure to pay support in July and October 2003 was willful and awarded the mother an attorney's fee of $10,019.22. The father did not file an objection to the Support Magistrate's finding that he willfully violated the support provisions of the parties' judgment of divorce. The Appellate Division noted that by failing to object to the finding the father failed to preserve the willfulness issue for appellate review. The hearing of objections in Family Court is the equivalent of an appellate review. (Citing Matter of Redmond v. Easy, 18 A.D.3d 283, 794 N.Y.S.2d 643). The Appellate Court also held that once a finding of willfulness was made, the court was required by Family Court Act § 438[b], to award an attorney's fee to the mother. Factors to be considered in computing an appropriate award of an attorney's fee include the parties' ability to pay, the nature and extent of the services rendered, the complexity of the issues involved, and the reasonableness of the fee under all of the circumstances. It reduced the award to $3,826, which constituted the attorney's fee incurred with respect to the violation petition.

Recipient May Not Impliedly Waive Unpaid Child Support. Change in Custody Insufficient to Constitute A Waiver

In Matter of Duffy v Duffy --- N.Y.S.2d ----, 2006 WL 1544517 (N.Y.A.D. 2 Dept.), 2006 N.Y. Slip Op. 04421 the parties separation agreement, which was incorporated into a judgment of divorce, provided for joint legal custody, primary physical custody of both children to petitioner and biweekly child support payable by respondent in the amount of $424. In June 2002, the parties informally transferred primary physical custody of their son to respondent. Respondent began paying petitioner $93 biweekly, which he contended represented his support obligation as a result of the change in custody. In March 2004, respondent commenced a support modification proceeding in Family Court, resulting in a modification of the judgment of divorce. Petitioner then commenced a proceeding alleging a violation of the divorce judgment and seeking a money judgment for arrears. The Support Magistrate found that respondent willfully violated the judgment from June 1, 2002 through March 4, 2004, established arrears for that time period and awarded counsel fees to petitioner. The Appellate Division held that Family Court properly determined that respondent willfully violated the child support portion of the divorce judgment. Without an express waiver by petitioner of her right to receive the amount of child support recited in the divorce judgment, respondent was required to pay the court-ordered amount; a support recipient may not impliedly "waive the right to unpaid child support simply by failing to demand payment or seek enforcement of support obligations". The change in custody of one child was insufficient to constitute a waiver of child support. Therefore, respondent was required to file a modification petition if he desired to lower his child support payments. By unilaterally reducing the amount of support he paid, absent an express agreement with petitioner, respondent violated the divorce judgment. Petitioner proved that respondent did not pay as required but was financially capable of making those payments, thus establishing that the violation was willful.

June 16, 2006

Despite Father’s Defiance of Court Orders Appellate Division Bends over Backward in Best Interest of Child

In Zafran v Zafran --- N.Y.S.2d ----, 2006 WL 1085381 (N.Y.A.D. 2 Dept.) in an order dated October 9, 2002 (affirmed Zafran v. Zafran, 306 A.D.2d 468, 761 N.Y.S.2d 317), the Supreme Court awarded custody of the parties' daughter to the defendant mother, based on a finding that the plaintiff father was responsible for alienating the parties' two sons from the mother. The order dated October 9, 2002, also implemented a case management plan, mandating family therapy conducted by a court-appointed mental health professional to serve as case manager, and awarded the father temporary visitation with the daughter, supervised by the case manager, pending the court's final determination on the issue of visitation, which was the subject of a hearing. At the hearing, it became apparent that the father had failed to cooperate with the court-ordered case management plan, which was designed to modify his alienating behavior so that he could resume unsupervised visitation with the daughter. The father had sought to manipulate the process to his advantage by, inter alia, surreptitiously tape recording his therapy sessions with the case manager. The visitation hearing was suspended to permit the court and the parties to address the issues presented by the father's secret taping. As a final step before resuming and completing the hearing, the Supreme Court, in an order dated July 16, 2004, directed the father to submit to a psychiatric evaluation, to "update the [c]ourt's forensics in this matter so that the visitation herein could be facilitated." The father did not undergo a psychiatric evaluation and stated through counsel in open court that he had no intention of submitting to a psychiatric evaluation or participating in the case management plan. The mother then moved, inter alia, to hold the father in contempt for failing to comply with the orders dated October 9, 2002, and July 16, 2004, and to suspend all visitation between the father and daughter pending further order of the Supreme Court. In an order dated February 4, 2005, the Supreme Court denied the relief requested by the mother, and instead terminated all visitation and contact between the father and the daughter. The Appellate Division found that the Supreme Court reasonably perceived a risk that the father would alienate the parties' daughter from the mother as he had done with the parties' sons. Moreover, by refusing to cooperate with the court-ordered case management plan, the father arguably forfeited his visitation rights. The Appellate Division did not agree that termination of visitation and contact between the father and the daughter was the appropriate response to the father's recalcitrance. "We are especially mindful that "[v]isitation is a joint right of the noncustodial parent and of the child" \*\*\* and that "[i]t is generally in the best interest of the child for a rapport to be established with the noncustodial parent" \*\*\*. The record did not convince it that the result reached by the Supreme Court, which has the effect of terminating the daughter's relationship with her father, is in the daughter's best interest. It suggested that the Supreme Court revisit the issue of contempt, either in the context of a renewed motion by the mother or on its own motion. "Since the daughter's interests, and not just those of the father, are at stake, the father's refusal to cooperate with the Supreme Court's case management plan, including his express, open-court statements that he had no intention of complying with the court's orders, cannot be tolerated." The Court rejected the fathers attempt to justify his defiance of court orders by arguing that those orders had the impermissible effect of conditioning his right to apply for visitation with the daughter upon his participation in therapy. On the prior appeal it had held that "since the father's right to visitation was not made contingent on his participation in therapy, there is no improper interference with his rights to visitation". The Supreme Court's subsequent order dated July 16, 2004, directed the father to submit to a psychiatric evaluation in order to "update the [c]ourt's forensics" and, thus, facilitate the court's ultimate determination of the visitation issue, a measure which clearly did not constitute an impermissible requirement of participation in therapy as a condition to applying for visitation. The therapy requirement was imposed as a component of the court-ordered program of temporary visitation, which is perfectly permissible. Because the therapy requirement was already properly in place, insisting that the father comply with that requirement does not impose a condition to an application for visitation. Any other rule would leave the Supreme Court powerless to enforce its legitimate directive that the father participate in therapy as part of a visitation program; the father would be entitled to violate the therapy requirement at will, and thus unilaterally remove the issue of therapy from the court's consideration upon any future reapplication for visitation. Moreover, the rationale underlying the rule against conditioning visitation upon participation in therapy is that a court may not properly delegate to mental health professionals the ultimate determination of whether a parent will be awarded visitation rights. It specifically directed the Supreme Court to exercise its own discretion to determine whether and when the suspension of the father's visitation rights should be lifted. That determination will not be left to the judgment of any mental health professional, but will be based upon the Supreme Court's findings and conclusions.

UIFSA is Retroactive

In Matter of Strom v Lomtevas, --- N.Y.S.2d ----, 2006 WL 1085871 (N.Y.A.D. 2 Dept.), the parties were divorced in New York in November 1987 pursuant to a resettled judgment of divorce which provided that the father was to pay the sum of $50 per week in child support. The resettled judgment additionally provided that "the Supreme Court retains jurisdiction with respect to custody, alimony, support and visitation as it finds appropriate under the circumstances and the Family Court shall not have concurrent jurisdiction." The mother, who subsequently remarried and relocated to Germany, filed a petition on October 8, 2002, inter alia, to enforce the support provision of the resettled judgment of divorce under the Uniform Interstate Family Support Act, article 5-B of the Family Court Act. The Family Court received the petition pursuant to UIFSA. The Family Court granted the father's motion to dismiss the petition, finding that pursuant to the resettled judgment of divorce, it did not have subject matter jurisdiction. The Appellate Division reversed. The Appellate Division reversed. It noted that in 1997, when New York adopted the UIFSA, and as originally enacted, the UIFSA only applied prospectively. In 1998, however, the Legislature amended Family Court Act 580-904 to apply the UIFSA retroactively to "clarify that actions and pleadings filed and orders issued prior to the effective date of UIFSA will be governed by UIFSA. Although the parties' resettled judgment of divorce, which vested exclusive enforcement jurisdiction with the Supreme Court, was issued before the effective date of the UIFSA, the UIFSA and Family Ct Act 580-102 now governed the resettled judgment's provision for child support with jurisdiction established in the Family Court. Since the Family Court is the exclusive UIFSA enforcement tribunal , the provision of the 1987 resettled judgment of divorce, which vested the Supreme Court with exclusive jurisdiction, was inconsistent with the retroactively-applied State law and was rendered null and void. The Appellate Division reinstated the petition and remitted the matter to the Family Court for further proceedings on the petition.

Adoptive Mother Who Surrenders Child is Liable for Child Support

In Matter of Greene County DSS o/b/o Ward v. Ward --- N.Y.S.2d ----, 2006 WL 1169127 (N.Y.A.D. 3 Dept.), respondent, who was divorced in 1999, sought to adopt a child with special needs and did so in June 2002. While the child's physical and psychological disabilities initially showed some improvement, by June 2003 the child's behavior had deteriorated to such an extent that respondent was unable to cope with the situation. As a consequence,respondent sought and obtained a judicial surrender of the child. Petitioner thereafter a proceeding seeking an order of support for the child. Family Court granted petitioner's application. The Appellate Division affirmed. Family Ct Act 413 provides, in pertinent part, that "the parents of a child under the age of [21] years are chargeable with the support of such child and, if possessed of sufficient means or able to earn such means, shall be required to pay for child support a fair and reasonable sum as the court may determine" (Family Ct Act 413[1][a] ). A "parent," in turn, is defined as "an individual who is the biological parent, stepparent or adoptive parent of a child" (18 NYCRR 422.1[a] ). Social Services Law 398(6)(f) provides a narrow exception to the mandate set forth in Family Ct Act 413, stating that "the acceptance by the social services official of a surrender of a child born out of wedlock from the mother or father of such child shall relieve the parent executing such surrender from any and all liability for the support of such child." Respondent contended that because she was unwed and the child was born out of wedlock, she should be relieved of her child support obligation under the terms of Social Services Law 398(6)(f). The Appellate Division disagreed. It held that the plain language of Social Services Law 398(6)(f) makes clear that the exception to a parent's obligation of support applies to children born out of wedlock and surrendered by the mother or father of such children. And while Social Services Law 398(6)(f) admittedly does not so expressly state, it is evident from both the use of the phrase "the mother or father" and the context in which such phrase is employed that "the parent executing such surrender" refers to the "biological parent" and not the sweeping definition of "parent" contained in 18 NYCRR 422.1(a). Such interpretation was supported by the legislative history underlying Social Services Law 398(6)(f). Had the Legislature wished to extend the exception set forth in Social Services Law 398(6)(f) beyond the biological parents of a child born out of wedlock, it would have so stated.

June 1, 2006

All Marital Debt Distributed to Husband Who Dissipated Assets. Wife Awarded Permanent Maintenance.

In Brzuszkiewicz v Brzuszkiewicz, --- N.Y.S.2d ----, 2006 WL 870934 (N.Y.A.D. 3 Dept.) the parties had been married for 23 years and had three children, only one of whom was under 21 years of age. Supreme Court granted plaintiff a divorce and ordered an equal division of the parties' pensions, distributed all other marital assets to plaintiff and all marital debt to defendant, and directed defendant to pay plaintiff permanent maintenance in the amount of $300 per month. The Appellate Division affirmed. It found that in addition to the length of the parties' marriage and their disparate incomes, the primary factor in Supreme Court's distribution was its finding that defendant had wastefully dissipated virtually all of the marital assets as well as plaintiff's separate property. Defendant mismanaged his rental property so that its income never exceeded it expenses, incurred excessive credit card debt and invested in a business that resulted in no economic benefit to the parties. As a result of this dissipation, the marital residence was the only remaining asset of significant value. Although valued at $96,000, the residence had a net equity of only $16,000 to $24,000 because defendant had recently extracted most of its value through refinancing to pay off his credit card. In addition, the parties had outstanding debts in excess of $90,000 as well as a large deficiency judgment against them due to foreclosure of a mortgage on defendant's rental property. The court rejected defendant's contention that Supreme Court abused it discretion by awarding plaintiff nondurational maintenance. It considered the relevant statutory factors, giving particular emphasis to the disparity between the parties' incomes, plaintiff's age, her lack of assets and defendant's dissipation of assets. Defendant earned $55,000 per year and his income would likely increase before he retires. Plaintiff received only $22,000 per year from her employment and had little prospect of any significant increase before she retires, given that she was 57 years of age at the time of trial and had limited earning capacity due to her arthritis and severe hearing loss. Plaintiff's income from her pension and Social Security after retirement would be less than her current earnings, which are already insufficient to meet her modest monthly expenses. These factors all militated in favor of an award of permanent maintenance. Supreme Court also reasoned that defendant's earnings would increase and his debts would decrease in the future. Thus, the court appropriately balanced plaintiff's needs with defendant's ability to pay.

Abuse of Discretion to Deny Disclosure Which will Assist in Proving Case

In Siosky v Sinosky, 809 N.Y.S.2d 743 (4th Dept.2006) plaintiff sought an order terminating his maintenance obligation. Supreme Court denied plaintiff's application to depose defendant, and granted defendant's motion for dismissal. The Appellate Division reversed. It held that the court abused its discretion in denying his application to depose defendant. "Pursuant to CPLR 3101(a), '[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof' " (Matter of New York County DES Litig., 171 A.D.2d 119, 122-123, 575 N.Y.S.2d 19). "This provision has been liberally construed to require disclosure where the matter sought will 'assist preparation for trial by sharpening the issues and reducing delay and prolixity.' Thus, restricted only by a test for materiality 'of usefulness and reason,' pretrial discovery is to be encouraged". While a court has broad discretion in controlling discovery and disclosure, " 'a clear abuse of discretion will prompt appellate action'. The Appellate Division found that there was a clear abuse of discretion because the plaintiff had established that the opportunity to depose the defendant would likely have assisted him in proving his case.

Attorney Sanctioned for Making Materially False Factual Statement to the Court

In Rogovin v Rogovin, 27 A.D.3d 233, 812 N.Y.S.2d 41( 1st Dept, 2006) the Appellate Division held that Petitioner's attorney's failure in the custody proceeding to inform Family Court that the very relief he was seeking therein, an injunction against respondent's removing the subject child from the State of New York, had been denied, both by Supreme Court and this Court, in this Supreme Court habeas corpus proceeding he had also initiated on behalf of petitioner, was a sanctionable materially false factual statement. The omission was compounded by the attorney's assertion in opposition to the Law Guardian's motion for sanctions that he had verbally informed Family Court of the prior applications, which assertion was proven false by the transcript of the Family Court proceedings submitted with the Law Guardian's reply. The intent to protect a child does not justify a lack of candor with the court. It found no basis exists to disqualify the Law Guardian, who, having determined that the child was unimpaired in accordance with local standards, properly acted as the child's advocate in urging retention of the custodial status quo, rather than as an aide to the court in determining the child's best interests (citing Family Ct. Act § 241; see Matter of Albanese v. Lee, 272 A.D.2d 81, 707 N.Y.S.2d 171 [2000]; Law Guardian Definitions and Standards, State of New York Unified Court System, Statewide Administrative Judge for Matrimonial Matters). Argument from the Law Guardian in support of the child's stated preferences is to be expected. The Appellate Division also found that the record filed by petitioner's attorney was so deficient as to amount to frivolous conduct.

Payment of Marital Debts is Not Waste of Assets

In Rand v Rand, --- N.Y.S.2d ----, 2006 WL 1491960 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court properly concluded that the pre-tax $438,000 withdrawn by the plaintiff from his TIAA-CREF pension fund did not constitute waste or a dissipation of the parties' assets. The record supported the Supreme Court's finding that the plaintiff used the funds to pay legitimate expenses, much of which took the form of marital debts.

No Recoupment of Maintenance . Incomplete Education Is Not Enhanced Earning Capacity.

In Fruchter v Fruchter, --- N.Y.S.2d ----, 2006 WL 1493623 (N.Y.A.D. 2 Dept.)the Appellate Division held that while a party in a matrimonial action may request the downward modification of a temporary child support award when that party can demonstrate financial hardship, such a downward modification may operate only prospectively. Thus, the plaintiff was not entitled to recoupment of payments previously made pursuant to the pendente lite order. It also found that the Supreme Court erred in appointing an appraiser to value the plaintiff's enhanced earning capacity arising from educational accomplishments and professional training acquired during the marriage, including his Masters of Business Administration (hereinafter MBA) and Certified Financial Analyst (hereinafter CFA) studies and his legal training and employment. It held that his legal training and employment were not marital property because he received his law degree before the marriage. It was undisputed that the plaintiff did not finish the required courses to obtain an MBA degree and did not take all three CFA examinations required to receive that certification. Thus, as his MBA and CFA studies were uncompleted, any enhanced earning capacity which may result upon completion of these studies would not constitute marital property. Accordingly, the plaintiff had no enhanced earning capacity subject to equitable distribution to be appraised.

May 16, 2006

Parties Can Not Confer Jurisdiction on Appellate Division or Family Court Support Magistrate

In Commissioner of Services a/a/o Campbell v Harris, -- N.Y.S.2d ----, 2006 WL 463254 (N.Y.A.D. 1 Dept.) the Department of Social Services, as assignee, filed a petition seeking an order of filiation. When they appeared in Family Court the parties stipulated on the record as follows: "IT IS HEREBY STIPULATED AND AGREED that this action and the issues therein be referred to the Hearing Examiner/Referee to hear and determine. All appeals of decisions made by the Hearing Examiner/Referee in their capacity as Referee shall be made to the Appellate Division. All issues of support are

still subject to the objection process." After the Support Magistrate adjudged Harris the father of the child another Support Magistrate entered an Order of Support. Harris filed an objection to both orders. Family Court sustained his objections because, inter alia, the Support Magistrate commenced the hearing without advising Harris of his right to counsel. Thereafter, the court vacated her order and remanded the matter for a new paternity hearing, having determined that she did not have jurisdiction to vacate the orders of the support magistrates because of the stipulation signed by Harris and Campbell whereby all appeals of decisions made by the Hearing Examiner/Referee "shall be made to the Appellate Division." The Appellate Division reversed on the law holding that family court lacked jurisdiction. It held that assuming arguendo that the provision of the order of filiation allowing objections "[to] be filed with this court" would not abrogate an agreement between the parties to forego the objection process, the stipulation was void as a stipulation to enlarge the appellate jurisdiction of the Court. The stipulation was problematic in its entirety since the parties' agreement to adjudication by a hearing examiner/referee at that time was enjoined by statute. The statute in effect as of 2003 precluded support magistrates from hearing, determining or granting any relief with respect to issues of contested paternity. Harris disputed paternity. The action therefore required a hearing before a judge. Although the parties purported to waive this right and stipulate to allow the action to proceed before a hearing examiner, they could not effectively do so since their stipulation was void and unenforceable under the Family Court Act (see Matter of Niblock v. Niblock, 181 A.D.2d 825 [1992] Nor could the parties stipulate to enlarge the Appellate Jurisdiction of the Appellate Division (see Matter of Shaw, 96 N.Y.2d 7 [2001] ).

No counsel Fee in Action to Set Aside Separation Agreement

In Fine v Fine, --- N.Y.S.2d ----, 2006 WL 406297 (N.Y.A.D. 2 Dept.) the parties entered into a stipulation of settlement of their matrimonial litigation. The stipulation of settlement was incorporated, but not merged, into the judgment of divorce entered July 21, 1999. As the unmerged stipulation of settlement survived as a separate contract, the plaintiff commenced the instant action to set it aside on the ground that it was fraudulently induced by the defendant's alleged misrepresentation of his income. The complaint sought no relief under the judgment of divorce. The Supreme Court granted that branch of the plaintiff's motion which was for an attorney's fee to the extent of awarding her a fee in the sum of $5,000, pursuant to Domestic Relations Law 237(b). The award was in addition to an earlier $3,500 award of an attorney's fee to the plaintiff. The Appellate Division reversed. Domestic Relations Law 237(b) permits a court to award an attorney's fee "[u]pon any application to annul or modify an order or judgment for alimony ... or maintenance." The Supreme Court's reliance upon Conrad v. Conrad (64 A.D.2d 751, 406 N.Y.S.2d 636), in awarding the fee here, was misplaced, as Conrad affirmed an award of an attorney's fee where the parties' separation agreement merged into the judgment of divorce, thereby triggering the discretionary provisions of Domestic Relations Law 237(b). Here, relief is sought only as to the parties' stipulation of settlement, which did not merge into the judgment. A plenary action to vacate a stipulation of settlement on the basis of fraud, is not a matrimonial action. Accordingly, the Supreme Court erred in awarding the plaintiff an attorney's fee under Domestic Relations Law 237(b). An attorney's fee may be awarded when a party seeks by a plenary action to enforce a separation agreement or provisions of a judgment of divorce. However, the plaintiff, by seeking to set aside the parties' stipulation by a plenary action, was not entitled to an attorney's fee under Domestic Relations Law 237(b).

Application of Formula Amount to Income in Excess of $80,000 Requires Finding that Departure from Statutory Percentage not warranted.

In Cohen v Cohen --- N.Y.S.2d ----, 2006 WL 870800 (N.Y.A.D. 3 Dept.) the parties were married in June 1995 and had one child. In March 2002, plaintiff commenced the action for a divorce. Supreme Court entered a judgment of divorce directing defendant to pay $2,000 in spousal maintenance per month for six years and $2,059.98 in child support per month. The Appellate Division agreed with defendant that Supreme Court erred in applying the statutory percentage to defendant's entire income without some record articulation of the court's reasoning. It is well settled that where the court opts to apply the full child support percentage [to annual income in excess of $80,000], the court's reasoning must evidence careful consideration of the parties' circumstances and reflect a finding that departure from the statutory percentage was not warranted. Supreme Court set defendant's annual income at $145,410 and, without further explanation, simply multiplied that amount by the statutory percentage (17%) to obtain a child support award in the amount of $2,059.98 per month. Further, while there may be evidence in the record to support the imputation of income to defendant beyond the widely varying accounts of his finances set forth by his expert at trial and in his sworn statements of net worth showing his annual income to be at most $85,000, Supreme Court did not delineate the sources of the income imputed to defendant or specify the amount assigned to each category. Similarly, although the court appeared to have imputed income to plaintiff in ruling that she would be liable for 40% of the child's unreimbursed medical expenses and day-care costs, the court did not specify the amount of that imputed income or take it into account in determining either of the parties' basic child support obligations. Supreme Court's decision was insufficiently detailed to permit the court to evaluate defendant's claim that the award of child support was excessive and the matter was remitted It directed that upon remittal, Supreme Court should set forth in detail the amounts and sources of the parties' actual and imputed income and, if the court determines that the statutory percentage should be applied to the total combined parental income in determining child support, articulate the factors that the court deems relevant to its determination, if that combined annual income exceeds $80,000. The issue of durational maintenance was also remitted for redetermination.

No Hearing Required Where Family Court Possessed Sufficient Information to Render Informed Determination

In Grassi v Grassi --- N.Y.S.2d ----, 2006 WL 862854 (N.Y.A.D. 2 Dept.) Family Court, without a hearing, granted sole custody of the parties' daughter to the father, denied the mother visitation with the daughter and, in effect, conditioned her further petition for supervised visitation upon her ability to demonstrate, among other things, that she maintained sobriety, regularly attended therapy sessions, and underwent a complete psychiatric in-depth extensive evaluation. The Appellate Division modified the order on the law by deleting the provision thereof, in effect, conditioning the mother's further petition for supervised visitation. It held that a parent seeking a change in custody is not automatically entitled to a hearing, but must make some evidentiary showing sufficient to warrant a hearing. The mother failed to make such a showing. In any event, the Family Court possessed sufficient information to render an informed determination on custody and visitation, without a hearing, consistent with the best interests of the child. The court presided over the parties' extensive court appearances, spanning approximately two years, and was intimately familiar with their situation, including the mother's repeated denial of her alcohol problem and the daughter's physical manifestations of her discomfort and anxiety on visitation days. The court conducted an in camera interview with the daughter and relied upon the reports of the Law Guardian and the Department of Probation. Accordingly, the court providently exercised its discretion in discontinuing the mother's supervised visitation with the daughter and declining to conduct a hearing on the issues of custody and visitation. However, it agreed with the mother's contention that it was improper for the Family Court to bar her from petitioning for visitation without first demonstrating "that she has maintained sobriety for a significant period of time; maintained regular therapy sessions; undergone a complete psychiatric in-depth extensive evaluation; and, if prescribed medication, she has complied and taken medication as directed". Although the court may, in appropriate circumstances, require a party to obtain counseling and treatment as a component of a custody or visitation order, it has no authority to compel a parent to undergo therapy as a condition to a future application for custody or visitation.

May 1, 2006

Counsel Now Required to Write a Letter to Court Where No Decision in 60 Days

22 N.Y.C.R.R. 202.8 (h) was amended to require counsel to advise the court by letter that 60 days have elapsed after a motion has been finally submitted or oral argument held, whichever was later, and no decision has been issued by the court. The letter must indicate the name and index number of the case and state: "Pursuant to section 202.8(h) of the Uniform Civil Rules for the Supreme and County Courts, please be advised that 60 days have elapsed after submission on (date) of the motion by (party) for (relief requested), and no decision has been issued." The letter may not contain any other substantive language. The letter requires no response.

Contingency Fees Barred in Any Matrimonial Action

In Ross v Delorenzo --- N.Y.S.2d ----, 2006 WL 1009642 (N.Y.A.D. 2 Dept.) the defendant hired the plaintiff to represent her in a divorce action and signed an hourly fee agreement. After discussing the case, the plaintiff concluded that, based on the short duration and alienated nature of the marriage and the dearth of marital property, the defendant was only entitled to nominal maintenance and was not entitled to equitable distribution. Based on the parties past business relationship the plaintiff decided to also interpose claims alleging an oral partnership and constructive trust and the parties signed a contingency fee agreement whereby the plaintiff would recover one third of all sums recovered on the partnership and constructive trust claims. The parties later executed a new hourly fee agreement that increased the plaintiff's hourly rate. According to the plaintiff, at some point during the course of the litigation he and the defendant agreed that he would accept $300,000 in full satisfaction of his fees if the matter settled for less than $1.8 million. After the matter was settled the parties stipulated to and the defendant thereafter remitted the sum of $200,000 to the plaintiff. When the plaintiff reminded the defendant that he was entitled to an additional $100,000, but the defendant refused to pay it, and the suit ensued. The Appellate Division held that an attorney may not, in the context of a suit which includes both matrimonial and nonmatrimonial causes of action, enter into a contingency fee agreement whereby he becomes entitled to a percentage of so much of the proceeds of the litigation as are derived from the nonmatrimonial causes of action. The court noted that while an attorney may charge a contingency fee to prosecute nonmatrimonial claims generally, "[a] lawyer shall not enter into an arrangement for, charge or collect ... any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or in any way determined by reference to the amount of maintenance, support, equitable distribution or property settlement" (citing, inter alia, 22 NYCRR 1200.11[c][2][i]; see 22 NYCRR 1400.1 and 1400.2.) "The rule against contingent fees in domestic relations cases in New York is deep seated and well established. The policy reasons include a belief that this kind of fee might induce lawyers to discourage reconciliation and encourage bitter and wounding court battles. Another often expressed policy reason to preclude contingent fees in matrimonial actions is that they are not necessary, since the court may award attorney's fees to a nonmonied spouse and thus any party should be able to retain counsel" . The Court was aware of rulings from other states holding that such fees do not violate the public policy against contingency fees in domestic relations matters because they are not contingent upon the securing of "alimony or support or property settlement in lieu thereof" . However, New York's prohibition on contingency fees in domestic relations matters is very broad, and does not distinguish between property settlements made in lieu of maintenance, support, or equitable distribution and property settlements based on nonmatrimonial property claims (see 22 NYCRR 1200.11[c][2][i]; see also 22 NYCRR 1400.1 and 1400.2). And, allowing contingency fees for nonmatrimonial claims interposed with matrimonial claims would contravene the important policy concerns that inform the general prohibition. Such a rule would create an incentive for attorneys to characterize most, if not all, of the proceeds of a settlement as deriving from the nonmatrimonial claims in order to maximize the value of, and therefore the contingency fee derived from, those claims. The result would be to diminish the amount of property available for maintenance, support, and equitable distribution. The Second Department concluded that the better rule is to prohibit contingency fees in the context of any action containing matrimonial claims

Counsel Sanctioned By Appellate Division for Matter Dehors the Record

In Miller v Dugan, --- N.Y.S.2d ----, 2006 WL 552483 (N.Y.A.D. 2 Dept.) the Supreme Court awarded the defendant sole title to the marital residence and certain rental property, directed her to transfer her interest in the marital residence and the rental property to the defendant, and awarded her the sum of $57,500 as the value of her equitable share of the rental property. The Appellate Division affirmed. On the court's own motion, counsel for the respective parties were directed by the Appellate Division to show cause why an order should or should not be made and entered imposing such sanctions or costs, if any, against the plaintiff and/or her counsel, pursuant to 22 NYCRR 130-1.1(c)(3). It stated that: “The purpose of an appellate brief "is to assist, not mislead the court" (Merl v. Merl, 128 A.D.2d 685, 686, 513 N.Y.S.2d 184). Counsel who mischaracterize events, fabricate issues, and rely upon matter dehors the record act "in direct derogation of their professional obligations" (Merl v. Merl, supra at 686, 513 N.Y.S.2d 184). In the present case, the imposition of sanctions and/or costs against the plaintiff and/or her counsel may be warranted. Many of the plaintiff's appellate arguments appear to be unsupported by, or even contradicted by, the record and completely without merit in law or fact (see 22 NYCRR 130-1.1[a],[c][3]; Curcio v. Hogan Coring & Sawing Corp., 303 A.D.2d 357, 359, 756 N.Y.S.2d 269; Braten v. Finkelstein, 235 A.D.2d 513, 514, 652 N.Y.S.2d 769). Accordingly, it directed counsel for the parties to submit affirmations or affidavits on the issue of the imposition of sanctions and/or costs against the plaintiff and/or her counsel.

Husband Precluded for Failure to Comply with Discovery Demands

In Hildreth-Henry v Henry--- N.Y.S.2d ----, 2006 WL 552573 (N.Y.A.D. 2 Dept.) the Supreme Court after a nonjury trial, awarded the plaintiff yearly maintenance in the sum of $20,800 for five years, and did not credit him for his contributions to the appreciation in value of the plaintiff's separate properties. The Appellate Division held that since the plaintiff was not employed during the marriage and desired to attend college classes to earn an associate's degree, the five-year award of maintenance was a provident exercise of the court's discretion. The defendant's contention that the Supreme Court erred in failing to grant him a credit for his contributions to the mortgage payments of the marital residence, which the parties stipulated was the plaintiff's separate property, was not properly before this court, since the defendant did not request such relief in the Supreme Court , and it declined to review the issue in the exercise of discretion. Furthermore, the Supreme Court properly denied the defendant's request for credit for a portion of the appreciation of the plaintiff's other separate property. As a result of his failure to comply fully with the plaintiff's discovery demands, the defendant was precluded from testifying at trial and, therefore, could not establish his claim to the appreciated value of the plaintiff's other separate property.

Stipulation of Settlement Conditioned on Divorce Enforced.

In Tarone v Tarone, 25 A.D.3d 779, 809 N.Y.S.2d 150 (2d Dept.,2006) the plaintiff and the appellant entered into a stipulation of settlement of the financial issues in their Action for a divorce with the understanding that the stipulation would be "incorporated but not merged into the parties Judgment of Divorce." Immediately thereafter, the court conducted an inquest regarding the issue of constructive abandonment alleged by the plaintiff. At the conclusion of the inquest, the court granted "the plaintiff a Judgment of Divorce based upon the grounds of constructive abandonment" and held that "[t]he terms of the stipulation are incorporated into the decree." The plaintiff was directed to submit a judgment of divorce to the court. Thereafter, the Supreme Court granted the appellant's motion to set aside its determination, held that the plaintiff failed to establish grounds for divorce, and set the matter down for a new trial, but refused to set aside the stipulation of settlement. The Appellate Division held that this was error. Open-court stipulations are judicially favored, and will not be set aside absent fraud, overreaching, mistake, duress, or unconscionability. However in view of the determination that the plaintiff failed to establish his entitlement to a divorce, the stipulation of settlement should have been vacated (citing Lyons v. Lyons, 187 A.D.2d 415, 416, 589 N.Y.S.2d 557; Elkaim v. Elkaim, 123 A.D.2d 371, 506 N.Y.S.2d 450). The stipulation could not be considered a valid postnuptial or "opting out" agreement pursuant to Domestic Relations Law 236(B)(3).

April 17, 2006

Child Support Award in High Income Cases Should Be Based On Need and Standard of Living and Court May Consider Partial Tax Year Income Information

In Culhane v Holt --- N.Y.S.2d ----, 2006 WL 910403 (N.Y.A.D. 1 Dept.) the First Department emraced the rule enunciated by the Second Department in Matter of Brim v. Combs, 25 AD3d 691, 808 N.Y.S.2d 735, 736 [2006] that "[I]n high income cases, the appropriate determination under [FCA § 413(1)(f) ] for an award of child support on parental income in excess of $80,000 should be based on the child's actual needs and the amount that is required for the child to live an appropriate lifestyle, rather than the wealth of one or both parties". The First Department also adopted the rule of the Fourth Department (in Kellogg v. Kellogg, 300 A.D.2d 996 [2002]; Matter of Monroe County Dept. of Social Servs. v Mercado, 241 A.D.2d 948 [1997]) when it held that the Magistrate did not violate the mandate of Family Court Act § 413(1)(b)(5)(i) when he based respondent's income on the average of his projected earnings for 2004 and 2005. It stated that while FCA § 413(1)(b)(5)(i) provides that the relevant income figure is the "gross (total) income as it should have been or should be reported in the most recent federal income tax return," nothing in the statute prohibits reliance upon partial information from a tax year not yet completed, and a court is not required to rely upon a party's own account of his or her finances and may impute income based upon that party's past income or demonstrated earning potential. Brim v Combs relied on the First Departments statement in Anonymous v. Anonymous, 286 A.D.2d 585 [2001]), where the trial court fixed child support in an amount necessary to enable the child to significantly enjoy the aspects of the parties marital standard of living consistent with the social milieu in which she was raised. The First Department commented that “...we note that consideration of the childs actual needs with reference to the prior standard of living continues to be appropriate in determining an award of child support on parental income in excess of $80,000.00”. The Court in Anonymous also referred to Gluckman v Qua, 253 AD2d 267, where the Third Department held that the childrens needs is one of the factors to be considered if the court decides to deviate from the statutory percentage in excess of $80,000.00.

Vocational Assessment of Wife Denied Where Wife Never Worked Outside Home

In Obermueller v Obermueller, 24 A.D.3d 641, 808 N.Y.S.2d 324 (2d Dept.2005) the plaintiff, who was approximately 60 years of age, never worked outside the home in this more than 28 year marriage. The defendant served a notice pursuant to CPLR 3121 to the plaintiff to submit to a vocational assessment. The Appellate Division held that the Supreme Court providently granted the plaintiff's motion for a protective order. Although broad financial disclosure is necessary and required in a matrimonial action, the trial court is also vested with "broad discretion to supervise disclosure to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice".. Under the circumstances of this case, including the fact that the defendant simultaneously sought discovery through other CPLR article 31 devices, which discovery had not been completed when the plaintiff's motion was made, the plaintiff's motion for a protective order was appropriately granted to prevent unreasonable annoyance and expense to the plaintiff.

Modification of child Support Denied Where Surviving Agreement and Boden-Brescia Test Not Met

In Hejna v Reilly, -- N.Y.S.2d ----, 2006 WL 407796 (N.Y.A.D. 3 Dept.) the parties entered into a separation agreement which was incorporated, but not merged, into their judgment of divorce. Plaintiff obtained primary physical custody of the parties' two

children. Defendant agreed to pay $603.59 in biweekly child support and to contribute one half of the college tuition expenses for each of the children "based upon the cost of same at a New York State supported college, equivalent to SUNY Albany." In September 2003, while still in high school, the daughter elected to take courses at SUNY Albany, for which the father paid. A year later, the daughter matriculated at Yale University. The mother moved for modification of the child support provisions of the separation agreement, seeking increased child support and to direct the father to pay one half of each child's college expenses as determined by the institution actually attended by the child. The father cross-moved for partial reimbursement of the expenses incurred during the daughter's attendance at SUNY Albany and recoupment of support paid to the mother while the daughter allegedly resided with him. Supreme Court granted the mother's motion for an upward modification of child support from biweekly payments of $603.59 to weekly payments of $642 and the father's cross motion for a money judgment based upon the daughter's SUNY Albany expenses. The Appellate Division rejected he mother's argument that the child support provisions should be modified and reversed. It held that it is well settled that the child support provisions of separation agreements that are incorporated but not merged into divorce decrees can be modified only if it is shown that the agreement was not fair and equitable when entered into or that there has been a subsequent unanticipated change in circumstances and a concomitant showing of need. The mother did not assert that the terms of the agreement were unfair or inequitable. Rather, she argued that an unanticipated change in circumstances had occurred based upon the father's increased income and his receipt of a $58,332 inheritance, as well as the daughter's choice to attend a costly private university. The Appellate Division held that "neither an increase in the income of the noncustodial parent nor the generalized increased needs of the parties' growing children, standing alone, are sufficient to warrant an upward modification of support". Where, as here, a separation agreement "manifests an understanding that the child might pursue a college education [and s]pecific provision was made ... to cover those expenses," an unanticipated or unreasonable change in circumstances will not be found based solely on an increase in the cost of that education (Matter of Boden v. Boden, 42 N.Y.2d 210, 213 [1977]; see Matter of Gravlin v. Ruppert, supra at 5). Further, neither the father's increase in income from approximately $68,000 to $80,000 nor his inheritance constituted unreasonable or unanticipated circumstances warranting a modification of child support. The mother's conclusory allegations, unsupported by documentary evidence, that the cost of the daughter's education had left her without adequate support were insufficient to establish that the children's needs are not being met. The court noted that its holding with respect to the father's inheritance was limited to a rejection of the mother's argument that a $58,332 bequest constituted an unanticipated change in circumstances in light of the facts of this particular case. It did not question the proposition that, as a general matter, "while New York does not consider inheritances to fall within the statutory definition of gross income used to calculate a parent's basic child support obligation, it treats the entire amount of the inheritance as an available resource where additional support is warranted". The Appellate Division agreed with the mother that Supreme Court improperly directed her to reimburse the father for expenses that he incurred when the daughter attended SUNY Albany. The parties agreed only that the father would be responsible for a certain portion of the children's college expenses and, in the absence of any indication that the mother would be required to provide an equal amount, such a term may not be reasonably implied by the agreement's language.

Split of Authority on Modification of Child Support Where No Surviving Agreement

In Kent v Kent --- N.Y.S.2d ----, 2006 WL 463650 (N.Y.A.D. 1 Dept.) the First Department recognized that there is a split in authority as to whether a substantial increase in the noncustodial parent's income, in and of itself, warrants an upward modification, where there is no surviving agreement. It referred to the following cases: Matter of Commr. of Soc. Servs. v. Currie, 182 A.D.2d 433 [1st Dept 1992] [increase in court-ordered child support based solely on increase in income of noncustodial spouse warranted where such increase lifts child out of living below poverty level]; Matter of Love, 303 A.D.2d 756 [2d Dept 2003] [increase in income only one factor to consider on upward modification application]; Matter of Sorrentino v. Sorrentino, 203 A.D.2d 829 [3d Dept 1994] [increase in income alone under certain circumstances sufficient change in circumstances to warrant upward modification].

April 3, 2006

Preclusion Warranted Only Where Failure to Disclose is Wilful and Contumacious

In Anthony v Anthony, 24 A.D.3d 694, 807 N.Y.S.2d 394(2d Dept.,2005) Supreme Court granted that branch of the plaintiff's motion which was pursuant to CPLR 3126 to the extent of precluding him "from offering any testimony [at trial] in connection with credit card accounts, bank accounts, investment accounts, the use of the second mortgage placed upon the marital premises by him and the value of the Maryland property for which he failed to provide information [and directing that] all issues with regard to the documents defendant failed to supply shall be resolved in favor of the plaintiff," and granted that branch of the plaintiff's motion which was for an award of an attorney's fee in the sum of $3,120. The Appellate Division reversed the order and denied those branches of the plaintiff's motion which were pursuant to CPLR 3126 and for an award of an attorney's fee are denied. It held that while the nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter of discretion for the court an order of preclusion should only be imposed where the moving party establishes that the failure to disclose is willful and contumacious (citing Mangiapane v. Brookhaven Beach Health Related Facility, 305 A.D.2d 642, 759 N.Y.S.2d 890; Klutchko v. Baron, 1 A.D.3d 400, 768 N.Y.S.2d 217). Since the plaintiff did not show that the defendant's failure to disclose was willful and contumacious, the court's determination to preclude the defendant from offering testimony at trial concerning certain categories of documents, to resolve issues concerning those documents in favor of the plaintiff, and to award an attorney's fee to the plaintiff was improvident.

Life Insurance Award Should Have Been Declining Term Policy

In Somerville v Somerville, --- N.Y.S.2d ----, 2006 WL 344806 (N.Y.A.D. 3 Dept.) he parties married in February 1999. Supreme Court granted defendant a divorcedirected plaintiff to pay spousal maintenance in the amount of $1,000 per month for 24 months. Supreme Court awarded sole legal and physical custody of the child to defendant with liberal visitation to plaintiff. Plaintiff also was ordered to pay child support in the amount of $2,000 per month (including arrears), in addition to 92% of any childcare and uncovered healthcare expenses and 100% of the child's educational expenses. To secure such obligations, plaintiff was ordered to maintain a $1 million life insurance policy for the child's benefit for the duration of his support obligation. The Appellate Division held that the $1 million life insurance policy intended to secure plaintiff's child support obligation should be a declining term policy that would permit plaintiff to reduce the amount of coverage by the amount of child support actually paid (citing Florio v. Florio, --- AD3d ----[Jan. 19, 2006], slip op p 6).

Ineffective Assistance of Counsel Warrants New Custody Hearing

In Mitchell v Childs, --- N.Y.S.2d ----, 2006 WL 407686 (N.Y.A.D. 3 Dept.) the petitioner was in prison and consistently sought visitation. The current proceeding was grounded upon petitioner's September 21, 2004 petition which he completed pro se. In that petition he that he had the right to have visitation with his child, despite his incarceration, unless it is first shown that visitation is detrimental to the child's welfare. At the initial court appearance on October 19, 2004, only the Law Guardian was present. Family Court appointed a Public Defender for petitioner. At the next court appearance, the Public Defender appeared without petitioner and respondent appeared pro se. The Law Guardian advocated for dismissal of the proceeding since petitioner had no relationship with the child; no mention was made about allegations that respondent had consistently violated the court's prior order. The Public Defender openly admitted to Family Court that she had not yet spoken with petitioner and had no relevant documents with her, other than a copy of the petition. Family Court adjourned the matter and denied both the motion to dismiss and the Public Defender's request to have petitioner participate by phone. Instead, Family Court told the Public Defender to speak with petitioner and be prepared to speak on his behalf at the next scheduled hearing. On November 30, 2004, respondent and her counsel, the Law Guardian and a different Public Defender appearing for petitioner were present. This Public Defender admitted that she had not spoken to petitioner, had no file on the matter and had absolutely no information about this proceeding. Respondent's counsel moved to dismiss the petition, claiming no change in circumstance. Respondent's counsel represented to Family Court that petitioner might soon be eligible for parole so there was no point in having visitation; the Law Guardian agreed. Without articulating a basis, Family Court dismissed the petition, without prejudice, and stated that "[i]t's almost malpractice that the members of the Office of the Public Defender don't talk to each other." The Appellate Division held that petitioner was deprived of the effective assistance of counsel. Recognizing that petitioner had to demonstrate that he "received less than meaningful representation and that he suffered actual prejudice as a result of the claimed deficiencies in the representation provided by counsel" (citing Matter of Jonathan LL. [Lobsang LL.], 294 A.D.2d 752, 753 [2002] ), the court found it evident, as did Family Court, that there was a consistent failure by the Public Defender's office to communicate with petitioner at any point prior to his scheduled appearances. Moreover, even though problems were noted in petitioner's pro se pleadings, such to be liberally construed. Had petitioner's counsel communicated with him, these drafting deficiencies could have been rectified by the filing of an amended petition. The court could not condone the inadequacy of the representation provided to him when petitioner has a statutory right to have counsel in these circumstances.

Incontrovertable Official Document Which is De Hors the Record May Be Considered on Appeal

In Interrante v Rozzi ,--- N.Y.S.2d ----, 2006 WL 407776 (N.Y.A.D. 3 Dept.) plaintiff commenced an action for a divorce in 1996. In 1999, Supreme Court granted plaintiff a preliminary injunction prohibiting defendant from selling, transferring or otherwise disposing of the parties' marital assets, including stocks and securities, during the pendency of the action. Following trial, Supreme Court issued a decision and order in February 2003 that, among other things, awarded plaintiff a judgment of divorce and directed equitable distribution of the marital assets. In May 2004, the court stayed that decision and order pending an accounting of the marital assets and, thus, did not enter a judgment of divorce. The court also ruled that the October 1999 restraining order was still in effect and that defendant was in violation of it. The Appellate Division affirmed. Both the record and defendant's admissions as reflected in a Supreme Court order issued subsequent to the May 2004 order fully supported the court's finding that the restraining order continued in force and effect, and that defendant knowingly violated that order. The Appellate Divison held that contrary to defendant's argument that the subsequent order may not be considered on appeal "an incontrovertible official document, even though it is dehors the record, may be considered on appeal for the purpose[ ] of sustaining a judgment" (citing Brandes Meat Corp. v. Cromer, 146 A.D.2d 666, 667 [1989]; see Matter of Park Realty Corp. v. Hydrania, Inc., 17 A.D.3d 898, 899 [2005] ).

Denial of Right to Counsel Warrants Reversal of Custody Order

In Matter of Williams v Bentley, --- N.Y.S.2d ----, 2006 WL 406820 (N.Y.A.D. 2 Dept.), the Appellate Division held that Family Court improperly conducted a custody hearing in the absence of the mother's counsel. Family Court awarded custody to the father, stating that it intended to avoid delaying the hearing and disposition of the custody matter. The mother repeatedly told the Family Court that she would not proceed in the absence of her lawyer and that she would wait for her lawyer. Requiring the mother to try the custody matter without benefit of counsel impermissibly placed the court's interest in preventing delay above the interest of the parents and the children, and violated the mother's right to be represented by counsel. The deprivation of a party's fundamental right to counsel in a custody or visitation proceeding is a denial of due process and requires reversal, without regard to the merits of the unrepresented party's position.

March 16, 2006

Supreme Court Impermissibly Engaged in "Double Counting" Husbands’ Income in Fixing Maintenance Award

In Keane v Keane --- N.Y.S.2d ----, 2006 WL 223830 (N.Y.A.D. 2 Dept.) the Supreme Court, inter alia, awarded the wife maintenance of $1,292 per month through December 1, 2010, and $471 per month thereafter, granted her a distributive award of $57,600, plus monthly payments of only $2,000 until September 2012, and denied her an award of an attorney's fee,. The judgment was modified, by the Appellate Division, inter alia, deleting the provision thereof awarding the plaintiff wife nondurational maintenance . The parties were married for over 30 years and were 62 and 63 years of age, respectively, at the time of trial. The plaintiff wife was not employed during the marriage. The husband was the sole shareholder of a real estate entity which held two assets, one of which was a real estate parcel leased to an automobile body repair shop which yielded monthly rental income. The only evidence of the body shop property's value was supplied by his appraiser, who estimated its value to be approximately $290,000, on the basis of a capitalization of income approach which took into consideration, inter alia, the monthly rental income. The appraiser estimated the body shop property's value to be approximately $324,000 if it were valued according to the market approach. The parties stipulated that the marital property would be equally distributed between them. In 1981 the defendant and his two siblings inherited a vacation residence . In 2001 the property was valued at $1,050,000, which was $990,000 more than its estimated value in 1980. The evidence established that the defendant held sole title to the Madison property at the time of the commencement of the matrimonial action The Appellate Division held that , contrary to the plaintiff's contention, the defendant established that he held a two-thirds interest in the property as nominee of his siblings and that his original one-third interest constituted separate property based upon evidence that he acquired it through inheritance from his father. The Appellate Division held that the Appreciation in the value of the defendant's separate property due to the plaintiff's contributions or efforts constituted marital property subject to equitable distribution and that the Supreme Court correctly determined that 30% of the appreciation of the defendant's original one-third interest in the property (30% of $330,000) constituted marital property subject to equitable distribution. The balance of the appreciation in the value of the property resulted from market forces rather the plaintiff's contributions or efforts. The Appellate Division held that considering the plaintiff's age, the length of the marriage, and her limited employment history, the plaintiff was unequipped to become self supporting and that an award of non-durational maintenance was appropriate. In adjudicating the amount of maintenance, the Supreme Court properly considered the parties' Social Security benefits. The Appellate Division held that the Supreme Court improperly considered the defendant's monthly rental income received from the body shop repair business in awarding the plaintiff maintenance of $1,292 per month through December 1, 2010. The Supreme Court valued the body shop property at full market value by utilizing the capitalization of income method supplied by the defendant's appraiser, and included its value in calculating the plaintiff's distributive award of marital property. It was proper for the Supreme Court to utilize the capitalization of income approach to value this income producing property. Nevertheless, the Supreme Court also included the monthly rental income from the body shop repair business until the expiration of the lease term in 2010 in fixing the maintenance award of $1,292 per month through December 1, 2010, without making an adjustment to reflect that the rental income stream was previously included in the plaintiff's distributive award. It held that the Supreme Court impermissibly engaged in the "double counting" of the defendant's income by valuing the body shop property, which was equitably distributed as marital property, and by calculating the amount of maintenance to the plaintiff based upon the excess earnings of that business (see Grunfeld v. Grunfeld, 94 N.Y.2d 696; McSparron v. McSparron, 87 N.Y.2d 275; Murphy v. Murphy, 6 AD3d 678). "Once a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout". Consequently, the Supreme Court had to "reduce either the income available to make maintenance payments or the marital assets available for distribution, or some combination of the two" . It remitted the matter to the Supreme Court to recalculate that portion of the maintenance awarded to the plaintiff through December 1, 2010.

Reargument Granted By Appellate Division in High Income Child Support Case

In Matter of Brim v Combs, 2005 WL 758112 (N.Y.A.D. 2 Dept.), a child support proceeding to vacate a child support agreement and modify the father's child support obligation, the father a well known singer, appealed from an order of the Family Court which granted the petition and awarded the mother child support in the sum of $35,000 per month, child support arrears in the sum of $398,451.12, and an attorney's fee in the sum of $60,000. The Appellate Division modified the order by directing the father to pay child support in the sum of $21,782.08 per month and remitted for further proceedings. It found that in calculating the award of child support to the mother under Family Court Act 413, the Support Magistrate erred in basing the award in part on the amount of child support the father paid for his other child by a different woman, particularly where no evidence was presented as to that child's expenses, resources, and needs. It held that “ To this end, in high income cases, the appropriate determination under Family Court Act 413(f) for an award of child support on parental income in excess of $80,000 should be based on the child's actual needs and the amount that is required for the child to live an appropriate lifestyle, rather than the wealth of one or both parties (citing Anonymous v Anonymous, 286 AD2d 585). It found that the mother's net worth statement and her extensive testimony at the hearing established that her expenses related to the child were $21,782.08 per month, exclusive of the child's educational, health, medical, dental, extracurricular activity, transportation, security, and summer camp expenses, which in any case were paid by the father. This amount was deemed admitted as fact by the father due to his failure to comply with the compulsory financial disclosure requirements of Family Court Act 424-a. It held that The Family Court erred in awarding $35,000 in monthly child support to the mother. It held that the mother should have been awarded monthly child support in the sum of $21,782.08 to satisfy the child's actual needs and to afford him an appropriate lifestyle (see Family Court Act 413). The arrears in child support had to be recalculated in light of the change. Subsequently, in Matter of Brim v Combs, --- N.Y.S.2d ----, 2006 WL 203500 (N.Y.A.D. 2 Dept.) the Appellate Division granted the appellant's motion for leave to reargue and recalled and vacated its April 4, 2005 decision, substituting a new decision which was identical to the original decision except it awarded the mother $19,148.74 in child support, instead of $21,782.08, indicating that the mother's net worth statement and her extensive testimony at the hearing established that her expenses related to the child were $19,148.74 per month.

Loan Established by Check Notation. Counsel Fee to Wife Who Received Large Distributive Award Because of Husbands Trial Tactics

In Levine v Levine, 24 A.D.3d 625, 807 N.Y.S.2d 384, (2d Dept, 2005) the Supreme Court, Nassau County allocated marital debt and awarded an attorney's fee to the defendant in the sum of $250,000. The Appellate Division affirmed. During the course of the parties' marriage, the defendant's father gave them a 14% interest in a corporation called Browertown, a holding company formed for the purpose of constructing a nursing home. After constructionbegan, the corporation issued a capital call from its shareholders. The parties did not have the funds to meet the contribution of $280,000 demanded from the shareholders. Accordingly, the defendant's father gave the parties a check in the sum of $280,000 which had the word "loan" written on it to meet the capital call. The defendant claimed that this payment represented a bona fide marital debt to be satisfied from marital assets before distribution. The plaintiff, contended that the money was given to the parties by the defendant's father as gifts to both of them. The trial court found that the payment of $280,000 was a loan to both parties, based upon the memorandum notation on the check issued to the parties. The Appellate Division held that there was sufficient evidence adduced at trial demonstrating that the $280,000 payment constituted a loan, to be paid either when Browertown began to make disbursements to its shareholders, or upon demand made by the defendant's father. Accordingly, the trial court properly allocated the loan as marital debt to be satisfied from the marital assets prior to distribution. In light of factors such as the disparity in income between the parties, the plaintiff's trial tactics which unnecessarily prolonged the litigation, as well as the plaintiff's willful failure to comply with court orders, the Supreme Court properly directed the plaintiff to pay a portion of the defendant's attorney's fee, despite the substantial equitable distribution award to the defendant.

March 1, 2006

Medical Reports Not admissible as Business Records Where They Contain Doctor's Opinion or Expert Proof

In Bronstein-Becher v Becher, --- N.Y.S.2d ----, 2006 WL 240531 (N.Y.A.D. 2 Dept.), during a hearing pursuant to a violation petition, the evidence revealed that the father failed to make the requisite child support payments. Failure to pay support as ordered constitutes " 'prima facie evidence of a willful violation'. Once prima facie evidence of willful violation was presented, the burden shifted to the father to offer competent, credible evidence of his inability to make the support payments. At the hearing, the father's attorney sought to introduce into evidence medical reports from the father's psychiatrist, Dr. Edward M. Stephens. While the reports were certified, the hearing court found them to be inadmissible, stating they were "not a medical record [and] not a hospital record. It's a letter. Therefore, it's hearsay." The Appellate Division held that the hearing court was correct in refusing to accept Dr. Stephen's medical reports into evidence. A physician's office records, supported by the statutory foundations set forth in CPLR 4518(a), are admissible in evidence as business records. However, medical reports, as opposed to day-to-day business entries of a treating physician, are not admissible as business records where they contain the doctor's opinion or expert proof. Here, Dr. Stephens' two "narrative reports" were simply letters summarizing his diagnosis, treatment, and opinion concerning the father's ability to return to work. No proper foundation was provided demonstrating that they were in fact business records (see CPLR 4518[a] ). Their certification did not cure this defect as only hospital records, and not physician office records, are admissible by certification. Since the father failed to submit evidence sufficient to show his inability to pay, he failed to rebut the mother's prima facie case. Accordingly, the Family Court properly found him to be in contempt for willfully failing to obey the child support order.

Error to Terminate Maintenance Where Former Wife Cohabits With Unrelated Male

In Florio v Florio, --- N.Y.S.2d ----, 2005 WL 3676634 (N.Y.A.D. 3 Dept.) the parties were married in 1979 and the action was commenced in 2002. Supreme Court, inter alia, awarded plaintiff the three rental properties acquired by the parties during marriage, with a directive that he be responsible for the mortgages and related expenses until such time as he elected to sell such properties and made a similar award to defendant as to the marital residence, except that defendant was directed to sell the property on or before June 30, 2005, at which time she would retain all proceeds from the sale. Plaintiff was directed to pay defendant maintenance of $700 per week until June 30, 2005, at which point his maintenance obligation would be reduced to $400 per week. The Appellate Division rejected defendant's assertion that Supreme Court erred in granting plaintiff a $75,000 credit in distributing his employee savings plan. It stated that although plaintiff's proof on this point could have been presented with greater clarity, his testimony and the documentary evidence adduced at trial were sufficient to document the various marital expenses he paid following his departure from the marital residence. While there may have been deficiencies in plaintiff's paper trail, there was no serious dispute that plaintiff paid the expenses at issue, nor was there any proof that defendant in any way contributed to such payments. Nor was there any error or inequity in Supreme Court's directive that defendant sell the marital residence by a particular date. Defendant's testimony made clear that she could not have remained in the marital residence pending trial had plaintiff not paid the mortgage and the home equity line of credit and that she could not afford to retain the marital residence at her current income level. Supreme Court was not arbitrarily removing defendant from the marital residence but, rather, was imposing a limit upon the amount of time that plaintiff would be required to fund defendant's continued occupancy of it . Although Supreme Court essentially divided the remaining cash assets 50% to each party, the real estate was divided 35% to defendant and 65% to plaintiff. Supreme Court's only expressed rationale was that plaintiff was financially better able to maintain the rental properties until they could be sold. However, these properties were awarded, in kind, to plaintiff. The remaining tangible personalty was also awarded to plaintiff, although its value was not established by competent evidence by either party. The Appellate Division held that some semblance of parity must be achieved. In this 25-year marriage, not only did defendant contribute financially, but Supreme Court found that she contributed as a spouse, parent and homemaker. Under these circumstances, Supreme Court abused its discretion in not dividing all assets 50% to each party. The Supreme court's written decision provided that the award of maintenance "shall cease upon the [d]efendant's remarriage or cohabitation with an unrelated male or the death of the [p]laintiff." Defendant contended that Supreme Court erred in permitting plaintiff to terminate maintenance payments upon proof that she is cohabiting with an unrelated male as Domestic Relations Law 248 requires, in addition to cohabitation, proof that defendant "hold[s] herself out as his wife, although not married to such man." As the case law on this point plainly requires that both elements of the statute be established and, further, that mere cohabitation is insufficient any attempt by Supreme Court to impose a less stringent requirement clearly would be erroneous. Supreme Court did not err in the amount or duration of the maintenance awarded to defendant. While defendant held a Master's degree in elementary education and could, by her own admission, seek a better paying position, neither party presented any testimony as to the likelihood of the then 47-year-old defendant, who was earning $15,000 per year as a teacher's assistant, obtaining a full-time teaching position that would allow her to be self-supporting. Having failed to demonstrate that defendant was intentionally underemployed and/or capable of securing a full-time position well in excess of her then current salary, and in light of the income disparity existing between the parties at the time of trial, plaintiff could not now be heard to complain as to his maintenance obligation. However, Supreme Court abused its discretion as to the award of counsel fees to defendant. She received sufficient assets to enable her to pay her own counsel fees. Under such circumstances, Supreme Court abused its discretion in ordering plaintiff to pay defendant's then outstanding counsel fees in the amount of $7,500, particularly in view of the fact that defendant utilized marital assets to pay her initial round of counsel fees.

Counsel Fee to Wife Who Discontinued Prior Action Was Improvident Exercise of Discretion

In Mesholam v Mesholam, --- N.Y.S.2d ----, 2006 WL 205088 (N.Y.A.D. 2 Dept.) Supreme Court, inter alia, valued the husbands pension at $859,084 for purposes of equitable distribution, directed that he pay pendente lite arrears in the amount of $31,746, did not credit him for mortgage payments made on the marital residence, and directed that he pay 60% of the wife's counsel fees. The Appellate Division modified the judgment. It held that although trial courts have the discretion to select valuation dates which are appropriate and fair under the particular facts and circumstances presented. Under the circumstances of this case, the selection of the commencement date of the action as the valuation date for the husband's pension was an improvident exercise of discretion. There was no evidence that the parties reconciled and continued to receive the benefits of the marital relationship after the prior action was commenced. The appropriate date for valuation of his pension was September 7, 1994, the date of the divorce action previously commenced by the wife, which she discontinued voluntarily in August 1999. Supreme Court properly credited the wife with arrears accumulated under the pendente lite order in her favor in the prior action. They related to the period prior to the discontinuance of the wife's prior action. However, the Supreme Court should have reduced the wife's share of the proceeds from the sale of the marital residence by one-half of the total of the husband's payments of principal on the mortgage for that property from April 20, 2000, to August 29, 2001, the date the trial concluded. It also held that the award of counsel fees to the wife was an improvident exercise of discretion in view of her abrupt discontinuance of the prior action which left the husband with no practical course but to commence a new action, her significant resources resulting from the equitable distribution of marital property, and the amount of maintenance awarded.

Proper to Admit Hearsay In Custody Cases involving Allegations of Abuse and Neglect

In Mateo v Tuttle, --- N.Y.S.2d ----, 2006 WL 251125 (N.Y.A.D. 4 Dept.) the Appellate Division affirmed an order which awarded custody to petitioner father, with supervised visitation to respondent mother. It found that contrary to respondent's contention, the court properly admitted hearsay statements at the hearing on the petition. It is well settled that there is "an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in Family Ct Act 1046(a)(vi)" where, as here, the statements are corroborated. The child's hearsay statements to others were sufficiently corroborated. In any event, the statements of the child to petitioner and his wife as well as statements made by a nurse to petitioner's wife were not offered for the truth of the matters asserted therein but, rather, were offered to explain actions taken by petitioner and his wife, and thus those statements and that testimony fall within an exception to the hearsay rule.

February 16, 2006

Denial of Attorneys Fee For Engaging in Conduct Resulting in Unnecessary Litigation. Maintenance Reversed Where Impermissible Double Counting of Income

In Chamberlain v Chamberlain, ---- N.Y.S.2d ----, 2005 WL 3485881 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court correctly concluded that the parties' investment account, funded with the proceeds of an action commenced by the defendant to recover damages for personal injuries he sustained prior to the marriage, was his separate property, even though he placed those funds in an investment account titled jointly with the plaintiff. The proceeds of an action to recover damages for personal injuries are the separate property of the injured spouse. When spouses hold property in a joint account, however, a rebuttable presumption arises that both have an undivided one-half interest in it. Thus, by depositing the proceeds of his personal injury lawsuit in an account titled jointly with the plaintiff, the defendant created the presumption that the funds were marital. This presumption may be overcome by evidence that the account was titled jointly as a matter of convenience, without the intention of creating a beneficial interest, and that the funds in the account originated solely in the separate property of the spouse who claims the separate interest. Here, the defendant overcame the presumption by establishing that he was the sole beneficiary of the proceeds of the personal injury action, that the investment account into which the funds were deposited, although in joint names, was managed solely by him, and that the plaintiff had no involvement with the account other than one withdrawal which she made at the defendant's direction. The Supreme Court providently exercised its discretion in awarding the defendant 30 percent of the value of the degrees and license constituting the enhanced earning capacity achieved by the plaintiff during the marriage, based upon his indirect contributions to the attainment of that enhanced earning capacity by paying all of the family's living expenses while the plaintiff was a student and modifying his employment schedule in order to enable him to care for the parties' older child, who was born during that period. Since that enhanced earning capacity was marital property Supreme Court should have required the defendant to bear a concomitant portion of the student loan debt incurred by the plaintiff in pursuing her degrees. The defendant's share of that debt should have been set off against the defendant's distributive award, reducing it to $24,969. The record supported the Supreme Court's determination to impute an annual income of $60,000 to the plaintiff. Maintenance and child support are determined on the basis of earning capacity, not actual earnings. Here, the report of the financial expert that the plaintiff could expect to earn such an annual income and the plaintiff's part-time earnings commensurate with such full-time compensation supported the Supreme Court's determination. In denying the plaintiff's request for maintenance, however, the Supreme Court failed to remove from consideration that portion of the plaintiff's income stream that was distributed in equitable distribution, as it was required to do. It remitted the matter to the Supreme Court for reconsideration of the plaintiff's request for maintenance without consideration of the income stream derived from the enhanced earning capacity. A party who has engaged in conduct resulting in unnecessary litigation may properly be denied an award of an attorney's fee, and a party who was thereby caused to incur legal fees that otherwise would have been unnecessary may recover such fees The record supported the Supreme Court's determination to deny the plaintiff's request for an award of an attorney's fee and grant the defendant's request for an award of an attorney's fee on this basis.

No Award To Wife in Absence of Proof that Advanced Degree Enhanced Husband’s Earning Capacity

In Xu v He --- N.Y.S.2d ----, 2005 WL 3485889 (N.Y.A.D. 2 Dept.) the Appellate Division held that the statutory factors contained in Domestic Relations Law 236(B)(5)(d) "do not have to be specifically cited when the ... findings of the court otherwise adequately articulate that the relevant statutory factors were considered". In the absence of any proof that plaintiff's advanced degree enhanced his earning capacity, the court did not err in declining to issue an award based upon that degree. There was no abuse of discretion in the award to defendant of maintenance in the amount of $1,000 per month for a period of three years or in the court's imputation of $25,000 in yearly income to defendant in light of her educational and professional background.

Court Can Not Change Custody Without a Hearing in Non-Emergency Situation

In re R. G. v G. O.,--- N.Y.S.2d ----, 2005 WL 3490108 (N.Y.A.D. 1 Dept.) a proceeding for modification of a custody order, family court temporarily transferred custody of the parties' child from respondent mother to petitioner father pending a hearing on the issue of whether the mother's relocation with the child to New Jersey was in the child's best interests. The Appellate Division reversed, on the law, and returned custody of the child to the mother pending such hearing holding that Family Court erred in transferring custody without holding a hearing on the best interests of the child. The court pointed out that in applying the settled doctrine that custody awards must be based on the best interests of the child, a hearing is generally required before a judge may award a temporary change of custody in a non-emergency situation, and that the non-custodial parent has the significant burden of demonstrating at such hearing that the child's best interests under the totality of the circumstances warrant a modification of the previously entered custody order. Therefore, Family Court should have held one. The Court indicated that the nature and extent of a hearing may be as abbreviated, in the court's broad discretion, as the particular allegations and known circumstances warrant. The extent of the hearing may perhaps be as little as questioning the parties under oath by the court, subject to limited questioning by the lawyers. In any such case, the court should insure that the factual underpinnings of any temporary order are made clear on the record. Other than Family Court's evident displeasure at the mother's move to New Jersey, there was no apparent basis for the order nor any emergency concerns to support it. The mother did not violate any court order by moving some 90 miles from the Bronx to New Jersey, and the record contained controverted allegations regarding whether the mother had consent to relocate. The mother had previously been awarded sole custody of the child and no provision for visitation by the father had been made in the order granting her sole custody.

Maintenance Award Increased on Appeal

In Dermigny v Dermigny, 23 A.D.3d 429, 805 N.Y.S.2d 577 (2d Dept.2005) the Appellate Division modified the judgment by, inter alia, by awarding the plaintiff spousal maintenance of $3,000 per month for a period of five years. It held that the plaintiff should have been granted durational spousal maintenance to enable her to become self-supporting based on the great disparity in the parties' expected earnings and their potential assets, as well as the lifestyle enjoyed during the marriage. It also held that stock options issued to the defendant which were exercised before the commencement of the action, which were reduced to cash and commingled with other marital assets, were marital property that both parties helped to create during the marriage and expected to enjoy at a later date. Thus, the Supreme Court properly directed the distribution of the net proceeds from this asset at the rate of 50% to each party.

Although No Appeal Take Appellate Division Exercised Inherent Authority to Review Order in Custody Case

In the Matter of Cadejah A. A. --- N.Y.S.2d ----, 2006 WL 176800 (N.Y.A.D. 3 Dept.) the petitioner filed a petition against both respondents in October 2003 alleging neglect of their children based on admissions by the father that he had looked at the daughter while she was taking a shower and had watched her through the hole in her bedroom wall, and allegations that the mother had violated the order of protection and had refused to make, or agree to alternative living arrangements for the daughter. Family Court accepted the mother's admission and issued an order with a finding of neglect based upon inadequate guardianship and placing the daughter in the custody of petitioner for one year. Both the mother and father appealed. Although the mother made an oral waiver of her right to appeal, the Appellate Division exercised its inherent authority to review any matter involving the welfare of a child in a Family Court proceeding and determined her appeal.

February 1, 2006

Child Support Based on Imputed Income Must Have Basis

In Matter of Bianchi v Breakell, --- N.Y.S.2d ----, 2005 WL 3118046 (N.Y.A.D. 3 Dept.), respondent filed an objection to a cost of living adjustment in his child support obligation and a petition seeking a downward modification, alleging a change in employment and a substantial loss of income and benefits from his family. Respondent testified that in February 2002, after his construction business ceased to exist due to, among other things, an inability to acquire insurance, he was hired as a general contractor by LDB Associates, a company owned by his father and respondent's current wife. His entire income now consisted of an annual salary of $35,000, despite his testimony that he worked 40 to 60 hours per week. The Support Magistrate, correctly determining that the objection to the COLA brought the parties into court for a de novo determination under the Child Support Standards Act, rejected as incredible respondent's testimony that he now was a salaried employee limited to $35,000 per year, especially since his expenses were in excess of his claimed income after taxes. The Support Magistrate therefore imputed $80,000 in income to respondent from his employment, along with an additional $20,000 in benefits bestowed by his family, to find the combined parental income, after FICA, to be $137,281. After determining respondent's share of child support on the first $80,000 of combined income, it applied the statutory 17% to the balance

of $57,281, resulting in a support obligation of $307 per week, a reduction of $15 per week as compared to the prior order. Family Court denied respondent's objections. The Appellate Division held that while Family Court was wholly permitted to impute income to him "based upon a prior employment experience, as well as such parent's future earning capacity in light of that party's educational background" the determination had to be rejected because the articulated reason to impute $80,000 in income was based upon what would be a "reasonable employment wage." With no evidence in the record that respondent or anyone else with a similar educational and employment history could earn $80,000 per year doing similar work, the imputation of that amount was speculative. As to the additional $20,000 in income imputed to respondent, remittal was required due to the failure of the Support Magistrate "to specifically delineate each category/source of income imputed to respondent ... [as well as] the actual dollar amount assigned to each category". Thus, with these insufficiencies undermining its ability to review whether the statutory percentage was properly applied to the income exceeding the $80,000 statutory cap it reversed and remitted the matter for further proceedings.

Improper for Court to Direct Law Guardian to file "Report" or give “Recommendations”

In Matter of Graham v Graham, --- N.Y.S.2d ----, 2005 WL 3489247 (N.Y. A.D. 3 Dept.), a custody case, the Appellate Division strenuously voiced its opinion that it was improper for Family Court to direct the child's attorney, the Law Guardian, to file a "report" in this case. Although the Law Guardian was careful to characterize his written submission at the end of the proof as his "summation" and appropriately relied solely on record evidence in support of his position. Family Court, however, not only referred to the "summation" as a "report" but, in lieu of making independent findings, adopted--in its own decision--the Law Guardian's submission in its entirety. The Law Guardian also made "recommendations" in his submission; evidence that he, as well as Family Court, may have misunderstood his role. It stated: “ The use by a court of the "recommendation of the Law Guardian" has too long been tolerated in Family Court and matrimonial proceedings. When a court asks the child's attorney to make "a recommendation," it improperly elevates the Law Guardian's position to something more important to the court than the positions of the attorneys for each of the parents. Attorneys representing parents do not advocate on behalf of their clients by making "reports" and "recommendations." The Law Guardian should take a position on behalf of the child at the completion of a proceeding--whether orally, on the record, or in writing --and that position must be supported by evidence in the record.”

No Requirement that Actual CSSA Calculations Be Set Out in Agreement. However, Agreement Held Unconscionable.

In Bright v Freeman, --- N.Y.S.2d ----, 2005 WL 3485889 (N.Y.A.D. 2 Dept.) the father brought an action, inter alia, for a judgment declaring, in effect, that the child support provisions of the parties' "separation and child support agreement" properly departed from the presumptive support payable pursuant to the Child Support Standards Act. Supreme Court granted the father's motion for summary judgment declaring that "the agreement is enforceable." The Appellate Division reversed the order on the law and upon searching the record, granted summary judgment declaring that the agreement was unconscionable and unenforceable. The parties, who were never married, are the parents of two children. When they separated, they entered into a "separation and child support agreement" dated December 1, 2002, pursuant to which the father agreed to pay child support in the sum of $450 per month, per child. Following a dispute over the validity of the child support provisions of the agreement, which was being litigated in Family Court, the father commenced this action for a pre-emptive Supreme Court judgment declaring that the agreement was valid and enforceable. The Appellate Division found that pursuant to the CSSA a separation agreement which awards child support different from the presumptive amount mandated by statute must contain the following: (1) an acknowledgment that the parties have been advised of the substance of the CSSA; (2) a statement that the basic child support pursuant to the CSSA would presumptively result in the correct amount of child support; (3) what the CSSA basic child support would have been in the specific circumstances presented; and (4) the reasons why the agreed upon child support deviates from that set forth in the CSSA . The agreement did not violate Domestic Relations Law 240(1-b)(h). It recites, inter alia, the parties' combined net income, their respective net incomes after the CSSA deductions are made, as well as the percentage of income (25%) that is mandated to be applied to the first $80,000 in combined income and, in the court's discretion, to the combined income above that amount. The agreement also recited the father's putative support obligation. While the calculations themselves were not set out, the parties have specified the information and amounts as required by the CSSA. There is no requirement that the actual calculations used to reach the results also be set out in the agreement. Finally, the agreement sets forth the parties' reasons for departing from the statutory formula. However, in opposition to the father's motion for summary judgment the mother established, as a matter of law, that the parties' agreement was unconscionable. The Court stated that it is well settled that a separation agreement is closely scrutinized and may be set aside upon a showing that it is unconscionable or the result of fraud or overreaching in its execution. Separation agreements may be set aside if their terms evidence a bargain so inequitable that no reasonable and competent person would have consented to it. Here, the agreement minimized the father's financial liability and placed a disproportionately greater burden on the mother, inter alia, by requiring the father to pay the sum of only $900 per month instead of more than $2000 per month that would be due under the CSSA. Moreover, the agreement compelled the mother to spend a portion of the father's support payment for designated expenses such as the children's camp and college expenses, as well as to contribute the sum of $100 per month, per child to their college fund accounts. In addition, the mother was required to pay all unreimbursed medical benefits and dental expenses, as well as the cost of camp, Hebrew school, and similar expenses so long as she is employed and her health insurance continues. The agreement was to be effective only so long as the father earned $100,000 annually (net of the CSSA deductions), and provided for a reduction in his support obligation should his income diminish. However, it made no provision for an increase in his obligations should his income appreciate nor for any adjustment to his obligation in the event mother's income drops or ceases entirely. Finally, the agreement compelled the mother to reimburse the father for his visitation expenses up to $1,200 per child, per year. The Appellate Division concluded that “... that the agreement is so one-sided and inequitable as to be unconscionable. It is of such a quality that "no reasonable and competent person would have consented to it".

Maintenance Award For Car Payments Proper

In Booth v Booth, --- N.Y.S.2d ----, 2005 WL 3508849 (N.Y.A.D. 4 Dept.) defendant contended on appeal that Supreme Court erred in awarding plaintiff maintenance in the form of ordering defendant to make plaintiff's car payments. It is well settled that " '[t]he amount and duration of maintenance are matters committed to the sound discretion of the trial court' ". The record established that defendant had steady employment and received supplemental income from Air Force disability payments and rental properties. In addition, defendant received Social Security payments for each child based on plaintiff's disability and plaintiff has been ordered to pay child support to defendant. Plaintiff's income consisted of Social Security disability payments and minimal wages from part-time employment at a fast-food restaurant. Although her income exceeded her expenses, plaintiff had health problems that affected the stability of her employment. It also held that the court did not abuse its discretion in its equitable distribution of the marital property by awarding defendant 70% and plaintiff 30% of the marital assets. "It is well established that '[e]quitable distribution presents issues of fact to be resolved by the trial court, and its judgment should be upheld absent an abuse of discretion' ". Even where, as here, defendant contributed most of the family's support and was the primary caretaker of the children, an award of 30% of the marital assets to plaintiff was not an abuse of discretion.

January 17, 2006

UCCJEA Emergency Jurisdiction Requires Communication with Court of Other State

In Callahan v Smith, --- N.Y.S.2d ----, 2005 WL 3118147 (N.Y.A.D. 3 Dept.) the parties, who are the parents of a son now eight years old, lived together in Ohio until late June 2004, when petitioner came to New York with the child. In July 2004, she commenced this proceeding requesting Family Court to, among other things, exercise temporary emergency jurisdiction pursuant to Domestic Relations Law 76-c alleging, among other things, that respondent made disturbing accusations and/or requests of a sexual nature concerning her children (including the child at issue) and threatened to kill her. Upon respondent's default in the matter, petitioner was granted custody by order entered August 23, 2004. In its decision, the court found "sufficient ground to support the granting of [the] order." In December 2004, respondent moved to vacate the order alleging that he had already commenced his own custody proceeding in Ohio on June 25, 2004, and that petitioner had fled with the child without his notice or consent. At a March 2005 hearing on respondent's motion, there was a dispute between the parties concerning whether there was in fact a pending proceeding in Ohio. Family Court made no effort to confirm or deny this fact, despite the clear mandate of Domestic Relations Law 76-c (4). In addition, Family Court stated at the hearing that it was "not aware of any emergency with regard to the child, as opposed to [petitioner] herself personally[,] that required the court last summer to exercise any kind of emergency jurisdiction." The court repeated this sentiment a few more times during the hearing, namely, that there was no emergency "affecting the child." Based on this reasoning, Family Court granted respondent's motion and vacated the prior order. The Appellate Division reversed. Family Court's decision to vacate the prior order on the ground that there was no emergency affecting the parties' child ignored the clear and unequivocal language of Domestic Relations Law 76-c (1), which states, as relevant here, that "[a] court of this state has temporary emergency jurisdiction if the child is present in this state and ... it is necessary in an emergency to protect the child, a sibling or parent of the child " . Family Court, having apparently believed that an emergency did indeed exist with respect to petitioner at the time of its original determination, should have continued its assumption of temporary emergency jurisdiction. Moreover, at the very least, Family Court was obligated, upon being informed that a proceeding was pending in Ohio, to "immediately communicate with the [Ohio] court" . It therefore remitted the matter to Family Court for compliance with the statute. In a footnote the court pointed out that the duration of an order exercising temporary emergency jurisdiction is guided by whether there is a previous child custody proceeding or determination in a court of another. Here, there was a dispute concerning whether a proceeding was pending in Ohio. Resolution of this dispute will aid the court in determining the duration of the temporary order. It also pointed out that even though respondent originally defaulted, Family Court should have still immediately communicated with the Ohio court since petitioner herself, then pro se, notified the court at an August 18, 2004 appearance that respondent "has filed [in Ohio], but there has been no court date set".

Extreme Hardship Warrants Downward Modification of Agreement

In Marrano v Marrano, 804 N.Y.S.2d 215 (4th Dept.2005) pursuant to the parties' 1994 separation agreement, which was incorporated but not merged into the judgment of divorce, defendant agreed to pay plaintiff $40,000 in maintenance per year. In May 2001, plaintiff sought enforcement of that provision, and defendant cross-moved for a reduction in maintenance. Supreme Court confirmed the report of the Referee, which reduced the award of maintenance to plaintiff to $22,000 per year. Where a party seeks to reduce the amount of maintenance recited in a separation agreement that has been incorporated but not merged into a judgment of divorce, that party must make "a showing of extreme hardship". The record established that defendant earned approximately $174,000 from his real estate development business in 1994 but that, by 1999, his earnings were reduced to approximately $18,000. The gross income from his business was approximately $1,810,000 in 1995 but was reduced to $295,000 in 1999. Indeed, plaintiff did not controvert the evidence presented by defendant that his company, valued at $150,000, would produce a yearly income for defendant of $56,557 over the next three years, and that his approximate yearly personal expenses would be $50,400. His only other assets at the time of the hearing were $300 in a bank account and $15,000 in equity in his home. Therefore defendant met his burden of establishing that his continued payment of $40,000 per year to plaintiff would result in the requisite extreme hardship to warrant reduction of his maintenance obligation.

Important Tax Law Changes For 2006

Earned Income Credit Amounts Increase

The maximum amount of income you can earn and still get the credit is higher for 2006 than it is for 2005. You may be able to take the credit for 2006 if:

You have more than one qualifying child and you earn less than $36,348 ($38,348 if married filing jointly),

You have one qualifying child and you earn less than $32,001 ($34,001 if married filing jointly), or

You do not have a qualifying child and you earn less than $12,120 ($14,120 if married filing jointly).

The maximum amount of adjusted gross income (AGI) you can have and still get the credit has also increased. You may be able to take the credit if your AGI is less than the amount in the above list that applies to you.

Investment income amount.

The maximum amount of investment income you can have in 2006 and still get the credit increases to $2,800.

Exemption Amount Increased

The amount you can deduct for each exemption has increased from $3,200 in 2005 to $3,300 in 2006.

You lose all or part of the benefit of your exemptions if your adjusted gross income is above a certain amount. The amount at which the phaseout begins depends on your filing status. For 2006, the phaseout begins at:

$112,875 for married persons filing separately,

$150,500 for single individuals,

$188,150 for heads of household, and

$225,750 for married persons filing jointly or qualifying widow(er)s.

Social Security and Medicare Taxes

For 2006, the employer and employee will continue to pay:

6.2% each for social security tax (old-age, survivors, and disability insurance), and

1.45% each for Medicare tax (hospital insurance).

Wage limits. For social security tax, the maximum amount of 2006 wages subject to the tax has increased from $90,000 to $94,200. For Medicare tax, all covered 2006 wages are subject to the tax.

Standard Deduction Amount Increased

The standard deduction for taxpayers who do not itemize deductions on Schedule A of Form 1040 is, in most cases, higher for 2006 than it was for 2005. The amount depends on your filing status, whether you are 65 or older or blind, and whether an exemption can be claimed for you by another taxpayer.

The basic standard deduction amounts for 2006 are:

Head of household — $7,550

Married taxpayers filing jointly and qualifying widow(er)s — $10,300

Married taxpayers filing separately — $5,150

Single — $5,150

The standard deduction amount for an individual who may be claimed as a dependent by another taxpayer may not exceed the greater of $850 or the sum of $300 and the individual's earned income.

Standard Mileage Rates

For tax years beginning in 2006, the allowable deductions for the standard mileage rate are as follows:

Business miles. The standard mileage rate for the cost of operating your car increases to 44.5 cents a mile for all business miles driven.

January 2, 2006

Single Action Rule Not Applicable in Matrimonial Action

In Chen v Fischer, \_\_\_NY2d\_\_\_, 2005 WL 3452221 (N.Y.) Supreme Court found that the allegations in Chen's personal injury action were "virtually identical" to those in her counterclaim for divorce and arose out of the same transaction or series of transactions. The court determined that the tort action was barred by res judicata. The Appellate Division affirmed, agreeing that the action was barred because the tort claim could have been litigated with the divorce action and Chen did not expressly reserve the right to bring that claim when she withdrew her fault allegations for purposes of the stipulation. The Appellate Division extended the rule set forth in Boronow v. Boronow (71 N.Y.2d 284, 290 [1988] ), that issues relating to marital property be decided with the matrimonial action, to interspousal tort actions, holding that an interspousal tort action seeking to recover damages for personal injuries commenced subsequent to, and separate from an action for divorce is barred by claim preclusion. (12 A.D.3d 43, 47 [2004]. The Court of Appeals reversed. It held that to require joinder of interspousal personal injury claims with the matrimonial action would complicate and prolong the divorce proceeding. In addition, parties should be encouraged to stipulate to, rather than litigate, the issue of fault. Significantly, the Court pointed out that if fault allegations are actually litigated in a matrimonial action, res judicata or some form of issue preclusion would bar a subsequent action in tort based on the same allegations. It declined to adopt the reasoning of the New Jersey Supreme Court in Tevis v. Tevis (79 N.J. 422, 400 A.2d 1189 [1979] ), which held that under that State's "single controversy" rule, the interspousal personal injury claim should have been brought with the matrimonial action so that the issues between the parties could be decided in one proceeding in order to prevent protracted litigation.

Standard of Living is Primary Consideration in Fixing Maintenance

In Milnarik v Milnarik, --- N.Y.S.2d ----, 2005 WL 3118181 (N.Y.A.D. 3 Dept.) the matrimonial action was filed after the parties had been married for 12 years and had three children. The Appellate Division held that the imputation of $211,300 in income to defendant was well within the range of income that he had earned in sales and real estate development during the marriage and would not be disturbed. Tax records revealed that in the years preceding the commencement of the action, defendant earned between $129,444 and $273,429. When questioned at trial about how much he earned annually during the marriage, defendant testified that he "remember[s] making about $200,000 a year." This testimony was consistent with the testimony of his former employer, who testified that defendant worked for him for two years and earned a little over $400,000 in salary and bonuses between 2000 and 2002 (in addition to a country club membership and car allowance). The Supreme Court failed to sufficiently explain the precise deductions it was applying to this figure. Nor did it appear that the court deducted defendant's spousal maintenance obligation from his imputed income (see Domestic Relations Law <section> 240[1-b][b][4], [5][vii][C]). The matter had to be remitted for clarification and recalculation of child support. The court held that upon remittal, since plaintiff testified that she earned between $1,200 and $1,400 per month, her income should be set at $15,600 (an average of these two figures). There was no abuse of discretion in calculating child support on the combined parental income in excess of $80,000 given the lavish lifestyle enjoyed during this marriage, which included a million dollar home, a second home on an island in Lake Placid, luxury vehicles, boats, a country club membership and private schooling for their two sons. Plaintiff's monthly expenses, exclusive of the private school tuition, were well over $8,000. The court held that the award of $3,000 per month for five years was entirely appropriate, particularly since the parties agreed that plaintiff would not work once they had children, there was a great disparity in their incomes and they enjoyed a lavish lifestyle during the marriage. Since the uncontroverted evidence established that defendant insisted that his sons attend this particular private school the court did not err in directing him to pay his pro rata share of such expense. Defendant was entitled to a $3,250 credit representing half the value of jewelry he gave to plaintiff during the marriage.

Gifts To Former Spouse Not a Wasteful Dissipation

In Kohl v Kohl.--- N.Y.S.2d ----, 2005 WL 3385639 (N.Y.A.D. 1 Dept.) the Appellate Division held that the money given by the husband to his former wife and children of that marriage a wasteful dissipation of marital assets. Such gifts were not unreasonable in relation to the husband's income and were consistent with the type of gift giving he had engaged in throughout his marriage to the wife, which included generous gifts to her own two children from a prior marriage. The distribution of 35% of the husband's sales and consulting business to the wife was warranted by evidence that, inter alia, the husband had learned the skills associated with this business during the 15 years he had worked before the marriage, and that the wife contributed little to the creation of the new business, and impeded it by refusing to use marital stock accounts held in her name to help pay family expenses. No basis existed to disturb the maintenance award to the wife of $12,000 per month for one year following the sale of the parties' Southampton home, and $7000 per month thereafter until the husband turned 70. The wife was to receive a distribution of martial assets in excess of $8 million. The maintenance award was based on a finding of reasonable compensation that was urged by the wife's expert for purposes of valuing the husband's consultancy business. The Court rejected the husband's argument that because the wife will receive enough from the distribution to be self-supporting, she should not be awarded any maintenance at all, and found that the parties' lavish predivorce standard

of living was given appropriate consideration in the determination of maintenance.

First Department Rejects Court Permitting Same Sex Marriage

In Hernandez v Robles, --- N.Y.S.2d ----, 2005 WL 3322959 (N.Y.A.D. 1 Dept.) the Appellate Division found that the motion court erred in finding the provisions of the DRL unconstitutional to the extent that they do not permit same-sex marriage. The court stated that the definition of marriage in the DRL expresses an important, long-recognized public policy supporting, among other things, procreation, child welfare and social stability--all legitimate state interests. The Court held that the DRL provisions regarding marriage do not violate the due process and equal protection provisions of the New York State Constitution (N.Y. Const art I, section 6, section 11). Marriage, defined as the union between one man and one woman, is based upon important public policy considerations and has been recognized as a fundamental constitutional right . These considerations are based on innate, complementary, procreative roles, a function of biology, not mere legal rights. [T]he reasons justifying the civil marriage laws are inextricably linked to the fact that human sexual intercourse between a man and a woman frequently results in pregnancy and childbirth . The legislative policy rationale is that society and government have a strong interest in fostering heterosexual marriage as the social institution that best forges a linkage between sex, procreation and child rearing. It systematically regulates heterosexual behavior, brings order to the resulting procreation and ensures a stable family structure for the rearing, education and socialization of children. Marriage promotes sharing of resources between men, women and the children that they procreate; provides a basis for the legal and factual assumption that a man is the father of his wife's child via the legal presumption of paternity plus the marital expectations of monogamy and fidelity; and creates and develops a relationship between parents and child based on real, everyday ties. It is based on the presumption that the optimal situation for child rearing is having both biological parents present in a committed, socially esteemed relationship. The law assumes that a marriage will produce children and affords benefits based on that assumption. It sets up heterosexual marriage as the cultural, social and legal ideal in an effort to discourage unmarried childbearing and to encourage sufficient marital childbearing to sustain the population and society; the entire society, even those who do not marry, depend on a healthy marriage culture for this latter, critical, but presently undervalued, benefit. Marriage laws are not primarily about adult needs for official recognition and support, but about the well-being of children and society, and such preference constitutes a rational policy decision. Thus, society and government have reasonable, important interests in encouraging heterosexual couples to accept the recognition and regulation of marriage. This procedure was in direct conflict with FCA 418 and 532. Further, such a procedure is in direct contravention of the primary purpose of the FCA, which is to protect and promote the best interests of the child.

December 16, 2005

Equitable Estoppel Requires Best Interest Hearing

In Matter of Westchester County Department of Social Services, o/b/o Melissa B. v. Robert W.R., 803 N.Y.S.2d 672 (2 Dept. ,2005) the Appellate Division held, considering two issues of first impression, that Family Court Act 516-a (b) requires the

Family Court to conduct a hearing before ordering a genetic marker test to determine issues of fraud, duress, or material mistake of fact upon receiving a challenge to an acknowledgment of paternity brought more than 60 days after its execution.

It also held that where a party meets his burden of establishing fraud, duress, or material mistake of fact, the Family Court is then required to conduct a hearing regarding the best interests of the child before ordering a genetic marker test. The court

noted that the doctrine of equitable estoppel may be invoked to preclude a father from denying paternity to avoid support obligations where the invocation of the doctrine is in the best interests of the child and the purpose of the hearing is to determine whether the doctrine should be applied.

Master Electrician License is Marital Property

In Hlinka v Hlinka, --- N.Y.S.2d ----, 2005 WL 2542864 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed a judgment which awarded the defendant wife maintenance of $2,500 per month for five years and $1,500 per month for an additional five years, and awarded the defendant wife $898.88 monthly for 14 years and 10 months as equitable distribution of the plaintiff husband's enhanced earnings as a licensed master electrician.

Distributive Awards May Not Include Payments Which Are Taxable As Ordinary Income to the Recipient

In Carman v Carman, --- N.Y.S.2d ----, 2005 WL 2781147 (N.Y.A.D. 3 Dept.) the parties were married in 1978 and the divorce action was commenced in 2001. Supreme Court, inter alia, awarded plaintiff maintenance of $1,000 per month for 30 months,

determined that 20% of the value of defendant's license as a certified public accountant was marital property, valued defendant's interest in his business and equally divided the marital property between the parties. The Appellate Division held that Supreme Court appropriately determined defendant's child support obligation with regard to combined parental income in excess of $80,000. Although the Child Support Standards Act does not provide for nor permit the inclusion or deduction of a distributive award when calculating parental income because "a distributive award to be paid by one parent to the other pertains to the financial resources of the parties," it is an appropriate factor to be considered by the court when determining the appropriate amount of child support for income in excess of $80,000. Based on the parties' modest predivorce standard

of living, the lack of any special needs of the children, plaintiff's ability to return to work because the children were in school, and the substantial assets available to plaintiff through distributive awards, the court did not abuse its discretion when it determined that only half of the combined parental income over $80,000 should be utilized in calculating the parties' child support obligations. The Appellate Division held that Supreme Court properly considered 20% of defendant's CPA license as marital property. Before the marriage, defendant completed a Bachelor's degree and almost one year of the required two years of practice. During the marriage, he finished the remaining practice period, took an exam preparation course and passed all portions of the CPA exam. The court reasonably accepted the expert's 20% figure, representing one sixth of defendant's education and practical experience with a slight increase for exam preparation and successful completion, as the marital portion of defendant's enhanced earning capacity related to his CPA license. Where only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree or professional license, and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit

the distributed amount of that enhanced earning capacity. Defendant obtained his college degree and completed almost half of his two-year practice requirement before the marriage. He completed the second year of practice during the marriage, but

that experience was earned through a job where he was gainfully employed, earning money to support the parties as a couple. The exam preparatory course lasted less than two months and was a review of his college work. During this time, plaintiff was

also employed full time. While plaintiff performed household chores and provided an environment for defendant to study, this can be seen more as overall contributions to the marriage rather than an additional effort to support defendant in obtaining

his license. As plaintiff's testimony indicated that she did not substantially alter her schedule due to defendant's studying for his CPA exam and licensure, it would be inequitable to award plaintiff half of defendant's enhanced earning capacity

related to his CPA license . Based on plaintiff's limited contribution to defendant's acquisition of this asset, her equitable share of the marital portion of defendant's CPA license was 20%. Considering all of the appropriate factors, Supreme Court properly divided the remaining marital assets equally, including defendant's interest in his business. The marriage was of long duration, the parties were relatively young, both

parties had college degrees, they had no assets at the time of the marriage, plaintiff had primary physical custody of the two minor children, and both parties worked initially but plaintiff stayed home to care for the children after the youngest child was

born. The increase in value of defendant's annuity account was correctly classified as marital property because Defendant used his financial planning and accounting expertise to manage that account, even if only a few times a year, directly and actively contributing to the appreciation in value of that account. Regarding defendant's claim that he was entitled to a credit for moneys that plaintiff borrowed against the home equity line of credit after the commencement of the divorce action, plaintiff testified that this money was not for personal expenses but was expended on marital expenses such as the children and marital residence. Because defendant was ordered to pay retroactive child support and maintenance, which presumably would have been applied toward these marital expenses, he was entitled to a credit for half the amount of funds

borrowed from the home equity line of credit. The Appellate Division found that Supreme Court failed to consider all of the tax impacts to the parties. Courts are required to consider the tax consequences in fashioning equitable distribution but

distributive awards may not include payments which are taxable as ordinary income to the recipient . While Supreme Court correctly ordered distribution of a portion of defendant's year-end bonus for the year of commencement defendant should have

been ordered to pay plaintiff the after-tax amount of her portion, or $20,790, because he already paid the taxes on that bonus. Similarly, the court did not address the tax consequences associated with the distribution of defendant's business, despite

statements in the expert's report noting that, depending on the method of distribution, it may be appropriate to discount the business's value 25% to 40% due to taxes. The Appellate Division remitted for the court to consider the tax impact of its

awards, as well as to reevaluate the equitable distribution of assets in light of it’s modification of Supreme Court's distribution. Supreme Court's maintenance award was appropriate. "[M]aintenance should be designed to provide temporary support while

the recipient develops the skills or experience necessary to become self-sufficient". The record supported Supreme Court's finding that the parties lived a modest lifestyle despite defendant's substantial earnings. The court acknowledged that defendant earned considerably more than plaintiff, probably more than she will ever earn. But plaintiff was healthy, relatively young, obtained a Bachelor's degree, worked full time in the past, ran her own part-time bookkeeping business as well as working part time for another business, received a sizeable distributive award, and could return to full-time employment because the children were in school and the youngest was 10 years old. As plaintiff did not entirely sacrifice her employment opportunities during the marriage and was capable of finding gainful employment, $1,000 was a fair amount and 30 months was a reasonable time period to allow her to reestablish her earning power. Based on the expert's testimony and report, it appeared that the court's maintenance award was partly based on defendant's untapped earnings, namely his income that

remained after subtracting the amount attributable to his CPA license. The amount and duration of the award were not excessive considering defendant's remaining assets. While Supreme Court correctly determined that plaintiff could afford her own counsel fees, based on her distributive award plaintiff also should have equally shared the joint costs of litigation, such as fees for the parties' jointly retained expert and appraiser.

Arbitration of Child Support Permissible

In Frieden v Frieden, 802 N.Y.S.2d 727(2d Dept,2005) the plaintiff sought a divorce from the defendant with whom she had one child. They entered into a settlement agreement which required disputes over child support to be subject to arbitration. After

the defendant lost his job, he requested a reduction of child support payments, but the parties could not reach an agreement. The defendant requested arbitration pursuant to the agreement, but the plaintiff refused to arbitrate the dispute. Thus, the defendant moved before the Supreme Court to compel arbitration. The Supreme Court determined that child support matters were beyond the reach of arbitration. The Appellate Division reversed on the law. It held that Child support issues may be subject to arbitration. (citing Schneider v. Schneider, 17 N.Y.2d 123, 128, 269 N.Y.S.2d 107, 216 N.E.2d 318; Sheets v. Sheets, 22 A.D.2d 176, 178, 254 N.Y.S.2d 320). Arbitration of child support issues does not violate the objectives of the Child Support Standards Act because an arbitration award is subject to vacatur if it fails to comply with the CSSA and is not in the best interest of the child. Accordingly, the defendant's motion to compel arbitration should have been granted.

December 1, 2005

Obligation to Pay Home Equity Loan Is Not Open-ended Obligation

In Popelaski v Popelaski --- N.Y.S.2d ----, 2005 WL 2781147 (N.Y.A.D. 3 Dept.) Supreme Court, inter alia, awarded the plaintiff maintenance of $1,583 per month for 10 years, directed him to pay a home equity loan on the former marital residence, granted the plaintiff a credit for the entire reduction of principal for the mortgage on the marital premises, awarded the plaintiff a credit of $4,657.11 based on allocating to him the sum of $8,000 for marital funds he expended for his personal use, and directed that the plaintiff was entitled to declare the parties' three children as dependents on her income tax return, The judgment was modified by reducing the maintenance to $1,300 per month for 7 years, and granting the plaintiff a credit for 50% of the reduction of the principal of the mortgage on the marital premises. The Appellate Division held that the obligation to pay a home equity loan on the marital residence did not constitute an improper, open-ended obligation since it entailed specific monthly payments and had a predetermined duration. The Supreme Court erred in determining that the plaintiff was entitled to declare all three of the parties' children as dependents on her income tax returns. Where a noncustodial parent meets all or a substantial part of a child's financial needs, a court may determine that the noncustodial parent is entitled to declare the child as a dependent. Both parents were wage earners who each contributed toward the support of their three children. The Appellate Division held that the father may claim the parties' two youngest children as dependents on his income tax returns, while the mother may claim their oldest child as a dependent. The award of $15,000 counsel fees was an improvident exercise of its discretion. Given the defendant's child support and maintenance obligations and considerable debt burden, much of which was incurred for the legitimate purpose of mounting a legal defense to the action and ancillary proceedings, it was clear that the defendant, even with the additional income imputed to him by the court, lacked the ability to pay the plaintiff's counsel fees.

Counsel Fees Reduced On Appeal Even Though Defendant Use Obstructionist Tactics

In Daniel v Friedman --- N.Y.S.2d ----, 2005 WL 2787217 (N.Y.A.D. 2 Dept.) Supreme Court directed the husband to pay maintenance of $2,500 per month for three years, directed him to pay child support of $4,000 per month until the emancipation of the parties' first child and, upon emancipation of the parties' first child, to pay child support of $3,317.08 per month until the emancipation of the parties' second child, and awarded counsel fees to the plaintiff of $165,000. The Appellate Division modified the judgment by reducing the award of counsel fees to $70,089.63. It held that courts have discretion to value 'active' assets such as a professional practice on the commencement date of the action, while 'passive' assets such as securities, which could change in value suddenly based on market fluctuations, may be valued at the date of trial but such formulations should be treated as helpful guideposts and not immutable rules. Although an economic downturn between the date of commencement of the action and the date of trial had an effect upon the value of the defendant's business, the evidence at trial demonstrated that the business had rebounded significantly and that there were signs of potential positive growth for the future. The Appellate Division held that the trial court's determination to use the date of commencement of the action as the valuation date for the defendant's business was a provident exercise of discretion. It also held that the trial court providently exercised its discretion in awarding the plaintiff maintenance in light of the disparity in the parties' incomes and the wife's ability to become self-supporting in the future as a result of her new career. It appeared to the Appellate Division that the defendant's obstructionist tactics substantially contributed to the protracted nature of the litigation. However, in consideration of all the relevant factors, including the complex nature and extent of the marital property, a prior pendente lite award of counsel fees to the plaintiff paid by the defendant of $25,000, the defendant's payment of the parties' expert fees of approximately $78,000, and the plaintiff's ability to pay some of her own counsel fees, the Appellate Division reduced the award of counsel fees to $70,089.63, the amount actually due and owing at the time of her application.

Modest Contributions of Wife Warranted Reduction to 20% of Husband’s Enhanced Earning Capacity

In Schiffmacher v Schiffmacher, 801 N.Y.S.2d 848 (4th Dept. 2005) defendant contended on appeal that Supreme Court erred in awarding plaintiff 70% of the value of the parties' investment and savings accounts. The record established that the court properly considered the factors set forth in DRL 236(B)(5)(d), including the fact that plaintiff's contributions to the parties' investments were significantly greater than defendant's contributions. It rejected the contention of defendant that the court erred in determining the value of his master's degree in business administration. The value of the degree may be measured by comparing the average lifetime income of a college graduate and the average lifetime earnings of a person holding such a degree and reducing the difference to its present value. Plaintiff's expert utilized that method in determining the value of defendant's degree, and defendant presented no expert testimony that would support a different valuation. The Appellate Division held that court erred in awarding plaintiff one half of the value of defendant's enhanced earning capacity arising from the degree. In light of plaintiff's modest contributions to defendant's degree, the court should have awarded plaintiff only 20% of the value of defendant's enhanced earning capacity and it modified the judgment accordingly.

Income Imputed to Husband Who Intentionally Withheld Information As to Income

In Robbins-Johnson v. Johnson, 20 A.D.3d 723, --- N.Y.S.2d ----, (N.Y.A.D. 3 Dept.) the parties were married in 1993 and had no children. Supreme Court ordered defendant to pay maintenance in decreasing weekly amounts over a period of eight years, starting with $800 in the first year and ending with $100 in the last. Supreme Court also granted plaintiff counsel fees of $1,500 for services rendered in opposing a second motion by defendant for reduction of temporary maintenance. The Appellate Division affirmed. At the time of trial, defendant was 58, plaintiff was 46 and both were in good health. Although plaintiff had worked during some of the marriage, she lost her employment, along with attendant health and retirement benefits in 1996 when defendant restricted the hours she could work. Supreme Court imputed income to the parties greater than they claimed, attributing an annual income of $20,800 to plaintiff and $100,000 to defendant. Defendant's income was calculated using his admitted salary and then augmented based on Supreme Court's finding that he had intentionally withheld information concerning the actual amount of his income. The court also noted that defendant owns far more separate property than does plaintiff. Supreme Court considered these factors, as well as the living expenses of the parties and the evidence of their predivorce standard of living, and awarded plaintiff a decreasing share of defendant's annual income. Supreme Court detailed the parties' separate and marital property, finding a total net worth of $677,346, and valuing their vehicles and other marital property at $136,663.44. The court awarded plaintiff $16,500 of these assets and, to balance the division of marital property, directed defendant to pay plaintiff $50,000 as a distributive award. Thus, plaintiff received approximately 48% of

the marital property. The nearly equal distribution was appropriate in light of the parties' circumstances, including the 10-year duration of the marriage, loss of pension rights and liquidity of the assets. Defendant argued that a separate hearing was required because the counsel fee award was imposed as a sanction for frivolous conduct. The record showed that plaintiff did not make her request pursuant to 22 NYCRR 130-1.1 and the court did not treat plaintiffs request for counsel fees as a motion for costs or sanctions. Supreme Court's award was adequately supported by the affidavit of plaintiffs counsel setting forth the agreed-upon hourly rate for his services and the hours spent opposing defendant's motion. Further, plaintiff's counsel requested these fees and submitted his affidavit more than one month before the second day of the four-day trial and defendant then failed to question plaintiff or present any evidence concerning fees. Even though the issue was raised again at the end of the trial, defendant did not submit an answering affidavit or request a separate hearing on fees. Under these circumstances, defendant had ample opportunity to be heard on this issue and there was no abuse of Supreme Court's discretion in awarding counsel fees.

Hague Convention - Grave Risk of Harm Exception

In Didur v Viger, 392 F.Supp.2d 1268 (D. Kansas, 2005) the District Court held that the father established that the child's return to his mother's custody in Canada would expose him to grave risk of physical or psychological harm. The Canadian child welfare authorities documented incidents in which the mother repeatedly drove while drunk with the child, the mother was drunk in public with the child alongside her, the mother was intoxicated repeatedly while pregnant with the child's younger sibling, the mother refused to parent the child, and the mother suffered from mood swings and depression, the child was unable to obtain counseling in Canada, the mother sought to have her parents obtain custody of child, and the Canadian authorities recommended against returning the child to Canada and stated that he would be placed in foster care if he was returned.

November 16, 2005

Third Department Joins Other Departments Holding Prospective Child Support Payments May Be Waived

In Williams v Chapman, 2005 WL 2782578 (N.Y.A.D. 3 Dept.) the Third Department joined the other Departments in holding that prospective child support payments may be waived. Pursuant to an open court stipulation Family Court ordered respondent to pay petitioner $150 per week in child support for the parties' two unemancipated children. In February 1999, one child relocated to the father's residence and the parties agreed, in a handwritten document, that child support payments to the mother would be suspended while each party had physical custody of one of the children. In 2003, the mother commenced a proceeding, seeking approximately $37,000 in child support arrears asserting that the father failed to pay support for both children after one child left the mother's residence. Family Court found that the mother expressly waived prospective child support payments in the parties' agreement and denied her petition. The Third Department affirmed. It noted that in Matter of Dox v. Tynon, 90 N.Y.2d 166, 168 [1997] the Court of Appeals has held that pursuant to the New York State Support Enforcement Acts of 1986 and 1987 a recipient may not impliedly "waive the right to unpaid child support simply by failing to demand payment or seek enforcement of support obligations", but declined to reach the question of whether express waivers of future child support payments were similarly impermissible. The mother argued that express waivers of child support must also be deemed to violate the legislative intent of the amendments at issue in Matter of Dox. The Appellate Division rejected her argument which was at odds with positions taken by the other Departments (See Matter of Parker v. Parker, 305 A.D.2d 1077 [4th Dept 2003]; Matter of O'Connor v. Curcio, 281 A.D.2d 100 [2d Dept 2001]; Matter of Grant v. Grant, 265 A.D.2d 19,[1st Dept 2000], lv denied 95 N.Y.2d 758 [2000] Mitchell v. Mitchell, 170 A.D.2d 585, 585 [2d Dept 1991]). The purpose of the amendments under consideration in Matter of Dox was to preclude forgiveness of child support arrears to ensure that respondents are not financially rewarded for failing either to pay the order or to seek its modification. In determining that implied waivers are not permissible, the Court of Appeals emphasized that such waivers are "based on petitioner's behavior after respondent declined to make the requisite payments". Here the waiver was based upon the mother's conduct prior to any default, that is her agreement to forego future support payments, rather than support arrears. The court held than contrary to the mother's argument regarding legislative intent, when future child support payments are waived, no arrears accrue, and the statutory amendments precluding the cancellation of arrears are inapplicable. The court rejected the mother's argument that the express waiver given was invalid as a matter of law due to the parties' failure to comply with Family Ct Act 413(1)(h). While she was correct that in the absence of an express waiver, a party seeking modification of a child support obligation is required to apply to the courts and any order entered in such a proceeding must comply with the CSSA in arguing that the parties' out-of-court agreement must also comply with the statutory requirements, the mother failed to distinguish between a modification agreement and a waiver. A modification agreement 'is binding according to its terms and may only be withdrawn by agreement while a waiver requires no more than the voluntary and intentional abandonment of a known right and, to the extent that it remains executory, may be withdrawn without agreement. Thus, an agreement that does not satisfy the prerequisites of a legally binding modification agreement may nonetheless constitute a valid waiver.

Acupuncture License is Martial Property. Husband Warned That Proving Wife’s Alleged Fraud in Obtaining License Hurts His Case

In Liu v. Chen, --- N.Y.S.2d ----, 2005 WL 2522800 (N.Y.A.D. 2 Dept.) the plaintiff appealed from a judgment, which, inter alia, awarded the defendant $127,500, representing 50% of the value of the plaintiff's enhanced earning capacity due to her acquisition of a license to practice acupuncture, and valued AC500, Inc., the parties' acupuncture and herbology practice, at $220,000.The Appellate Division held that in determining the value of her enhanced earning capacity resulting from the acupuncture license, Supreme Court improperly relied on the valuation of the expert retained by the defendant. The expert testified that his estimate of the plaintiff's earnings was based on the earnings of AC500, Inc., the company which operated the parties' acupuncture and herbology practice for the year 2000. The expert, erroneously assumed that the company was operated solely by the plaintiff, and had no knowledge of the defendant's role in contributing to the company's earnings. While the plaintiff claimed that the defendant's contributions to the practice that year through his provision of herbology services constituted about 20% of those earnings, the defendant testified that his herbology practice accounted for only 1% of the company's revenue. Nevertheless, the defendant conceded that, in 2000, he worked full-time for the company, six days a week, alongside the plaintiff. The expert's valuation was based on incorrect assumptions, and should not have been relied upon in determining the plaintiff's enhanced earning capacity. Supreme Court also improvidently exercised its discretion in determining the marital portion of the plaintiff's acupuncture license. To meet the admission requirements for the acupuncture licensing exam, the plaintiff was required, inter alia, to establish that she received three years of prior training. The parties were married in China on November 29, 1990, and emigrated to the United States on or about September 27, 1991. The plaintiff qualified for and passed the New York State acupuncture licensing exam in 1992 based, among other things, on documentary evidence that she had received three years of training in China between January 1988 and April 1991. Thereafter, she received a limited permit to practice acupuncture in December 1992, and a full license in April 1995. All times prior to receiving her license, the plaintiff worked outside the home and helped to support the family. In light of the above circumstances, the court's decision to apply a 100% coverture factor in determining the marital portion of the acupuncture license lacked proper support in the record. The defendant claimed that, after the marriage, he paid for three months of acupuncture training for the plaintiff in China, from May 1991 through August 1991, before the couple moved to the United States. He also claimed that he paid the filing fee for the exam, assisted the plaintiff in studying for it, and drove her to the test center. While some portion of the license constituted marital property subject to equitable distribution the evidence did not justify the court's use of a coverture factor of 100%.The court pointed out that defendant's claim that the academic documents submitted by the plaintiff in support of her application for the license were fraudulent did not advance his claim for equitable distribution; to the contrary, such evidence, if true, could only serve to establish that the license was issued under false pretenses and, therefore, had no present value as a future source of earnings. The matter was remitted for a new determination of the valuation issue and to determine the marital portion of the acupuncture license.

Adultery Committed After Commencement is Still Basis for Divorce

In Golub v Ganz, ---- N.Y.S.2d ----, 2005 WL 2665335 (N.Y.A.D. 3 Dept.) the Appellate Division rejected the defendants argument that the trial court should not have granted a divorce on the basis of adultery because his only act of adultery took place after the action was commenced and because plaintiff's own alleged adultery constituted a complete defense to his adultery. Defendant's adultery, committed after the parties were married but before any judgment of divorce, fit within the parameters of Domestic Relations Law 170(4). Since no provision of the Domestic Relations Law precludes a party from obtaining a divorce upon acts of adultery that occur after an action is commenced and because no prejudice had been demonstrated by defendant a divorce could be granted on this ground (citing, inter alia, 1 Foster, Freed and Brandes, Law and the Family New York 6:9, at 392 [2d ed]). Nor was the plaintiff's acknowledgment at trial that she became "romantically involved" with another during the late summer of 2002, sufficient to establish that she committed adultery such that the defense of recrimination was established. Since plaintiff's adultery was not established by independent satisfactory evidence in the first instance, no negative influence arises from her invocation of the Fifth Amendment right against self-incrimination when asked at trial if she engaged in a sexual relationship with another . The defendant failed to establish that the appreciation of plaintiff's premarital stock in the Golub Corporation during the marriage could be attributed to her active efforts during the marriage. The subject stock was nonvoting, preferred stock, plaintiff was but one of hundreds of midlevel managers amongst the corporation's 102 grocery stores and 22,000 employees, had no role in corporate policy-making decisions, had no input into corporate procedures and was the manager of an income-producing department. She was in marketing. Nor had she ever been consulted by any member of corporate management or the board of directors regarding anything other than her specific duties. None of the positions ever held by plaintiff, nor her attendance at corporate meetings or charitable events, had affected the profitability of the corporation.

Noember 1, 2005

Party May Testify As an Expert

In Thoma v Thoma --- N.Y.S.2d ----, 2005 WL 2381622 (N.Y.A.D. 2 Dept.) the Appellate Division reversed the judgment and the matter was remitted to the Supreme Court for a hearing and new determination as to the issues of maintenance, child support, arrears, the proportion of unreimbursed medical, dental, optical, and pharmaceutical expenses to be paid by the plaintiff, and counsel fees, if any, to be paid by the plaintiff. The defendant was a licensed school teacher with two teaching certificates and a degree in architecture and interior design. She testified that her "best guess" was that if she secured full-time employment as a school teacher, she could earn a starting salary of $39,000 per year. The defendant testified that for five years since 1999, she was unable to obtain full-time employment. However, she acknowledged that in 2000 she was able to secure full-time employment at a private school but she quit that job. She further noted that she was unable to secure other full-time employment despite the fact that she "sent out 40 resumes last month." She failed to submit copies of applications

or any rejection letters. Her claim that she could not secure full-time employment was based upon conclusory assertions. It was clear from the record that the defendant is relatively young and capable of working. Therefore the award of lifetime maintenance was improper. Maintenance should continue only as long as required to render the recipient spouse self-supporting. In view of the conclusory testimony with respect to the defendant's inability to obtain full-time employment, The Appellate Division deemed it appropriate to remit for a new hearing to determine the results of her 40 job applications and whatever other efforts she made to secure full-time employment. It specifically stated that:” This case may warrant imputation of income to the defendant based upon her earnings potential.” At the trial, the Supreme Court precluded the plaintiff, an architect, from testifying as an expert as to the defendant's earning capacity in architecture and interior design on the ground that he was an "adversary." This was error. A party may testify as an expert witness. However, since the plaintiff never made an offer of proof as to his qualifications to testify. it was impossible to determine whether this error had an effect on the outcome. At the new hearing, the plaintiff should be permitted to attempt to qualify himself as a expert or to submit other expert testimony. In determining child support, the Supreme Court must deduct from the plaintiff's gross income the amount that he pays in maintenance and taxes paid pursuant to the Federal Insurance Contributions Act before determining the combined parental income and provide for an adjustment in child support upon the termination of maintenance, if any. One of the two children for whom child support was awarded will reach the age of 21 years on December 22, 2005. In view of the close proximity of this date, upon remittitur, the Supreme Court should determine the child support to be awarded before and after December 22, 2005. The judgment directed the plaintiff to pay the unreimbursed medical, dental, optical, and pharmaceutical expenses of the two children under the age of 21 years. However, the Supreme Court was required to determine the plaintiff's share of such expenses by prorating his income to the combined parental income. With respect to counsel fees, the plaintiff did not consent to a determination without a hearing and specifically objected to the amount of counsel fees incurred by the wife as excessive. Therefore, a hearing is warranted on the amount of counsel fees to be awarded, if any.

Claim of Bias By Referee Waived By Failure to Timely Objection

In Shen v Shen --- N.Y.S.2d ----, 2005 WL 2384687 (N.Y.A.D. 2 Dept.) the defendant contended on appeal that the referee who was appointed to hear and report exhibited bias against her, and that the Supreme Court should have directed a new hearing on the issues. The Appellate Division held that the defendant waived any claim of bias by her conduct in raising the issue of bias for the first time after the hearing, after the referee prepared her report, and after the plaintiff moved to confirm the report. The Court held that where a referee's findings are supported by the record, the court should confirm the referee's report and adopt the recommendation made therein. The majority of the referee's findings, including those regarding the custody of the parties' children, were amply supported by the evidence and were properly upheld by the Supreme Court. However, the determination that a particular IRA and bank account owned by the defendant constituted marital property subject to equitable distribution was not supported by the record. Those accounts were opened by the defendant prior to the parties' marriage, she deposited no funds in them during the marriage, and any increase in their value was not attributable to the plaintiff. Thus, the court should not have distributed those accounts. In view of the respective assets and earning capacities of the parties and the other relevant factors in this case the court improvidently exercised its discretion in directing the defendant to pay $41,934, or approximately 75%, of the plaintiff's counsel fees. Under the circumstances of this case, an award of $22,000 or approximately 40% of the plaintiff's total counsel fees was appropriate.

Judgment Modified to Correct Oversight

In Ignaszak v Ignaszak--- N.Y.S.2d ----, 2005 WL 2404643 (N.Y.A.D. 4 Dept.) the JHO determined that "[e]ach party shall be solely responsible for [his or her] attorney's fees," but that determination was not incorporated into the judgment of divorce. The Appellate Division stated that In its view the court's failure to incorporate the JHO's determination was an oversight, and it modified the judgment on the law by providing that each party shall be solely responsible for his or her attorney's fees.

Maintenance Not Dichargable in Bankruptcy

In re Duffy, --- B.R. ----, 2005 WL 2483328 (Bankr.S.D.N.Y.) the wife waived maintenance but the parties stipulation of settlement which was made during the equitable distribution trial contained the following provision: Adjudged and Decreed that the Defendant [Duffy] shall pay monthly spousal maintenance to the Plaintiff [Taback] commencing July 1, 1997 in the sum of $2,000 per month payable in monthly installments which shall be made on the first day of each month for the term of ten (10) consecutive years, which payments shall be non-dischargeable in bankruptcy and paid unconditionally to the Wife irrespective of her cohabitation or remarriage. The bankruptcy court held that this debt was dischargeable pursuant to 11 USC 523(a)(5), of the Bankruptcy Code which excepts from discharge any debt (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, ..., or property settlement agreement, but not to the extent that-- ...(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support....The Court held that the payments did not constitute alimony/maintenance within the meaning of Section 523(a)(5) of the Bankruptcy Code. The question whether obligations under a divorce decree constitute alimony/maintenance within the meaning of Section 523(a)(5), or equitable distribution of marital property not within subsection (5), is a question of bankruptcy law to be decided by the bankruptcy court on the basis of all the facts and circumstances, and the bankruptcy court must reject the characterization applied to the obligation by the divorce court or the parties if warranted by a consideration of all of the facts. The court found that payments were designated as "spousal maintenance" and treated as such by the parties at the suggestion of the trial court, not for the purpose of providing alimony but in order to facilitate the settlement of the wife’s equitable distribution claim by reducing the net cost to the husband. Unlike alimony/maintenance, the payments were to continue for ten years regardless of the wife’s cohabitation, which long predated the divorce, or remarriage, which was contemplated to occur and did shortly after the divorce judgment.

Must Give Credit For Room and Board at College When Directing Payment of College Expenses

In Navin v Navin, --- N.Y.S.2d ----, 2005 WL 2438521 (N.Y.A.D. 2 Dept.)the Supreme Court, inter alia, awarded the plaintiff maintenance in the sum of $540 per week and child support in the sum of $408.80 per week for the parties' unemancipated child. The Appellate Division modified, on the law, by deleting the decretal paragraph awarding the plaintiff child support of $408.80 per week for the parties' unemancipated child. In calculating the defendant's child support obligation, the Supreme Court failed to reduce the defendant's income by the amount of maintenance paid to the plaintiff before determining his child support obligation, and failed to direct a concomitant increase in the child support obligation upon the termination of the maintenance obligation. Further, while the Supreme Court properly directed the defendant to pay a proportionate share of the children's educational expenses, it was error to do so without including a provision that the amount that the defendant contributes to the room and board expenses of the unemancipated child's school while the child is away from home and at school shall be deducted from the defendant's child support obligation.

October 17, 2005

Order of Protection May Not Be Based Upon Unpleaded Allegations

In Czop v Czop, --- N.Y.S.2d ----, 2005 WL 2211379 (N.Y.A.D. 2 Dept.) a family offense proceeding, the husband was charged with harassment in the second degree resulting from a heated dispute with the wife. The wife testified at the hearing that shortly after he was served with divorce papers, the husband, yelling and wildly pacing back and forth, threatened the wife with bodily injury. She also testified that the husband owned guns, and that she feared for her safety. The Appellate Division pointed out that Harassment in the second degree is committed "when, with intent to harass, annoy or alarm another person: [a person] strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same " (Penal Law 240.26[1]. Evidence of a genuine threat of physical harm backed by the ability to carry it out is sufficient to prove harassment in the second degree. The Court held that an order of protection rendered in a family offense proceeding may not be based upon allegations not charged in the petition. At the hearing, the wife offered testimony regarding a prior physical assault. The husband objected to the admission of this evidence as it sought to prove an incident that was not charged in the petition. The Family Court sustained the husband's objection and struck the wife's testimony. However when it rendered its decision the Court referred to the wife's testimony of the prior assault, mischaracterizing it as "uncontroverted" and it stated that the wife's testimony of the prior assault would be taken into consideration. This was error. Family Court also erred in curtailing the husband's cross-examination of the wife concerning her alleged installation of a tape recording device on the parties' telephone line in order to surreptitiously record the husband's telephone conversations. Such conduct, if proved, constitutes eavesdropping in violation of Penal Law 250.05. This evidence was probative of the wife's credibility and such cross-examination should have been allowed. The Court agreed with the husband's contention that he was denied a fair hearing and remitted the matter for a new hearing and determination before a different family court judge.

Income Capped At $300,000 for Child Support Award

In Kaplan v Kaplan--- N.Y.S.2d ----, 2005 WL 2292997 (N.Y.A.D. 2 Dept.) the Supreme Court, Nassau County (LaMarca, J.), Supreme Court awarded the mother custody of the parties' child and permitted her to relocate, and awarded child

support in the sum of $3,925 per month, maintenance in the sum of $7,500 per month for 5 years, and an attorney's fee in the sum of $100,000. The Appellate Division reduced the child support to $2,836 per month, adding a provision directing that, upon the termination of the father's maintenance obligation, the father's child support obligation shall be upwardly modified to the sum of $4,112 per month, and adding thereto a provision directing that (a) the parties shall jointly consult with each other

with respect to the child's education and health, including, but not limited to, decisions pertaining to his special needs arising from his hearing disability, and (b) the parents in their consultation shall always use their best efforts and good faith to arrive at a joint decision in the best interests of the child, but that the mother shall have final decision-making authority. Given that the mother was supportive of visitation, that both parties are fit and loving parents, each capable of caring for the child, that the mother was available to care for the child and address his special needs, and that the mother was the primary caretaker since the child's birth, the trial court properly awarded custody of the parties' child to the mother. Given the foregoing, th court deemed it appropriate to modify the judgment to add a provision directing that the parties, in good faith, jointly consult with each other regarding decisions pertaining to the child's education and health, with the mother having final decision-making authority. In calculating the amount of the child support award pursuant to the Child Support Standards Act the trial court opted to apply the child support percentage (in this case 17%) to the combined parental income over $80,000. The mother was not working at the pertinent time, and was attending to child care, including the child's special needs. The father was working, and was earning in excess of $400,000 per year. Supreme Court providently exercised its discretion in capping his annual income at $300,000. Thus, as the Supreme Court correctly concluded, the combined parental income was $300,000, and the father's percentage obligation for child support was 100%. However, in making its child support determination, the Supreme Court failed to deduct from the father's income the amount of maintenance ($90,000 per year) that he was ordered to pay to the mother and the court erred in its FICA calculation. Rather than remit the matter to the Supreme Court, Nassau County, for a recalculation of child support, the court did it in the interest of judicial economy. The award of maintenance in the sum of $7,500 per month for 5 years was a proper exercise of the trial court's discretion, taking into consideration the relevant factors, including the parties' pre-separation standard of living, the separate property retained by each party and their respective net equitable distributive awards of marital property, the mother's absence from the work force as a certified social worker for most of the period following the birth of the parties' special needs child on January 19, 2001, the mother's continued role as the primary caretaker of a special needs child, the father's significantly higher earning capacity as a successful partner in a radiology practice, and the short duration of the parties' marriage.

Federal Court Can Not Enforce Rights of Access Under Hague Convention

In Wiezel v Wiezel-Tyrnauer — F.Supp.2d ----, 2005 WL 22850 (S.D.N.Y.) the father filed an application for the return of his children to Israel pursuant to the International Child Abduction Remedies Act and the Hague Convention on the Civil Aspects of International Child Abduction. His Petition was made pursuant to Article 12 of the Convention, which provides "Where a child has been wrongfully removed or retained...the judicial or administrative authority of the Contracting State where the child is...shall order the return of the child forthwith." Although he claimed to be a custodial parent of the Children, he did not seek the permanent return of the Children to Israel. Instead he sought court-ordered visitation or access rights, specifically an order directing the Mother to arrange, at her expense, for the children to visit their Father in Israel twice per calendar year, and to allow the Father to have at least four unsupervised visits per year with the Children in the United States. The District Court granted the mother’s motion to dismiss the petition because the father did not seek the permanent return of the children to Israel. The jurisdictional issue was whether the court had jurisdiction over an Article 12 claim by a petitioning parent who claims to have custody rights but is seeking as, a remedy, only visitation and other access rights. Petitioner was seeking to have the court enforce his custody rights by ordering visitation rights. The Court noted that Article 12 directs the court to order a single remedy, the return of the child, upon a finding of a wrongful removal. The Convention does not permit the court to order the relief that Petitioner was seeking. Moreover, the Convention sets forth separate procedures by which signatory nations may enforce access rights of petitioning parents, and those procedures do not involve the federal courts. While Article 12 addresses procedures to effectuate the return of a wrongfully removed child, Article 21 concerns "organizing or securing the effective exercise of rights of access" to a child. Although Article 12 specifically refers to action by the "judicial or administrative authority" of a member nation, Article 21 makes no mention of recourse to a judicial authority. Instead, a parent must apply to the "Central Authority" of a nation to secure enforcement of his or her rights of access, and the "central authority" for the United States is the Department of State. The court found that it lacked jurisdiction to issue orders to create and secure access rights. Lacking the authority to order the relief requested, the court found that the action had to be dismissed.

Compound Interest Improper On Pay-out of Counsel Fee Award

In Miklos v Miklos, 21 A.D.3d 353, 800 N.Y.S.2d 561(2d Dept.2005) the appellate Division modified an order directing the defendant former husband to pay an attorney's fee in the sum of $87,500, payable in four annual installments each in the sum of $21,875, and to pay her experts 60% of their fees. The Appellate Division held that while it was proper to direct the payment of the attorneys fee in installments Supreme Court improperly awarded compound interest of 1.5% per month, which is at least twice the statutory rate of 9% per annum, on any untimely installment payments.

October 3, 2005

NYSBA Ethics Opinion 781 Requires Lawyers to Withdraw Fraudulent Net Worth Statement or Withdraw From Case

In New York State Bar Association, Opinion 781 – 12/8/04, in order to submit a financial statement on behalf of a client, a matrimonial lawyer certified the accuracy of the statement to family court. After filing the statement, the lawyer learned that it contained a material error relating to the omission of substantial client assets. The lawyer asked the Committee if he is required to withdraw the financial statement?

The Committee on Professional Ethics rendered an opinion which concluded that a matrimonial lawyer who learns that a financial statement submitted by the lawyer to family court contains a material omission, and that the client perpetrated a fraud on the tribunal, must call upon the client to rectify the material omission. If the client refuses, the lawyer must withdraw the financial statement. If the lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule (which we be the case where it is not withdrawn), the lawyer must withdraw from the representation, with the court’s permission if required by court rules.

The lawyer must first determine if he or she received information “clearly establishing” that the client has committed a fraud. “Fraud” under the Code of Ethics “does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another.” If the lawyer is uncertain of the client’s state of mind in making this determination, EC 7-6 states that the lawyer should “resolve reasonable doubts in favor of the client.”

DRL 236[B][9][b] Applied in Family Court Proceeding For Modification of Spousal Support

In Sannuto v Sannuto,--- N.Y.S.2d ----, 2005 WL 2152701 (N.Y.A.D. 2 Dept.) The Appellate Division pointed out that Family Court Act 439(e) provides that an aggrieved party's specific written objections to the final order of support of the Support Magistrate must be submitted within 35 days after the mailing of the order to such party. Since the wife did not submit written objections to the Support Magistrate's order until more than 35 days after the mailing of the order, the Family Court should have denied the objections on this ground. However, the order of the Support Magistrate dated March 2, 2004, was subject to the review process set forth in Family Court Act 439(e), based upon the husband's timely objection, coupled with the wife's rebuttal to his objections. Upon review of the husband's objections, it held that the Support Magistrate erred in determining that the husband demonstrated a substantial change in circumstances to justify a downward modification of his spousal support obligation. Pursuant to Domestic Relations Law 236(B)(9)(b), the court may modify any prior order or judgment with respect to maintenance. The party seeking the modification has the burden of establishing the existence of a "substantial change in circumstances" warranting the modification. Importantly, in determining if there is a "substantial change in circumstances" to justify a downward modification, the change is measured by comparing the payor's financial circumstances at the time of the motion for downward modification and at the time of the divorce or the time when the order sought to be

modified was made. Under the circumstances in the present case, the court properly determined that the husband failed to meet his burden.

Child Support Agreement That Does Not Specify Amount of Basic Child Support Obligation And Reasons For Deviation is Void

In Jefferson v Jefferson,--- N.Y.S.2d ----, 2005 WL 2154697 (N.Y.A.D. 2 Dept.) the Appellate Division reversed an order which denied the Wife’s motion to to vacate the child support provisions of the parties' separation agreement on the ground that they did not comply with Domestic Relations Law 240(1-b)(h), and granted the motion. The matter was remitted to the Supreme Court for a determination of the parties' respective financial circumstances, including income, expenses, and standard of living, as of December 6, 2000, and for a determination of the appropriate amount of child support to be paid

based thereon. The child support provisions of the parties' December 6, 2000, separation agreement (hereinafter the agreement) deviated from the Child Support Standards Act (Domestic Relations Law 240[1-b]( CSSA) in that the agreement failed to take into account the combined parental income in excess of $80,000. Domestic Relations Law 240(1-b)(h) provides that a validly-executed support agreement which deviates from the basic child support obligation set forth in the CSSA must specify, inter alia, the amount that the basic child support obligation would have been under the CSSA and the reason or reasons that the agreement does not provide for payment of that amount. Here, the agreement failed to set forth the presumptively correct amount of support that would have been fixed pursuant to the CSSA, and failed to articulate the reason the parties chose to deviate from the CSSA guidelines. Consequently, the child support provisions of the agreement are invalid and unenforceable and the Supreme Court should have granted that branch of the plaintiff's motion which sought their vacatur.

Wife Entitled To Opportunity To Purge Contempt Before Going to Jail

In Cooper v Cooper --- N.Y.S.2d ----, 2005 WL 2155186 (N.Y.A.D. 2 Dept.) pursuant to a pendente lite order of the Supreme Court the wife was directed to return $274,000 she unilaterally withdrew from the parties' joint account and to account for any sums spent. She not only refused to abide by the court's directive, but, after issuance of the directive, secretly removed the funds and hid them in her father's safe and continued to deplete the funds. The Supreme Court held her in contempt and directed that she be incarcerated for four days with no opportunity to purge herself of the contempt. She was released by the sheriff after serving a day in jail, who mistakenly calculated her release date. Learning of her release, the Supreme Court directed that she be re-incarcerated. The Appellate Division stayed enforcement of those portions of the Supreme Court's orders directing incarceration, including the directive requiring re-incarceration and reversed the order directing incarceration on the law. It held that even if the wife had been properly adjudicated in contempt, the Supreme Court erred in failing to give her an opportunity to purge herself of her civil contempt, since she still had the ability to return the funds and to render an accounting (see Judiciary Law 774). It also erred in granting the husband's motion for contempt. Before holding a party in contempt, Domestic Relations Law 245 requires a showing that resort to other enforcement devices has been exhausted or would be ineffectual. The Wife’s attorney's efforts to defend against the contempt motion by demonstrating the efficiency of other enforcement remedies were prematurely terminated by the hearing court. Thus, the court improperly adjudicated the plaintiff in contempt.

Preclusion not Available where Movant Spouse Failed to Disclose Too

In Biggio v Biggio, --- N.Y.S.2d ----, 2005 WL 2211685 (N.Y.A.D. 2 Dept.) the Appellate Division held that husband having failed to make full disclosure, was in no position to argue that wife should have been sanctioned with penalty of preclusion for failure to make disclosure. It noted that the preclusion order overlooked the plaintiff's failure to make full disclosure, including disclosure of financial information regarding assets and expenses clearly within his sole control. Under the circumstances, the plaintiff was in no position to argue that the court should sanction the defendant with the penalty of preclusion.

September 16, 2005

Modification of Custody Requires Change of Circumstances and Best Interest Showing Where Surviving Agreement

In Matter of Rawlins v Barth, --- N.Y.S.2d ----, 2005 WL 1962987 (N.Y.A.D. 2 Dept.), the mother commenced a proceeding to transfer custody of the parties' two children from the father to her. The father had custody pursuant to a stipulation between the parties. The Appellate Division held that when the parties enter into a stipulation concerning custody, "it will not be set aside unless there is a sufficient change in circumstances since the time of the stipulation and unless the modification of the custody agreement is in the best interests of the children”.

Purchase Price Not Evidence of Value In Rapidly Rising Real Estate Market

In London v London, 2005 WL 1846874 (N.Y.A.D. 3 Dept.), the Appellate Division held that the trial court erroneously found that the marital residence was a marital asset despite uncontroverted evidence that it was acquired by defendant prior to the

marriage. As the nontitled spouse, plaintiff had the burden of establishing the value, if any, that was added to this property by her direct or indirect contributions during the marriage. As she did not, Supreme Court should not have awarded her any interest in this asset. Moreover, it was error for Supreme Court to order this separate property sold.(citing Carr v. Carr, 291 A.D.2d 672, 676-677 [2002] ). Supreme Court also found that defendant's pension and profit-sharing trust plans were marital assets despite uncontroverted evidence that these plans were established prior to the marriage while defendant was operating his own professional corporation. However, there is a marital component to these assets, as contributions were made after the marriage and before the dissolution of the professional corporation. The Appellate Court rejected defendants argument that plaintiff was entitled to no share in these assets by reason of her failure to offer proof of valuation concerning the separate and marital portions of these assets. Such proof is necessary only if the asset will be the subject of a distributive award. Rather than make a distributive award, Supreme Court erroneously equally divided these accounts without giving the defendant credit for his contributions. The Appellate Division held that the Majauskas formula ( Majauskas v. Majauskas, 61 N.Y.2d 481, 488-493 [1984] ) should be applied to properly distribute these accounts. The Supreme Court properly determined that certain premises acquired by defendant prior to the institution of the action, was marital. However, even though only about six months elapsed between those events, in a rapidly rising real estate market, evidence of a possible purchase price may not be the equivalent of the actual value of the property at the time of the commencement of the action.

Award For Religious School Tuition Proper

In Cohen v Cohen, 2005 WL 1819643 (N.Y.A.D. 2 Dept.)the Appellate Division affirmed a judgment of divorce which directed the husband to pay 64% of the religious school tuition for the parties' children, to continue to maintain health insurance benefits for the child ren and contribute his pro rata share of the children's unreimbursed medical expenses, and to pay maintenance to the defendant in the sum of $250 per week for a period of three years. It held that a court may award educational expenses for private schooling having regard for the circumstances of the case and of the respective parties and in the best interests of the child. Here, the parties led a religious life during the marriage, including enrollment of their children in full-time religious school. In view of this, as well as all of the circumstances of this case, the Supreme Court properly ordered the plaintiff to pay a pro rata share of the children's religious school tuition. There was no reason to disturb the maintenance award. The overriding purpose of an award of maintenance is to enable the receiving spouse to achieve financial independence. Inasmuch as the defendant was attending evening college classes to become a certified teacher, the three-year award of spousal support was a proper exercise of the court's discretion.

Valuation of Enhanced Value of Separate Property From Date of Acquisition, Rather Than Commencement Date

In Ritz v Ritz, 799 N.Y.S.2d 501 (1st Dept. 2005) the Appellate Division modified the judgment of divorce to reduce the plaintiff wife’s share of the enhanced value of defendant's rental apartment from 50% to 25%. The apartment was a separate asset of defendant's purchased before the marriage. It held that the trial court was correct in finding that the enhanced value was marital property as the rent money was deposited in a joint checking account and there was evidence of plaintiff's indirect contributions as a homemaker and mother. It was also correct in finding that the enhanced value was to be determined from the date of acquisition, not the date of commencement, because the court was only provided with a dollar figure for the date of commencement, and since defendant produced no evidence as to the amount of increase due to passive market forces as opposed to his direct efforts, it was proper to classify the entire increase as marital property. In view of this most favorable calculation for plaintiff to determine the marital portion, an award of 50% of the enhanced value was disproportionate. She contributed no money to the operation of the apartment; the rent money, which was merely "parked" in the joint checking account, more than paid for its expenses. Nor did plaintiff directly contribute to the operation or management of the apartment .

Durational Maintenance Awarded Where Wife Had Significant Savings

In Benzaken v Benzaken, 799 N.Y.S.2d 579 ( 2d Dept. 2005) the Appellate Division held that awarding the wife maintenance of $350 per week for three years was a provident exercise of discretion. One of the purposes of an award of maintenance is to encourage economic independence. The husband lived in a house owned by his mother and paid no rent. He reported having $207,729.83 in assets and no liabilities. He retained sole ownership of the family business pursuant to the resettled amended judgment. Although the wife had significant savings, she was unemployed and required training to find employment. An award of maintenance for a period of three years was sufficient to enable the plaintiff to complete a course of training and obtain employment. In light of the disparity between the economic circumstances of the parties, the Supreme Court providently exercised its discretion in directing the husband to pay the wife an attorney's fee of $4,000.

Error To Award Husband Share of Assets Titled in Wife’s Name Where No “Economic Partnership”

In Galvin v Galvin, 799 N.Y.S.2d 547 (2d Dept. 2005) the Appellate Division modified the judgment, on the law, by deleting the provisions thereof awarding the husband a distributive share of the property know as 1102 Victory Blvd., Staten Island, N.Y., and the accounts known as Bernard Herold & Co., Inc., Account No. 5M7-105023, Bernard Herold & Co., Inc., Account No. 577-141291, Merrill Lynch Account No. 433-51051, Merrill Lynch SEP Account No. 433-51M78, and a Mercedes Benz and denied the defendant a distributive share of those assets. It held that the trial court erroneously awarded the husband a distributive share of these assets which were titled solely in the plaintiff wife's name. Except for the marital home, the parties kept their finances separate during the course of the marriage. They conducted themselves during the marriage in a manner inconsistent with the typical "economic partnership." The husband played an extremely limited role in the marriage and failed to provide any significant financial resources to the marriage. In view of these facts, the trial court erred in awarding the husband a distributive share of these assets.

September 1, 2005

Wife’s Appeal of Maintenance Award Dismissed for Inadequate Record

In Mergl v Mergl, 796 N.Y.S.2d 823 (4th Dept. 2005) the Appellate Division dismissed plaintiff’s appeal from a judgment of divorce that, inter alia, granted defendant durational maintenance and counsel fees, based on plaintiff's failure to provide an adequate record. It noted that its rules provide that the complete record on appeal shall include, in the following order: the notice of appeal with proof of service and filing; the order or judgment from which the appeal is taken; the decision, if any, of the court granting the order or judgment; the judgment roll, if any; the pleadings of the action or proceeding; the corrected transcript of the action or proceeding or statement in lieu of transcript, if any; all necessary and relevant motion papers; and, to the extent practicable, all necessary and relevant exhibits". As there were no pleadings, no financial affidavits, and no exhibits that establish the parties' respective incomes, it was thus unable to determine whether Supreme Court's award of maintenance or counsel fees was error as alleged. It is the obligation of the appellant to assemble a proper record on appeal. The record must contain all of the relevant papers that were before the Supreme Court. Where a record on appeal does not contain documents submitted to the trial court and the absence of those documents renders meaningful appellate review impossible, dismissal of [the] appeal is an appropriate disposition.

Error to Value License of Practitioner Based Upon Hypothetical Earnings

In Guskin v Guskin, 18 A.D.3d 814, 796 N.Y.S.2d(2d Dept, 2005) the Appellate Division reversed the judgment of divorce and remitted the matter to the Supreme Court for a hearing on the issues of the value of the defendant's license to practice podiatric medicine and the distribution of the plaintiff's pension and tax-deferred annuity in light of the defendant's direct and indirect contributions, and for a new determination of the issue of counsel fees. It held that the "The enhanced earning capacity due to acquisition of a professional license during the marriage is clearly a marital asset subject to equitable distribution. Supreme Court improperly based its valuation of the defendant's license to practice podiatric medicine on the estimated earnings of a hypothetical license holder, rather than on his actual prior earnings. It also noted that when separate property appreciated during the marriage due to the active efforts of the titled spouse, and where such appreciation was due in part to the active contributions and efforts of the non-titled spouse as a parent and homemaker, the amount of that appreciation should be added to the sum of marital property for equitable distribution. The Supreme Court therefore also erred in distributing the plaintiff's pension and tax-deferred annuity after improperly limiting the defendant's testimony as to his noneconomic contributions to the household during the parties' long-term marriage.

August 16, 2005

Reduction in income Not Necessarily A Change in Financial Circumstances

In Carr v Carr, 2005 WL 1413395 (N.Y.A.D. 3 Dept.) petitioner's income, as reported in his tax returns from 1999 through 2003, fluctuated widely due to the dissolution of his law firm . His 1999 return, upon which the initial child support calculation was based, reported income of only $44,620. In July 2000, he obtained employment at an annual salary of $135,000, which remained unchanged. The former wife petitioned for an obtained an increase in monthly child support. It was reduced by the Appellate Division to $ 2,336.02. His 2001 return reported income of $277,566 and his 2002 tax return showed income of $60,116, which included his salary and losses attributable to the law firm dissolution. His 2003 petitioner's return showed income of $141,415, including his salary and interest income. At the time of his application he lived in the marital residence, which had been valued at $650,000 at the time of the divorce. He claimed net annual income of approximately $80,000, which included a monthly payment of $750 from a woman who was living with him. He asserted that his income had been supplemented by the liquidation of assets, and he acknowledged that the value of his retirement accounts had increased by $200,000 during the past year. Petitioner claimed annual expenses of approximately $130,200, including annual payments of $41,500 to a former wife, as well as nearly $10,000 for country club expenses and $9,800 for lawn care and pool maintenance, which was approximately half the amount of his expenses in 2001. Petitioner claimed little debt other than the mortgage on his residence and amounts owed to his attorney. Based solely upon his income in 2003, petitioner sought to have his monthly child support obligation reduced to $240.68. The Appellate Division held that a petitioner seeking a downward modification of a prior order of support must demonstrate a substantial change in circumstances warranting a downward modification. A reduction in a payor's net income, while a primary element of the analysis, does not limit Family Court's ability to examine the financial circumstances at the time of the prior order and the financial circumstances at the time of the application for modification and to consider whether the payor has the means or ability to comply with the prior order of support. It found that Petitioner's argument would improperly narrow the required showing of a substantial change in financial circumstances to a showing of a substantial change in reported income, which would invite petitions for modification any and every time there was a bump or dip in a payor's income, without regard to whether the payor has assets and/or earning capacity that are not reflected in the payor's tax return in a particular year. “This is not the law, nor should it be.” The Court held that notwithstanding the undisputed reduction in income as reflected in his 2001 and 2003 tax returns, petitioner did not establish that his financial circumstances had deteriorated such that he lacked the means to pay monthly child support in the amount of $2,336.02. His income remained substantial, as did his assets, and his significant expenditures on luxuries such as country club fees and lawn care belied any claim that he could not afford his child support obligation. The court could not agree that petitioner's volitional depletion of his savings to maintain his prior standard of living should be ignored in favor of a reduction in child support, particularly where, as here, petitioner conceded that he typically billed no more than 18 hours per week at work. While the parties' income will be used to establish the "basic child support obligation" , a reduction in petitioner's income does not necessarily constitute a change in financial circumstances warranting a downward modification of child support.

Factors Considered in Maintenance Award

In Gubiotti v Gubiotti, 2005 WL 1489502 (N.Y.A.D. 3 Dept.) the parties were married in 1972 and had three emancipated sons. At the time of the hearing plaintiff was 50 and defendant was 53. Plaintiff had a high school education and spent the greater part of the marriage as a homemaker. At times during the marriage, plaintiff worked outside the home in a variety of menial jobs and also babysat for other people's children. In 1995, she began to run a licensed day-care center in the marital home from which she reported a gross income of $18,901 in 2002. Defendant, who earned an MBA during the marriage, was a Life Insurance Company agent. Defendant's average gross income for 2000, 2001 and 2002 was $165,227, while his tax returns for those years reported an average net income of $58,962. Supreme Court distributed the marital estate and awarded plaintiff maintenance of $3,000 per month for seven years and $1,500 per month thereafter until plaintiff's death or remarriage or the death of defendant. On appeal Defendant asserted that the durational award of maintenance was excessive in that he will have to pay annual maintenance of $36,000 despite the fact that his income was only approximately $59,000. He contended that the durational maintenance award constituted 62% of his income, and left him with annual income in the amount of $17,250, after taxes. In making its factual findings pursuant to Domestic Relations Law 236(B)(6)(a), Supreme Court appeared to have used the figure of $59,000 in determining defendant's income, but also made findings suggesting that the award of maintenance was based in part upon income and perquisites of defendant not reflected in that $59,000 figure. There was evidence in the record to support both the $59,000 figure or a higher level of income, but a lack of detail in Supreme Court's express factual findings precludes the Appellate Court from determining whether the award of $3,000 per month for seven years was excessive. Defendant further contended that Supreme Court erred in awarding plaintiff nondurational maintenance because it was a de facto redistribution of his pension, and because it would require him to continue working into the years during which he intended to retire. Although these narrow, conclusory arguments lacked merit, the court had to remit the issue of nondurational maintenance to Supreme Court. It held that nondurational maintenance may be appropriate where, as here, plaintiff's energies during the marriage were primarily devoted to homemaking and child rearing to the detriment of her ability to become self-sufficient and maintain the predivorce standard of living An award of nondurational maintenance is among the issues to be resolved in the sound discretion of the trial court after consideration of the pertinent factors set forth in Domestic Relations Law 236(B)(6)(a), the payee spouse's reasonable needs, and the predivorce standard of living. Among the many specific considerations underlying an award of nondurational maintenance and the amount thereof is the present and potential future income of each of the parties. As with the award of durational maintenance in the amount of $3,000 per month, Supreme Court's findings of fact regarding defendant's income lacked sufficient detail to permit review of the nondurational maintenance award. Inasmuch as the evidence may support Supreme Court's maintenance award, but was insufficient to afford the Appellate Court the capability to make appropriate findings the Court declined to exercise its authority to consider the issue of the amount and duration of maintenance de novo.

Child Support Award Increased on Appeal

In Hammack v Hammack, 2005 WL 1644788 (N.Y.A.D. 3 Dept.) the parties were married in 1976 and had four children. If the statutory formula were strictly applied to the total combined parental income, defendant's obligation would have been $103,002. Supreme Court applied the statutory percentage to the first $80,000, fixing defendant's initial support obligation at $22,568. The court then tacked on an additional $8,000 per year (to be used for the limited purpose of contributing to the hockey costs for two of the children), thus making defendant's total child support obligation about $30,000 per year, which was approximately $73,000 less than that which a strict application of the statutory formula would call for. Defendant was also ordered to continue paying his proportionate share of up to $23,000 per year for the college expenses of the oldest child, his share of college expenses for the other three children up to an amount equal to tuition, room and board at the State University of New York, up to $6,000 per year for private school expenses for two of the boys, and his share of medical insurance and the cost of unreimbursed health related expenses for all of the children. The Appellate Division found that the award was insufficient. Although the trial court observed that the family's lifestyle was not lavish or extravagant, it was substantially more comfortable than that which would be permitted by the support obligation set forth by the court. While agreeing with Supreme Court that a $103,000 support obligation, based on a strict application of the combined parental income, appeared to be manifestly unjust and inappropriate, it also found this to be true of a $30,000 support obligation where the noncustodial parent earns in excess of $300,000 per year. Applying the facts to the factors found in DRL 240(1-b)(f), the Appellate Division found find that while the financial resources of the parents had for the most part been equalized as of the time the judgment was rendered, defendant's financial resources would continue to grow, increasing the disparity in the parties' incomes. Supreme Court overlooked the increasing needs of the children as they grow older, as well as their entitlement to share in their father's post-2003 standard of living. It found that that a child support percentage of 12% of the combined parental income which exceeds $80,000 would be more appropriate and defendant's total annual child support obligation was increased to $4,475 per month. The additional $8,000 per year for hockey costs was terminated. The remainder of Supreme Court's judgment with regard to the costs involved in the children's educational expenses and healthcare expenses remained unchanged.

August 1, 2005

Award of Entire Marital Residence to Wife Appropriate Where Husband Did Not Contribute

In Herzog v Herzog, 795 N.Y.S.2d 749 (2d Dept. 2005) the husband appealed from a judgment of the Supreme Court that directed him to pay maintenance of $400 per month for 15 years, awarded the defendant wife 50% of the marital portion of his pension, denied his request for equitable distribution of the marital premises and awarded the defendant the sum of $125,000, which represented her separate property contribution towards its purchase, as well as the remaining value of the marital premises, and awarded the defendant an attorney's fee of $10,000. The judgment was modified by the Appellate Division, on the law, by reducing the length of the maintenance award to a period of four years, or until the defendant's remarriage, whichever occurs sooner, and by deleting the attorney’s fee. It held that the trial court providently exercised its discretion in denying the plaintiff's request for equitable distribution of the former marital residence. While the marital residence, purchased in the joint names of the plaintiff and the defendant, was marital property, the defendant used proceeds from her separate property to purchase the residence. Therefore, there was no basis upon which to disturb the trial court's finding that the defendant was entitled to the purchase price of $125,000, which was derived from her separate property. The trial court did not find credible the plaintiff's testimony that the funds used to purchase the residence were a gift, and such determination is afforded great deference on appeal. With respect to the remaining value of the former marital residence, the court providently exercised its discretion in awarding the entirety to the wife. At trial, the plaintiff testified only to improvements he made to the former marital residence prior to the time when he and the defendant owned the property, and completely failed to substantiate any of his assertions regarding contributions to the former marital residence or the marriage. In contrast, the defendant credibly testified that she paid all expenses in connection with the residence after acquiring ownership, and supported such testimony with documentary evidence. The trial court improvidently exercised its discretion in directing the plaintiff to pay maintenance for a period of 15 years in light of the short duration of the parties' marriage. A four-year maintenance award was appropriate. It also improvidently exercised its discretion in awarding the defendant an attorney's fee under the circumstances presented.

Proper to Award Protective Order During Childs’ Entire Minority

In Matter of Neail v DeShane, 796 NYS2d 435 (3d Dept. 2005) the Appellate Division affirmed a mutual orders of protection that were for the duration of the child’s minority. It held that because the dispute concerned a custody proceeding under Family Court Act article 6, the duration of the orders of protection was permissible.

Forensic Report Diminished Where Not Comprehensive

In Neuman v Neuman, 796 NYS2d 403 ( 2d Dept. 2005) the Appellate Division held that fact that court-appointed forensic psychologist had recommended that child remain in the mother's custody did not render unreasonable Supreme Court's determination that custody should be transferred to father. The recommendations of court-appointed experts are but one factor to be considered in making a custody determination and are entitled to some weight. However, they are not determinative and do not usurp the judgment of the trial judge. The Court noted that where, as here, the forensic report was based solely on brief interviews (many done via telephone) with the parties, the children, the mother's paramour, teachers, a rabbi, and healthcare providers, did not contain any allegation of an underlying psychological problem regarding the child, and where no standardized psychological tests were administered nor objectives articulated for the child, the utility of the report was diminished.

Admissibility of Out-of-Court Statements of Child in Custody Case

In Matter of Jacqueline B v Peter K, 796 NYS2d 518 (Fam. Ct. 2005) a custody modification proceeding the court addressed the issue of the admissibility of out-of-court statements of the child through the testimony of third-party witnesses called by the Petitioner or the Law Guardian. It noted that the petition was filed under Article VI of the Family Court Act and while the Legislature has enacted special provisions, such as FCA § 1046 to admit hearsay statements relating to any allegations of abuse and neglect to be admitted into evidence providing the statements are corroborated by "[a]ny other evidence tending to support" their reliability, no alteration of the rules of evidence had been enacted for custody matters. It noted that a body of case law had developed upholding the admissibility of a child's hearsay statements in custody proceedings where the gravamen of the application is based upon allegations of abuse or neglect, and where the custody proceeding under Article VI becomes, in effect, a substitute for the child protective proceeding under Article X. Trial and appellate courts have applied the FCA 1046 exception to custody proceedings and have admitted, when corroborated, the out-of-court hearsay statements of a child in custody proceedings, custody modification proceedings, proceedings to terminate visitation, and applications for supervised visitation. The Court held that as the gravamen of the Petitioner's application to modify the joint custody order did not allege that the father physically or sexually abused the child or that he neglected the physical, mental or emotional condition of the child by failing to exercise a minimum degree of care, statements of the child were not admissible. When, however, the Court is trying a neglect or abuse case within the context of a custody proceeding, and those acts or omissions are the predicate for making or altering a custodial determination, statements of the child pertaining to those allegations would be admissible.

Pendente Lite Order Can Be Enforced after Complaint Dismissed

In Fotadis v Fotadis, 795 N.Y.S.2d 729 (2d Dept. 2005) the Appellate Division held that Supreme Court providently exercised its discretion by, in effect, denying the plaintiff's application to extend the time to serve the complaint, since the delay was over 15 months, she failed to show good cause for it, and a meritorious cause of action. Her verified complaint which stated a cause of action sounding in constructive abandonment was submitted for the first time as part of her surreply papers. Therefore, the Supreme Court properly refused to consider it Her claim of actual abandonment was insufficient since the alleged abandonment occurred less than one year prior to the commencement of the action. However, it was error to denyplaintiff's motion for leave to enter a judgment for arrears against the defendant. Although the defendant's current obligations pursuant to the pendente lite order terminated with the dismissal of the action the defendant was required to obey the pendente lite order while the action was .Upon dismissal of the action, the pendente lite order was no longer in

effect, but the plaintiff was entitled to any arrears which accrued under that order prior to dismissal and may enforce that obligation by seeking leave to enter a money judgment. And although a party may not seek to enforce a pendente lite

order by way of contempt proceedings subsequent to the termination of the action, the dismissal of the complaint did not extinguish any rights which accrued under contempt orders issued prior to dismissal.

Joint Custody Awarded to Permit Hague Protection

In Matter of Ish-Shalom v. Wittmann, 797 NYS2d 111 (2d Dept. 2005) Family Court awarded custody of the children to the mother and permitted her to relocate with the children to Florida. While affirming the award which permitted the mother to relocate, the Appellate Division modified to award the mother and father joint custody, with the residence of the children to remain with the mother in Florida and with all decision-making authority to remain with the mother. Finding that the award was appropriate, the Appellate Division shared the Family Court's concern that the immigration status of the mother, a German national who entered the country on a visitor's visa, "is questionable at best." The father and a court-appointed psychologist expressed concern that the mother would return with the children to Germany, where she was licensed to practice medicine. The mother had already removed the children from New York to Florida, in direct contravention of a direction by the Family Court in open court that "neither party shall remove the children from the jurisdiction of the court." The Court found that if the mother were to return to Germany with the children, the father, as noncustodial parent, could not petition under the terms of the Hague Convention on International Child Abduction for the children's return (citing Matter of Welsh v. Lewis, 292 A.D.2d 536, 537; Croll v. Croll, 229 F3d 133, cert. denied 534 U.S. 949). The Appellate Division held that under these particular circumstances, the father should have been awarded joint custody with the mother.

July 18, 2005

Waiver of Right to Pension

In Leichtner v Leichtner, 794 N.Y.S.2d 364, the Appellate Division held that although a pension is normally subject to equitable distribution, because the defendant failed to request that the Supreme Court award her a portion of the plaintiff's pension, and no evidence was offered with regard to the plaintiff's pension, the Supreme Court properly declined to distribute a portion of the plaintiff's pension to the defendant.

Maintenance Denied Attorney-Wife Who Failed to Demonstrate Disability Prevented Her Working at Attorney.

In Ferro v Ferro, 2005 WL 1346542 (N.Y.A.D. 2 Dept.), the Appellate Division affirmed a judgment of the Supreme Court which awarded the wife supervised visitation with the parties' children, denied her an award of maintenance, and directed her and the defendant to pay equal shares of the Law Guardian's fee from each party's share of the proceeds of the sale of the marital residence. As the Supreme Court awarded custody to the respondent, with the appellant responsible for child support, and as the appellant failed to sufficiently demonstrate that her disability prevented her from earning a living as an attorney, the Supreme Court properly denied her an award of maintenance. The judgment of divorce directed that the marital residence be sold, with the proceeds to be divided equally between the parties. Accordingly, Supreme Court properly directed the parties to pay equal shares of the Law Guardian's fee from each party's share of these proceeds.

Enhanced Earning Capacity Not Marital Property. Retroactive Award Denied.

In Corless v Corless, 795 N.Y.S.2d 273 (2d Dept. 2005), Supreme distributed the marital assets, allocated the marital debt, found the wife was solely responsible for a loan taken to finance her graduate school education, awarded her maintenance in the sum of $4,000 per month until she reached the age of 65 years, to then be reduced to the sum of $2,000 per month until the defendant reached the age of 65 years, awarded her child support in the sum of $3,000 per month without specifying that it was to be assessed retroactive to the date of the commencement of the action, determined that the defendant pay 35% of the reasonable attorney's fees and litigation costs incurred by her and awarded her $17,768 in attorney's fees and litigation costs. The Appellate Division modified the judgment by adding a provision directing the defendant to maintain a life insurance policy with the plaintiff as beneficiary in the sum of $400,000 until he reached the age of 65 years. It held that Supreme Court erred in failing to direct the defendant to obtain and maintain a life insurance policy to secure his obligation for maintenance and child support. It also held that the defendant's use of his income, including severance pay, to pay legitimate household expenses did not constitute a dissipation of marital assets. While outstanding financial obligations incurred during the marriage which are not solely the liability of either spouse may be deemed marital obligations, a financial obligation incurred by one party in pursuit of his or her separate interests should remain that party's separate liability. The plaintiff's graduate school education was not treated as marital property and the student loan used to finance that education was, under the circumstances, incurred for the plaintiff's sole benefit. In view of the foregoing, the Supreme Court providently exercised its discretion in allocating this debt to the plaintiff as her separate responsibility.

Parent Entitled to Hearing on Law Guardian Fees and May Claim Malpractice

In Mars v Mars, 2005 WL 1389223 (N.Y.A.D. 1 Dept.), the Appellate Division held that because the court directed plaintiff to pay the law guardian's fees and the children were old enough to articulate their wishes, plaintiff has standing to

assert legal malpractice as an affirmative defense to the fee application to the extent of challenging that portion of the fees attributable to advocacy, as opposed to guardianship. Adopting the rule enunciated by the Second Department that "if a parent who has been directed to pay a fee contests a law guardian's claims relative to the time expended and the reasonable value of the services provided, he or she should be afforded hearing on the issue" (citing Matter of Plovnick v. Klinger, 10 AD3d 84, 91 [2004] ), the Appellate Division held that if as plaintiff alleged, the law guardian's invoices reflect work never done, plaintiff must be afforded the opportunity to challenge the reasonableness of the law guardian's fee at the fee hearing.

Hearsay Not Admissible in Custody Case Absent Abuse or Neglect Allegations

In Matter of Jacqueline B v Peter K, 2005 WL 1353910 (N.Y.Fam.Ct.), a custody modification proceeding the court addressed the issue of the admissibility of out-of-court statements of the child through the testimony of third-party witnesses called by the Petitioner or the Law Guardian. It noted that the petition was filed under Article VI of the Family Court Act and while the Legislature has enacted special provisions, such as FCA § 1046 to admit hearsay statements relating to any allegations of abuse and neglect to be admitted into evidence providing the statements are corroborated by "[a]ny other evidence tending to support" their reliability, no alteration of the rules of evidence had been enacted for custody matters. It noted that a body of case law had developed upholding the admissibility of a child's hearsay statements in custody proceedings where the gravamen of the application is based upon allegations of abuse or neglect, and where the custody proceeding under Article VI becomes, in effect, a substitute for the child protective proceeding under Article X, trial and appellate courts have applied the FCA 1046 exception to custody proceedings and have admitted, when corroborated, the out-of-court hearsay statements of a child in custody proceedings, custody modification proceedings, proceedings to terminate visitation, and applications for supervised visitation. The Court held that as the gravamen of the Petitioner's application to modify the joint custody order did not allege that the father physically or sexually abused the child or that he neglected the physical, mental or emotional condition of the child by failing to exercise a minimum degree of care, statements of the child were not admissible. When, however, the Court is trying a neglect or abuse case within the context of a custody proceeding, and those acts or omissions are the predicate for making or altering a custodial determination, statements of the child pertaining to those allegations would be admissible.

Fair Trial Denied By Judge’s Intrusive Questioning

In Matter of Yadiel Roque C, 793 N.Y.S.2d 857(4th Dept, 2005), Respondent appealed from an order adjudicating him to be a juvenile delinquent, contending that he was denied a fair trial by the court's intrusive conduct during the fact-finding hearing. Although respondent's contention was not preserved for our review the Appellate Division reviewed it in the interest of justice, and reversed the order. It held that although a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial, the court may not take on 'the function or appearance of an advocate. In last analysis, ... [the trial judge] should be guided by the principle that his [or her] function is to protect the record, not to make it", including juvenile delinquency proceedings. Here, "[t]he course of conduct of the trial judge was such that he assumed the appearance of an advocate at the trial by his extensive examination of certain witnesses".

Custody Awarded Without Hearing

In Van Orman v Van Orman, 2005 WL 1378612 (N.Y.A.D. 4 Dept.), the Appellate Division held that Family Court properly granted the petition for sole custody of the parties' two children without a hearing. At that time, respondent was incarcerated in New York and was also held upon a detainer issued from the Commonwealth of Massachusetts. The Court held that no hearing is required upon a custody petition when the court possesses sufficient information to make a comprehensive assessment of the best interests of the children (citing Matter of Glenn v. Glenn, 262 A.D.2d 885, 887, lv dismissed in part and denied in part 94 N.Y.2d 782; cf. Matter of Mills v. Sweeting, 278 A.D.2d 943, 944). As a result of his incarceration, respondent was incapable of fulfilling the obligations of a custodial parent. The court therefore properly dismissed respondent's petition, without prejudice to the right of respondent to re-file when he is released from incarceration.

July 1, 2005

“Income” For Child Support Award Includes Maintenance Where Judgment Contains Future Adjustment

In Nichols v Nichols, 2005 WL 1368068 (N.Y.A.D. 3 Dept.) the Appellate Division held that where defendant earned $96,910 annually while plaintiff received only $18,056 annually from a disability retirement pension and earnings from part-time employment, given plaintiff's age and poor health, the gross disparity between the parties' incomes and the unlikelihood of plaintiff becoming self-supporting, Supreme Court did not abuse its discretion in fixing maintenance at $350 per week until she was 62, a period of six years. The Appellate Division also held that Supreme Court should have included the maintenance award in its calculation of defendant's share of unreimbursed health expenses and college expenses. The percentage of unreimbursed health care costs for the marital children is pro rated in the same proportion as each parent's income is to the combined parental income and the same formula is generally used in computing each parent's share of the children's future educational expenses. In computing the combined parental income, the spouse obligated to pay maintenance is entitled to have that amount deducted from his or her income while the spouse in receipt of the maintenance will experience an increase in income. After reducing defendant's salary by $18,200, the annual amount of his $350 weekly maintenance obligation, defendant's income for purposes of his unreimbursed health care obligation was $78,710. In turn, plaintiff's income was increased by $18,200. Thus, defendant's percentage of the combined parental income ($114,966) was 68.5%, requiring that defendant's pro rata obligation for their son's college expenses and unreimbursed health care expenses should have been reduced from 88.5% to 68.5%. The Appellate Division also held that Supreme Court erred in granting plaintiff counsel fees. For an award of counsel fees to be justified, there must exist a sufficient evidentiary basis for the court to evaluate the value of the services rendered. Although both counsel agreed to submit affidavits of services rendered, no proof was submitted. The award of counsel fees was vacated and the matter remitted for a redetermination

Acknowledgment Not Necessary on Modification Agreement Where Parties Not Married

In Penrose v Penrose, 793 N.Y.S.2d 579 (3d Dept. 2005) the parties 1985 separation agreement was incorporated but not merged into a judgment of divorce. By an "Agreement and Waiver" dated August 2, 1993, plaintiff waived all of her rights under the divorce decree in exchange for specific bequests as then set forth in a will executed by defendant that same day. In 2003, plaintiff brought an application for enforcement of certain terms of the divorce decree. The Appellate Division held that her attempt to enforce the provisions of the 1985 separation agreement was time barred. Moreover, since the parties were no longer married at the time of its execution it rejected plaintiff's contention that the 1993 agreement should have had a notarized acknowledgment in order to be valid.

Unacknowledged Custody Agreement Valid and Enforceable

In Kelly v Kelly, 2005 WL 1377954 (N.Y.A.D. 4 Dept.) defendant argued on appeal that Supreme Court erred in awarding custody of the parties' children to plaintiff. At trial, defendant stipulated to an award of custody to plaintiff, and the court denied his subsequent request to withdraw that stipulation. On appeal, defendant relied on Domestic Relations Law 236(B)(3) in

support of his contention that the stipulation was invalid. The Court held that his reliance was misplaced because the requirements of Domestic Relations Law 236(B)(3) pertain to stipulations which effect the equitable distribution of marital property. Here, the stipulation pertained to custody and was binding pursuant to CPLR 2104.

Request For Custody Not Necessary in Custody Proceeding

In Miller v Orbaker, 793 N.Y.S.2d 840 (4th Dept.,2005) the Appellate Division rejected petitioner's contention that Family Court erred in awarding sole custody of the child to respondent because respondent did not file a cross petition seeking that relief. Because petitioner sought sole custody, the issue of an award of custody to any party was properly before the court. In a child custody proceeding, a court has the authority to "enter orders for custody ... as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child" (Domestic Relations Law § 240[1][a] ).

Exception to Fraudulent Transfer Rule

In Bernstein v Bernstein, 795 NYS2d 733 (2d Dept. 2005) the Appellate Division held that where jointly-held property is transferred for the purpose of defrauding creditors, the transferor may not then share in the value of the transferred asset for purposes of equitable distribution. Nevertheless, where the plaintiff expressly acknowledged that she knowingly encouraged and benefitted from the transfer, the asset properly was subject to equitable distribution to the defendant .

Parent’s Share of Add-on’s Not Limited to $80,000.00 Cap

In Matter of D'avanzo v Papa, 796 NYS2d 106 (2d Dept. 2005) after a hearing Family Court directed the father to pay basic child support in the sum of $2,008 per month and 79% of child care expenses and unreimbursed medical, dental, and optical expenses. The Appellate Division modified to substitute a provision directing the father to pay 92% of child care expenses and unreimbursed medical, dental, and optical expenses. It held that the Family Court's determination of basic child support was proper. Since the combined parental income exceeded $80,000, the court, in its discretion, could apply the applicable percentage, in this case 17% for one child, or the factors set forth in Family Court Act 413(1)(f) or both to the parental income in excess of $80,000. The Support Magistrate, applying the factors set forth in Family Court Act 413(1)(f), properly considered $150,000 of the father's gross income in determining basic child support. However, the Support Magistrate improperly determined that the father was only responsible for 79% of child care expenses and unreimbursed medical, dental, and optical expenses. A parent's share of such expenses is computed by prorating the parent's income to the combined parental income (see Family Ct Act 413[1][c][4], [5] ). The $80,000 cap has no application to this calculation.

Pendente Lite Counsel Fees Awarded For Non-Matrimonial Proceedings

In Soifer v Soifer, 794 N.Y.S.2d 20 (1st Dept. 2005) the Appellate Division affirmed an Order of the Supreme Court which awarded defendant wife interim attorneys' fees in the total amount of $178,646.99, consisting of payment to defendant's attorneys of $59,156.49 for outstanding legal fees charged through July 21, 2004, reimbursement to defendant for $44,490.50 she paid to her attorneys, and $75,000 as an advance on anticipated future services. It modified a subsequent order which upon renewal, awarded defendant additional interim attorneys' fees of $63,522.98 for that period, to reduce the award to $18,520, and otherwise affirmed. It held that the first order “ appropriately redresses the parties' economic disparity, and is adequately supported by evidence of the nature and extent of the legal services rendered and anticipated and defendant's attorneys' time records and hourly rate. The attorneys' bills were properly redacted so as to safeguard defendant's attorney-client privilege. However, the legal work performed between August 8 and September 25, 2004 mostly related to the then separate Family Court article 10 proceeding brought against defendant. Since fee awards for services rendered in an article 10 proceeding are not authorized by Domestic Relations Law 237 it modified the first order so as to include only the services rendered before August 8, 2004. The Appellate Division held that fees for services related to the article 10 proceeding rendered after the October 18, 2004 court-ordered transfer of that proceeding to Supreme Court for joint trial with the divorce action were reimbursable. It also held that the award for future services in the first order was an appropriate advance on those and other anticipated fees.

June 16, 2005

Income For Child Support Calculation Does Not include Maintenance Award

In Lee v Lee, 795 NYS2d 283 ( 2d Dept. 2005) the Appellate Division held that Supreme Court erred in considering the maintenance to be received by the wife as her income for purposes of performing the CSSA calculations and that it should have provided for a method for reducing the defendant's overall child support obligation as each child reaches the age of 21 or is otherwise emancipated. The parties had four minor children as of the time the action was commenced, and it held that the defendant's overall child support obligation should be diminished as each child reaches the age of majority. In the particular circumstances of this case, it found that as the number of children that the defendant is obligated to support diminishes from four to one, upon the date that each child, in succession, becomes (or already has been) emancipated, the amount of child support owing should be based on the figure of $200,000, against which the diminishing statutory percentages pertaining to the number of children that the husband is obligated to support, i.e., 29%, 25%, and 17%, should be applied. In dicta the court stated that it is not the defendant's overall child support obligation, which in this case encompassed his duty to support four children, that might properly be reduced on account of his payment of "college expenses" on behalf of one or more of those children; rather, the "college expenses" paid on behalf of one particular child, or on behalf of some particular children, could properly serve as a credit only with respect to so much of the defendant's overall child support obligation as relates to such particular child or children. In respect to any credit against child support that might be granted in connection with the defendant's payment of "college expenses," any such credit should be calculated based solely on those expenses that are associated with the cost of room and board, or on other similar expenses of the kind that "child support" is normally intended to defray. Such a credit should not be calculated based on the cost of college tuition, which is beyond the realm of what is normally considered "child support." Those cases in which, in one context or another, the courts have approved of the reduction of a parent's child support obligation based on that parent's payment of tuition expenses did not, in its view, reflect the general rule.

Cannot Enforce Counsel Fee By Conditional Preclusion Order

In Singer v Singer 16 A.D.3d 666, 792 N.Y.S.2d 541(2d Dept. 2005) the Appellate Division affirmed an order which granted the wife's motion for an award of an interim counsel fee in the sum of $100,000, but reversed that part as directed that if such payment was not made within 20 days of the date of the order, he would be precluded from proffering any testimony or evidence as to claims of separate property or equitable distribution at trial. The court providently exercised its discretion in awarding the wife an interim counsel fee in the sum of $100,000 based upon, inter alia, the financial disparity between the parties, the husband's obstreperous conduct which unnecessarily protracted the litigation, and the quality of the representation afforded the wife by her counsel. However, a conditional order of preclusion is not an available mechanism to enforce an order directing payment of an interim counsel fee award.

Attorney Has Right to Represent Self in Divorce Action

In Nimkoff v Nimkoff, 2005 WL 1216034 (N.Y.A.D. 1 Dept.) the Appellate Division held that the IAS court erred in barring the defendant from representing himself (citing Walker & Bailey v We Try Harder, Inc., 123 AD2d 256), which held that an attorney has a statutory and constitutional right to represent himself and the advocate-witness rule does not apply when an attorney represents himself or his partnership). Although the right to represent oneself is not absolute, any restriction must be carefully scrutinized. Even where a self-represented attorney-litigant is held in contempt due to misconduct during court appearances, a deprivation of the right to self-representation must be extremely well supported. The court’s out-of-hand denial of defendants’ application for overnight visitation, which he made when the child was two years old, constituted an improvident exercise of discretion. There was no indication that defendants’ relationship with the child was such that overnight visitation would not be in the child's best interest. The court's observations of defendants’ demeanor and conduct in court should not be the focus when considering the visitation arrangement. The focus must be solely on the child's best interest, which is normally best protected by allowing the development of the fullest possible healthy relationship with both parents.

Modification of Custody Order Requires a Two-Step Analysis

In Matter of Griffen v Griffen, 2005 WL 1119595 (N.Y.A.D. 3 Dept.) the Appellate Division, Third Department, held that where a party seeks to modify a prior order of custody, he or she must demonstrate a sufficient change in circumstances to warrant alteration of the existing custody arrangement in order to ensure the continued best interests of the children. Only when such a change in circumstances has been demonstrated may Family Court properly proceed to undertake a best interest analysis.

Pendente Lite Maintenance and Counsel Fee Award Affirmed

In Susskind v Susskind, 795 BYS2d 315 (2d Dept. 2005) the Appellate Division affirmed an order which directed the husband to pay pendente lite support of $4,000 per month for the wife and the parties' two children, interim counsel fees in the sum of $35,000, all carrying charges on the marital residence, all educational and extracurricular expenses of the parties' two minor children, all unreimbursed in-network medical expenses of the plaintiff and the two minor children, all costs associated with the plaintiff wife's motor vehicle, and conditionally precluded him from introducing evidence as to his finances at trial based upon his failure to comply with court-ordered discovery, unless he fully responded to the plaintiff wife's discovery demands within 30 days of the date of the court's order. It held that: "Pendente lite awards should reflect an accommodation between the reasonable needs of the moving spouse and the financial ability of the other spouse with due regard for the parties' preseparation standard of living" (\*\*\*). "An appellate court will rarely modify such an award, unless exigent circumstances exist, such as where a party is unable to meet his or her own financial obligations or justice otherwise requires" (\*\*\*) Here, the husband failed to demonstrate the existence of such circumstances. Therefore, modification of the award is unwarranted. "Rather, perceived inequities in pendente lite orders are best addressed via a speedy trial at which the parties' economic circumstances may be thoroughly explored"(\*\*\*). The Court also held that given the financial circumstances of the parties the Supreme Court properly exercised its discretion in directing the husband to pay one-half of the wife's counsel fees. The wife was not required to exhaust her own capital in order to qualify for an interim counsel fee award. However, since the wife failed to demonstrate that she lacked sufficient funds of her own to compensate counsel at this state of the litigation, the Supreme Court properly awarded her only half of the attorney's fees sought.

Agreement Waiving Child Support Upheld

In Daratany v Daratany, 2005 WL 1109435 (N.Y.A.D. 2 Dept.) the parties 1986 judgment incorporated but did not merge the terms of a 1986 oral stipulation of settlement. Both the stipulation and the judgment provided, inter alia, that the defendant pay the plaintiff maintenance and child support for the parties' three children, and provided for the immediate listing and sale of the former marital residence, for equal division of the net sale proceeds between the parties and that, pending sale thereof, the plaintiff would have sole occupancy of the former marital residence. They signed a modification agreement in 1994 which provided, in substance, that in exchange for the defendant's conveyance of his remaining interest in the former marital residence, his obligation for child support "past and future" was terminated. The defendant delivered a deed in July 1994 conveying his interest in the former marital residence to the plaintiff and her present husband. In 2003 the plaintiff asserted that she was owed child support arrears. In response, the defendant brought this motion. As to the defendant's support obligation which allegedly accrued before June 1994, the Judicial Hearing Officer determined that the conveyance pursuant to the modification agreement satisfied such obligation in toto. The Appellate Division held that here, as in Matter of O'Connor v. Curcio (281 A.D.2d 100, 103), the parties identified the consideration, to wit, the defendant's interest in the former marital residence, paid by the defendant to the plaintiff for the plaintiff's relinquishment of future child support. The 1994 modification agreement was not executory but fully performed and the parties are bound by its terms. Accordingly, the defendant's child support obligation should have been vacated as to the period after June 1994.

June 1, 2005

College Credit Limited By Second Department (in dicta)

In Lee v Lee 2005 WL 1107377 (NYAD 2 Dept) the Second Department held that the trial court should provide in the judgment a method of reducing the overall child support obligation as each child is 21 or emancipated, based on the diminishing statutory percentages. In dicta it stated that college expenses paid on behalf of a child could properly serve as a credit only with respect to so much of the overall child support obligation as relates to the particular child. The credit should be based solely on those expenses associated with the cost of room and board , or other similar expenses that child support is intended to defray. Such a credit should not be based on the cost of college tuition. Cases which reflect the reduction of a parents child support obligation based upon the parents payment of tuition expenses do not reflect the general rule. Life insurance was awarded for wife’s benefit because she will be depending on husband for substantial maintenance and child support and would be severely prejudiced in the event of his death.

Oral Modification of Divorce Judgment

In Kayser v Kayser, 2005 WL 1022959 (N.Y.A.D. 2 Dept.) the defendant moved for a money judgment for child support arrears by reason of defendants failure to pay those items, as required by the parties' judgment of divorce. In opposition, the plaintiff contended that there here was an oral modification of the judgment of divorce pursuant to which the defendant waived those items in exchange for the plaintiff's waiver of his equitable distribution award. The Appellate Division held that the Supreme Court properly denied the defendant's motion because the plaintiff showed consideration to support the alleged oral modification and that the conduct of the parties was unequivocally referable to the oral modification.

Child Support Waiver Void Ab Initio

In Smith v Smith, 2005 WL 1007635 (N.Y.A.D. 4 Dept.) pursuant to a prior consent order entered in a paternity proceeding petitioner father was "responsible for providing for the needs of the child[ ] and [would] not seek support from [respondent] mother, for child support or child care expenses...." Petitioner, who had joint custody and physical residence of the child, subsequently commenced a proceeding seeking child support under article 4 of the Family Court Act. Following a hearing, the Hearing Examiner issued an order that required respondent to pay child support and contribute to child care costs. The Appellate Division held that petitioner was not required to establish a basis to set aside or modify the prior order. The prior order did not comply with Family Court Act 413(1)(h) because it failed to set forth the presumptive child support amount or the court's reasons for deviating from that amount. The provisions of section 413(1)(h) may not be waived by either parent, and the failure of petitioner to contend that the prior order failed to comply with that section is of no moment. Because the prior order failed to comply with section 413(1)(h), it was void ab initio, and the court was required to disregard it and to address the child support issue de novo.

Unacknowledged Agreement Enforceable In Other Actions

In Matter of Sbarra, 2005 WL 975858 (N.Y.A.D. 3 Dept.) decedent created a tax deferred pension plan trust naming respondent, his wife, as sole beneficiary. He later purchased life insurance and established individual retirement accounts also naming her as beneficiary. In 1998 decedent and respondent stopped living together and executed a separation agreement. This agreement provided that respondent would receive certain marital assets valued at $650,000, retain approximately $300,000 worth of assets that had been held in her name alone and waive any right that she had "to share as beneficiary of any life insurance proceeds, death benefits, retirement benefits, or to share in any other death benefits payable under any contract or otherwise." In their subsequent divorce action, respondent asserted that the separation agreement had been properly executed and was fair and reasonable. When the judgment of divorce was issued on May 10, 1999, the separation agreement survived and a Qualified Domestic Relations Order was later entered directing the transfer of certain pension plan assets to respondent pursuant to the agreement. After decedent's death and the admission of his will to probate, a dispute arose between petitioner and respondent over the remaining pension plan assets and the other assets of which respondent was the named beneficiary. Supreme Court held that respondent had waived her rights to the remaining assets and awarded them to petitioner. The Appellate Division rejected Respondent’s assertion on appeal that, although she signed the separation agreement, she did not acknowledge her signature to the notary public who signed it later, making it unenforceable as a waiver of her rights to decedent's pension plan and other assets. It held that while a separation agreement must be properly acknowledged in order to be enforceable in a matrimonial action since respondent did not deny that she signed the separation agreement and it survived the judgment of divorce, the agreement was enforceable in other types of actions despite the alleged insufficiency of the acknowledgment . Moreover, Since respondent affirmatively alleged in the divorce action that the separation agreement was valid, she was judicially estopped from challenging its validity. Having received the benefit of the Separation agreement's provisions for division of marital property in the earlier divorce action, respondent could not now assume a contrary position here simply because her pecuniary interests had changed.

Court Imputing Income Must State Source and Actual Dollar Amount

In Matter of Kristy Helen T. v. Richard F.G., 2005 WL 957960 (N.Y.A.D. 2 Dept.), the Support Magistrate imputed income to the father in calculating his basic child support obligation pursuant to the Child Support Standards Act. The Appellate Division noted that a Support Magistrate is permitted to impute income in calculating a support obligation where it finds that a party's account of his or her finances is not credible. However, in exercising the discretion to impute income to a party, a Support Magistrate is required to provide a clear record of the source from which the income is imputed and the reasons for such imputation. As the Support Magistrate failed to specify the sources of income imputed and the actual dollar amount assigned to each category, the record was not sufficiently developed to permit appellate review. The matter was remitted to the Support Magistrate to specify the sources of income imputed and the actual dollar amount assigned to each category, and the appeal was held in abeyance pending receipt of the report.

Personality Disorder is Not Extreme Hardship

In Malaga v Malaga, 2005 WL 958023 (N.Y.A.D. 2 Dept.) the parties divorce judgment incorporated, but did not merge their stipulation of settlement which provided that the defendant would pay maintenance to the plaintiff in the sum of $800 per month for a period of eight months. In 1999 the plaintiff filed a motion in the original matrimonial action pursuant to Domestic Relations Law 236(B)(9)(b) to modify the judgment dated August 21, 1990, so as to award her maintenance. After a psychiatric evaluation and a hearing, the Supreme Court found that she established "extreme hardship" in that, inter alia, her personality disorder precluded her from being self-supporting. The Supreme Court awarded lifetime maintenance in the sum of $2,000 per month. The Appellate Division reversed. It held that were a separation agreement or stipulation of settlement has been incorporated, but not merged, into a judgment of divorce, a court is authorized to modify maintenance obligations even after the term for durational maintenance in the stipulation has expired. However, it may only grant such a modification, either upward or downward, upon the showing of "extreme hardship" (Domestic Relations Law 236[B][9][b]. The record did not support the conclusion of the Supreme Court that the plaintiff established "extreme hardship". She testified to monthly expenses totaling approximately $750, including a purported $250 per month for groceries, and costs associated with a new car she purchased with the $14,000 net proceeds of a lawsuit that she settled. Her monthly income, including a $989 pension from a former employer, with or without her social security payment of $604 and social security disability payment of $48, among other subsidies, more than sufficiently covers her outlays. Thus, she failed to prove "extreme hardship" and failed to justify the resumption of the defendant's obligation to pay her maintenance in any amount.

May 16, 2005

2005 Equitable Distribution Decisions Update

In Hathaway v Hathaway, 791 N.Y.S.2d 631 (2d Dept,2005) the Supreme Court, inter alia, dissolved the marriage, equitably distributed 70% of the marital assets to the plaintiff and 30% of the marital assets to him, awarded him maintenance in the sum of $1,000 per month until July 15, 2003, and directed that the plaintiff's "outstanding legal fees ... and those fees paid previously from her separate property ... be paid to plaintiff's counsel and reimbursed to plaintiff, respectively, from the marital assets prior to the distribution to the parties." The Appellate Division modified the judgment on the law, by deleting the provision regarding the plaintiff’s legal fees. It held that the distributive award of 70% of the marital assets to the plaintiff was a provident exercise of discretion. While the parties were married for a considerable period, approximately 33 years, and although the defendant devoted significant time to the parties' two daughters' educational and athletic activities during most of that time, the defendant refused to work, against the plaintiff's wishes, despite being skilled in the computer field and otherwise gainfully employable. The plaintiff was the sole wage earner, and the plaintiff also performed substantially all of the usual and customary housekeeping duties and was evenly involved with the upbringing of the children, while the defendant's contribution to the marriage was minimal. The defendant contended that the Supreme Court improperly awarded him rehabilitative maintenance in the sum of only $1,000 per month until July 2003, as opposed to life-time maintenance for a much larger amount, due to, inter alia, his age, alleged poor health, claimed incapability of becoming self-supporting, and the plaintiff's superior financial position. The Appellate Division held that Supreme Court providently exercised its discretion in granting the defendant limited maintenance, since there was little to no evidence regarding the parties' pre-separation standard of living or any evidence regarding the defendant's needs, the defendant, who had a college education and worked during the early years of the marriage, had the skills for gainful employment in the computer field in which he worked following the parties' physical separation, and despite having been awarded only 30% of the marital property, the actual amount of his distributive award was relatively high. The Supreme Court erred in directing that the plaintiff's "outstanding legal fees ... and those fees paid previously from her separate property ... be paid to plaintiff's counsel and reimbursed to plaintiff, respectively, from the marital assets prior to the distribution to the parties." This provision effectively made the defendant, the non-monied spouse, pay a substantial portion of the counsel fees of the monied spouse, the plaintiff who was worth over $1 million, in violation of Domestic Relations Law § 237 and, therefore, was improper.

Decisions of Interest

Necessary Joinder of Parties May Not be Necessary

In Ramnarine v Ramnarine, 792 N.Y.S.2d 40 (1st Dept,2005) the Appellate Division affirmed a judgment which dissolved the marriage and set aside a conveyance of the marital home to plaintiff husband's brother. It rejected the plaintiff's argument that the court could not divest his brother of title to the house unless and until the latter was formally joined as a party to this action. The brother, who was represented by plaintiff's attorney in connection with his own further conveyance of the house, had notice that his title was to be challenged at a hearing, appeared at the hearing without objection, offered testimony and documentary evidence, and otherwise had a full and fair opportunity to litigate the validity of his title. Even though he had the opportunity to do so, he never sought to intervene. Such participation and indeed control of the hearing by the brother seriously undercut the jurisdictional objection he made, “through plaintiff” that he was a necessary party who must be formally joined.

No Waiver of Pension Rights Where Agreement Clear and Unambiguous

In Valentin v New York City Police Pension Fund, 792 N.Y.S.2d 22 (1st Dept,2005) the Appellate Division affirmed a Judgment which granted the petition to set aside respondent Pension Fund's determination and remanded the matter for disbursement of death benefits to the decedent's estate instead of to Selena Valentin. It held that the interpretation of an unambiguous marital agreement was a question of law for the court and did not require deference to any particular expertise of the administrative agency. In the agreement, involving a childless couple who had separated after less than a year of marriage, and which was executed just 18 days before decedent's death, Selena Valentin waived any rights, title or interest in his pension or retirement benefits, and any other interest in his estate, specifically, a right to take under any "testamentary writing ... now or hereafter in force and effect." The court held that this evinced a clear intent of the parties to separate their lives and finances, and was to be the sole expression of the division of their property and interests. Taken as a whole, this unambiguous contract was sufficiently specific to demonstrate, as a matter of law, that respondent-appellant waived any right to the death benefits she was awarded by the Pension Fund. The fact that the decedent did not remove his estranged wife as a named beneficiary on his pension during the last 18 days of his life was of no moment, nor was the fact that the agreement did not expressly include a waiver of pre-retirement death benefits.

Watch out for an unintended Waiver of Rights

In Luce-Metcalf v Digati, 792 N.Y.S.2d 267 (4th Dept.2005) the parties 1989 separation agreement, which was incorporated but not merged into their judgment of divorce, provided that the defendant retained the right to occupy the marital residence, owned by the parties during the marriage as tenants by the entirety, until his death or removal from the premises, at which juncture the premises were to be sold and one half of the net proceeds distributed to plaintiff. In 1998, the parties jointly conveyed the premises to their son for a nominal consideration, reserving a life estate to defendant. One year later, the son conveyed his remainder interest in the premises to defendant alone. Plaintiff moved in Supreme Court, which had granted the divorce, for an order compelling defendant to convey the premises to plaintiff and defendant, as a means of enforcing what plaintiff considered to be her continuing right under the separation agreement to share in the proceeds of any future resale of the premises. The court adjudged that plaintiff's right to collect one half of the net proceeds of any future sale of the subject property, as set forth in the separation agreement, remained in full force and effect, and ordered that, upon a future sale of the premises, defendant shall share the proceeds with plaintiff pursuant to the terms of the separation agreement. The Appellate Division held that the court erred in determining that plaintiff retained any interest in the premises or any right under the separation agreement to share in the proceeds of any eventual resale. “In joining in the conveyance of the premises to her son, plaintiff alienated all of her right, title, and interest in the premises (see Real Property Law § 245). Concomitantly, plaintiff relinquished any expectancy in the proceeds of any future sale, thereby modifying the separation agreement to a corresponding extent, waiving her rights thereunder, and releasing defendant from his obligations thereunder.”

Large Counsel Fee to Wife Where Husband Had Resources to Litigate

In Weinstein v Weinstein, 2005 WL 1088251 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which granted plaintiff's motion for an award of $300,000 in counsel fees. It held that the court properly exercised its discretion in awarding counsel fees, given the parties' respective financial circumstances and all the other circumstances of the case, stating that: “Defendant has always been far more able than plaintiff to pay legal fees in connection with this proceeding. His substantial resources have been a significant factor in achieving the desired outcome with regard to custody of the children. This has resulted in an escalation of legal fees for plaintiff.”

Did you know about this Recent Legislation?

CPLR 2103-a, Confidentiality of addresses in civil proceedings, provides that in any civil proceeding the court may authorize any party to keep his or her residential and business addresses and telephone numbers confidential from any other party where disclosure of the addresses or telephone numbers would pose an unreasonable risk to the health or safety of that party. Added by Laws of 2004, Ch. 111, § 1, effective July 15, 2004.

May 2, 2005

Court of Appeals Rules on Construction of Agreement

In Kamens v Utica Mut. Ins. Co, 2005 WL 729152, --- N.E.2d --- ( 2005) the issue before the Court of Appeals was the effect of a provision in the parties stipulation of settlement, as part of their divorce settlement, which provided that "[Susan] will execute any and all forms or instruments necessary to remove herself as primary contingent beneficiary on annuity owned by Utica Mutual Life Insurance Company implementing a structured settlement that the parties received as a result of injuries suffered by [Charles]." Plaintiffs argued that Susan was agreeing to a "renunciation" of her interest in the Utica Mutual agreement, and point out that under Estates, Powers and Trust Law 2-1.11(d) the effect of a renunciation is "as though the renouncing person had died at the time of filing" the renunciation. While Susan did not file a formal renunciation, plaintiffs' argument was that she in substance agreed to do so. If Susan renounced her interest prior to Charles's death, she must be deemed to have predeceased Charles, and by the terms of the Utica Mutual agreement the payments after Charles's death should go to plaintiffs, their children. Defendants argued that the purpose of Susan's agreement "to remove herself as primary contingent beneficiary" was to convey her rights under the Utica Mutual agreement to Charles. Defendants argued that a conveyance is what Susan in substance agreed to. If Susan's rights were conveyed to Charles, Charles was entitled to name anyone else he liked, to receive the payments that Susan would have been entitled to under the agreement.

The Court stated that the real issue is whether they meant that Susan step aside in favor of her daughters, or in favor of Charles. The Court found that the parties intended Charles, not plaintiffs, to benefit from Susan's agreement to "remove herself." It noted that a primary purpose in any divorce settlement is to divide assets between the husband and the wife, and where, as here, the wife agrees not to claim a particular asset, the natural reading of the agreement is that the asset becomes the husband's. It is true, of course, that parties may and often do agree to give assets to their children, but where that occurs one would normally expect the children to be mentioned. Susan's agreement to "remove herself" made no mention of plaintiffs, suggesting that there was no intention to benefit them. Other language in the divorce settlement supported this inference. The sentence immediately following the one in dispute expressly gave a benefit to "the children." That sentence provided: "In addition, [Susan] will execute any and all forms or instruments necessary to change her as primary beneficiary under the husband's life insurance policy and [Charles] will agree that he will appoint the children irrevocable beneficiaries of such policy." When the parties sought to confer rights on plaintiffs, they left no doubt of their intention. Finally, a colloquy that occurred in open court during the divorce settlement confirmed that the clause in dispute was meant to benefit. The Court held that the Appellate Division correctly concluded that the effect of the disputed provision in the 1985 divorce settlement was to give Charles the right to name anyone he chose as the primary contingent beneficiary of the Utica Mutual agreement.

Appeal without transcript Dismissed

In Rudick v Rudick, \_\_\_AD3d\_\_\_, 2005 WL 600678 (N.Y.A.D. 2 Dept.), the mother appealed from an order which, after a hearing, granted the father's application for a downward modification of his maintenance obligation. The Appellate Division dismissed her appeal holding that her failure to include transcripts of the support hearing required dismissal of her appeal. It stated that It is the obligation of the appellant to assemble a proper record on appeal. The failure to provide necessary transcripts inhibits the court's ability to render an informed decision on the merits of the appeal. The papers provided were patently insufficient for the purpose of reviewing the issues she raised.

Must Register to Enforce Foreign Support Order

In Matter of Linksman v Linksman, \_\_\_AD3d\_\_\_, 2005 WL 646367 (N.Y.A.D. 2 Dept.)) pursuant to the parties 1997 Virginia divorce decree and their previously entered into settlement agreement, the father's child support obligation was $400 per month. In 2001 the Family Court modified the father's obligation by reducing it to $0. In 2003 the mother commenced a proceeding in the Family Court to enforce the Virginia decree and for arrears. A Support Magistrate awarded the mother arrears in the sum of $15,835. The Appellate Division denied the petition and dismissed the proceeding holding that because the mother failed to demonstrate that the Virginia decree was registered in New York, New York lacked subject matter jurisdiction to enforce the decree (citing 28 USC § 1738B[I]; Family Ct Act §§ 580-603, 580-611[a].

Counsel Fees Pendente Lite

In Stella v Stella, 791 N.Y.S.2d 20, (1st Dept.2005) the Appellate Division affirmed a Judgment which awarded plaintiff pendente lite counsel and expert fees, plus interest, in the total amount of $227,726.33, It held that inasmuch as the record disclosed that defendant husband had significantly greater financial resources at his disposal than plaintiff wife, and that defendant's actions had caused protracted litigation, the court properly exercised its discretion in making the interim awards.

Modification of Maintenance

In Glass v Glass, 791 N.Y.S.2d 15 (1st Dept.2005) the Appellate Division held that where a judgment of divorce incorporates by reference, but does not merge with, a stipulation of settlement between the parties the parties to such agreement may contractually provide for a support modification on a lesser standard than legally required.

2005 Equitable Distribution Decisions Update (Continued)

Schiffer v Schiffer, 2005 WL 71204 (NYAD 2 Dept)

Child Support: $8031.75 per month. Maintenance: $2500.00 per month for 8 years. Counsel Fee: $145,000. While Supreme Court properly deducted the amount of defendant's parental income used in calculating child support it failed to account for the increase in his income and the concomitant increase in the child support payments upon the termination of maintenance.

Sina v Sina , 2005 WL 774515 (NYAD 1 Dept)

Years Married: 8. Payments for basic living expenses, the court appointed accountant and divorce lawyers did not constitute dissipation, nor did the decline in the stock market, which was out of defendant's control.

Sysgrove v Sysgrove, 15 AD3d 292, 791 NYS2d 93 (1st Dept.,2005)

Years married: 19. 50% of equity in marital residence awarded to husband, valued in amount of bona fide offer of $950,000. in July 1998 ( a year after action commenced) made prior to time wife transferred the property to her mother to eliminate her mortgage and tax obligations. Husbands' expert's testimony, valuing it at $2.1 million in July 2001 prior to trial was properly rejected.

April 15, 2005

Equitable Distribution

In Hale v Hale, \_\_AD3d\_\_, 2005 WL 612968 (NYAD 1 Dept) where the parties were married 6 years, the appellate Division affirmed a maintenance award to the wife for four years. The Appellate Division held that as to the husband's appeal from those portions of the original divorce judgment relating to the distributive award, equitable distribution and a distributive award are two different elements of relief and arguably, maintenance would not fall into either category. Where the only "distributive award" was the parties' Cadillac, precluding the husband's appeal from aspects involving equitable distribution for his choice of semantics would elevate form over substance. As for his arguments regarding maintenance, since he ultimately appealed from "each and every portion" of the amended judgment, he should not be denied the right to challenge the awards of maintenance and equitable distribution on appeal.

The husband argued there was no evidence on which the court could have concluded his condominiums's appreciation in value was due in any way to the direct or indirect efforts of either party, and that the court should delete the award of $89,141 for his wife's share. Since the record contained evidence that the wife played some role in the upkeep and maintenance of the condo, it was not an abuse of discretion for the court to grant her a share in its appreciated value. The court rejected the husband's assertion that the trial court erred in accepting the wife's appraiser's $925,000 valuation based on comparable sales for properties much newer or larger than the condo. The Appellate Division held that substantial deference should be accorded to the court's rejection of the testimony of the husband's appraiser, whose associate left a note stating "150 K over, should be around 800 to 900 ...."

Even though the wife did not produce witnesses to refute her husband's testimony that his employer loaned him substantial sums of money over the years, the Appellate Division held that the burden remained on him to prove that the travelers' checks and other sums from the employer were loans and not part of his salary The trial court gave several reasons why it found that the husband failed to sustain his burden, including his acknowledgment that the writing constituted mere "housekeeping" he created subsequent to the purported loans, offering no explanation for the "moratorium."

The trial courts maintenance award resulted from a provident exercise of discretion. In light of the wife's age and limited earning capacity, it would be unreasonable to expect that she could support herself in a lifestyle approximating that which she enjoyed during the marriage. During the marriage, the husband gave his wife an allowance of $2,500 per month, paid for all expenses, and they took frequent vacations. Although he indicated his intention to retire when he is 65, this award was not for her lifetime, but only for four years, and his income and earning capacity demonstrated that he can manage the payments. While the parties were married only six years, they did live together for an additional eight years. In any event, a short marriage alone would not compel an award of lower maintenance in view of the marked disparity between the parties' income and earning capacity.

The Appellate Division held that the husband should not have been given 100% of the credit for the mortgage payments he made on the New York co-op, including principal and interest. When he began deducting the co-op's carrying charges from his wife’s maintenance installments in May 2003, the payments he made to the third parties for the mortgage and other charges should have been viewed as in lieu of spousal support. Thus, while the court was correct in determining that he could not offset payments made in lieu of direct spousal support, it should have awarded him property credit for only that portion representing the principal, not interest. Since the court awarded each party a 50% interest in the co-op, it should have awarded him only 50% of the credit toward the principal of the mortgage.

The Appellate Division also held that the trial court should have used the value of the parties' boat at the commencement of the action, which the husband estimated at $450,000. Since he had exclusive possession, he should be solely responsible for any drop in value, in light of his witness's testimony that increased engine usage would hasten depreciation. The Appellate Division rejected the wife's attempt to deprive her husband of his equal share of her frequent flyer miles, which, by implication, it held was marital property.

Child Support in High Income Cases

In Matter of Brim v Combs, 2005 WL 758112 (N.Y.A.D. 2 Dept.), a child support proceeding to vacate a child support agreement and modify the father's child support obligation, the father a well known singer,appealed from an order of the Family Court which granted the petition and awarded the mother child support in the sum of $35,000 per month, child support arrears in the sum of $398,451.12, and an attorney's fee in the sum of $60,000. The Appellate Division modified the order by directing the father to pay child support in the sum of $21,782.08 per month and remitted for further proceedings. It found that in calculating the award of child support to the mother under Family Court Act 413, the Support Magistrate erred in basing the award in part on the amount of child support the father paid for his other child by a different woman, particularly where no evidence was presented as to that child's expenses, resources, and needs. It held that “ To this end, in high income cases, the appropriate determination under Family Court Act 413(f) for an award of child support on parental income in excess of $80,000 should be based on the child's actual needs and the amount that is required for the child to live an appropriate lifestyle, rather than the wealth of one or both parties (citing Anonymous v Anonymous, 286 AD2d 585). It found that the mother's net worth statement and her extensive testimony at the hearing established that her expenses related to the child were $21,782.08 per month, exclusive of the child's educational, health, medical, dental, extracurricular activity, transportation, security, and summer camp expenses, which in any case were paid by the father. This amount was deemed admitted as fact by the father due to his failure to comply with the compulsory financial disclosure requirements of Family Court Act 424-a. It held that The Family Court erred in awarding $35,000 in monthly child support to the mother. Instead, the mother should have been awarded monthly child support in the sum of $21,782.08 to satisfy the child's actual needs and to afford him an appropriate lifestyle (see Family Court Act 413). The arrears in child support had to be recalculated in light of the change.

Law Guardian’s Role

In Usack v Usack, 2004 WL 3258905 (N.Y.A.D. 3 Dept.), 2005 N.Y. Slip Op. 02712 the Appellate Division specifically emphasized (citing Weiglhofer v. Weiglhofer, 1 AD3d 786, 788 n 1 [2003] ) that it is not proper for a Law Guardian to make a "report" to a court. There the Law Guardian submitted, at Supreme Court's direction, a report containing her own unsworn observations regarding the parties, recounting personal interactions or opinions about them, all of which, it noted, could have been explored and elicited by calling witnesses and upon cross-examination of the parties and other witnesses. We note that in Weiglhofer, supra, where the Supreme Court ordered and relied on a "report" from the Law Guardian, the same court emphasized that a law guardian is the attorney for the children and not an investigative arm of the court. “While law guardians, as advocates, may make their positions known to the court orally or in writing (by way of, among other methods, briefs or summations), presenting reports containing facts which are not part of the record or making submissions directly to the court ex parte are inappropriate practices. Consequently, courts should not direct law guardians to make such reports.”

April 1, 2005

2005 Equitable Distribution Decisions Update

Bennett v Bennet , 2005 WL 3019118 (NYAD 4 Dept)

Years Married: 32. Maintenance Award: $1300 a week until age 69. [Continuing Maintenance Award until wife reached 75 would be onerous for plaintiff who was planning to retire earlier. W Proper to decline to consider tax consequences of a distributive award from pension and distribution from dissolution of law firm where neither party presented evidence to support a determination. Wife properly awarded interest on distributive award.]

D'Angelo v D'Angelo, \_\_AD3d\_\_, 788 NYS2d 154 (2d Dept.,2005)

[Valuation date for marital assets must be between the date of commencement and the date of trial. Where the appraisal of the marital residence was conducted 3 years before the trail and the appraiser testified that property values had changed the court should have ordered a new appraisal. Failure to respond to a notice to admit that a debt is marital is a concession that it is.]

D'Elia v D'Elia, \_\_AD3d\_\_, 788NYS2d 156 (2d Dept.,2005)

[Can not cure defective acknowledgment of antenuptial agreement by submitting duly executed certificate of acknowledgment at trial. However, deed from husband to wife of undivided half interest in property changed its character from separate to marital.]

Falgoust v Falgoust, \_\_AD3d\_\_, 790 NYSd 532 WL 469305 (2d Dept.,2005)

Years Married: 8. Maintenance Award: $500 per week for two years. [Federal and State taxes are not deducted from a parents income for purposes of calculating child support. Maintenance Award for two years proper where wife received a considerable distributive award and was capable of being self-supporting. Wife entitled to 1/3 of appreciation of value of husbands separate residence where he maintained and improved the property with his earnings during he marriage and she took care of the children and did household chores.]

Hale v Hale, 2005 WL 612968 (NYAD 1 Dept)

Years Married: 6. Maintenance Award: to wife for four years. [Although distributive award and equitable distribution are different elements of relief and Maintenance Award differs from both, husband permitted to appeal even though his notice of appeal was limited. Since wife paid some role in upkeep and Maintenance Award of condo,(which appears to be husbands separate property) it was not an abuse of discretion to award her a share of its appreciated value. Even though wife did not produce witnesses to refute husbands testimony that his employer loaned him substantial sums of money the burden remained on him to prove that travelers checks and other sums were loans and not salary, and he failed to sustain burden. Husband entitled to share of wife’s frequent flyer miles. Husband should not have been given credit for all mortgage, principal and interest payments on co-op but since wife awarded 50% of the co-op , credit should be for only 50% of principal payments. Boat should be valued at date of commencement which husband estimated at $450,000. He should be responsible for any drop in value in light of his witness testimony that increased engine use would hasten depreciation.]

Hendricks v Hendricks, \_\_AD3d \_\_, 788 NYS2d 190 (3d Dept.,2004)

Years Married: 35. Husbands Age: 59., Husbands Income: $73,500. Wife’s Age: 58. Wife’s income: $450/mo Soc Sec. Maintenance Award: $1275 per month until husband retires. Counsel Fee: denied. [remitted to determine issues of health insurance and life insurance]

Puglisi v Puglisi, 2005 WL 599981 (NYAD 2 Dept)

Maintenance Award: Denied. [ Proper to distribute wife's pension entirely to her considering that the parties led separate economic lives during their marriage.]

Redder v Redder, \_\_\_AD2d\_\_\_, 2005 WL 549412 (NYAD 3 Dept)

Husbands Income: $80000. Wife’s Income: $27,000 imputed. Child Support Award: $250 per week. Maintenance Award: $1500 per month for 24 months. Counsel Fee: denied. [Supreme Court did not have the authority to direct the parties to pay the fees of the Law Guardian. They are limited to compensation from the state (specifically rejecting the First Department view. Father deeded non custodial parent, where joint custody and equal time sharing, for purposes of child support award where he was greater wage earner.]

Redgrave v Redgrave, 2004 WL 3015135 (NYAD 3 Dept)

Years Married: 29. Husbands Age: 54. Husbands Income: $34,000. Wife’s Age: 50. Wife’s Income: $273,000. Maintenance Award: award to husband reversed on appeal. [Proper to deny wife a share of husbands $20,623 per year pension where he earned $34,494 from his other employment and wife earned $273,551. Proper to award husband 50% of wife's share in title company where he made economic and non-economic contributions. Improper to direct husband be reimbursed for all pendente lite expenditures he made for the marital residence where wife continued to share in payment of mortgage and taxes and he had exclusive occupancy.]

Snow v Snow, \_\_AD3d\_\_, 2004 WL 3052077 (3d Dept.,2005)

Years Married: 25. Husbands Income: $6900. Child Support Award: $425.00 per month. Property Distribution to Wife: remitted. [Supreme Court may not impose a Child Support Award obligation that will reduce a non-custodial parents income below the federal poverty level.]

Wade v Steinfeld, \_\_\_AD2d\_\_\_, 790 NYS2d 64 (2d Dept.,2005)

Maintenance Award: lifetime award to wife. Counsel Fee: $29,092 to wife. Property Distribution to Wife: one half of marital portion of husbands interest in benefits from NYS Teachers Retirements System. [Husband not awarded any portion of wife's law license. Wife entitled to credit for her separate property contribution to martial residence where she overcame presumption that she intended to commingle her funds by depositing them for 3 days in parties joint account]

March 18, 2005

Private Payment of Law Guardian Fees Struck Down by Third Department - Court Cites Our Article

In Redder v Redder, 2005 WL 549412 (N.Y.A.D. 3 Dept.)) the Law Guardian applied for a fee in excess of the statutory limit and for payment of that fee from plaintiff. Supreme Court awarded a fee of $7,125 and directed each party to pay half of that amount to the Law Guardian. Both parties appealed arguing against the award of a fee payable equally by the parties directly to the Law Guardian. The Appellate Division noted that Law Guardian fees are governed by the pertinent standards regarding compensation (citing Judiciary Law 35[3]; 22 NYCRR 835.5). With respect to compensation, while the statutes and regulations speak directly to a procedure for payment from the state (see Family Ct Act 248; 22 NYCRR 835.5), there is no specific statutory or regulatory scheme for direct payment of an appointed Law Guardian by a parent or parents (citing generally Brandes, Compensation and Law Guardians, NYLJ, July 28, 1998, at 3, col 1). The lack of parameters for a direct-pay system creates the potential for issues about the integrity of the appointment process in such situations (which often pay no attention to the statutory caps on compensation for assigned counsel), the independence of the Law Guardian, and raise concerns about fundamental fairness to all children regardless of the economic status of their parents. It noted that it had previously stated, in dicta, that "Law Guardian costs shall be payable by the [s]tate". While acknowledging that resolution of this issue is susceptible to more than one reasonable view (citing Matter of Plovnick v. Klinger, 10 AD3d 84 [2d Dept 2004] ) and there are policy arguments supporting different feasible approaches, it held that until the Legislature or Court of Appeals provides otherwise, the current statutory and regulatory framework should be interpreted as limiting compensation to Law Guardians appointed pursuant to the Law Guardian Program in a contested custody proceeding to payment by the state ( citing Lips v. Lips, 284 A.D.2d 716, 717 [2001] ); see also Family Ct Act 248 ["The costs of law guardians ... shall be payable by the state of New York"]; Matter of Lynda A.H. v. Diane T.O., 243 A.D.2d 24, 27-28 [4th Dept 1998], lv denied 92 N.Y.2d 811 [1998] [holding that Family Court "had no authority to compel the parties to pay the Law Guardian's legal fees and expenses"]; Brandes, Compensation and Law Guardians, NYLJ, July 28, 1998, at 3, col 1). [FN2] The order directing the parties to pay the Law Guardian directly was reversed, and the Law Guardian was told he could apply for a fee as provided in 22 NYCRR 835.5.

Counsel Fee Request Without Net Worth Statement Denied as Defective

In Bertone v Bertone ,790 N.Y.S.2d 35 (2d Dept.,2005), a proceeding for modification of child support, the Second Department held that the plaintiff's failure to submit an updated net worth statement on her behalf rendered that branch of her cross motion which was for an award of an attorney's fee defective.

New 22 NYCRR Part 500

The Court of Appeals has rescinded in its entirety 22 NYCRR part 500 and approved a new Part 500, entitled The Rules of Practice of the Court of Appeals. The new 22 NYCRR part 500 will be effective September 1, 2005. Changes of note include; substitution of a Court-promulgated preliminary appeal statement for the jurisdictional statement previously required for appeals (see Rule 500.9); use of scheduling letters to set due dates for appeal papers (see Rule 500.12[a]) and elimination of the automatic 20-day extension for filing dates for appeals; reduction of the time period from 80 days to 60 days for perfecting appeals, unless an extension is granted (see Rule 500.16[a]); and set filing dates for all applications for amicus curiae relief (see Rule 500.23). The number of copies to be filed on appeals and motions for leave to appeal in civil cases also has been changed.

Constructive Abandonment Reminder - You have to nag and ask repeatedly

In Archibald v Archibald, 2005 WL 357894 (N.Y.A.D. 2 Dept.) the appellate division affirmed a judgment which, after a nonjury trial, dismissed the complaint for a divorce. "It is well settled that to establish a cause of action for a divorce on the ground of constructive abandonment, the spouse who claims to have been constructively abandoned must prove that the abandoning spouse unjustifiably refused to fulfill the basic obligations arising from the marriage contract and that the abandonment continued for at least one year" . The refusal must be "unjustified, willful, and continued, despite repeated requests for continued conjugal relations". Where there is no proof that one spouse repeatedly requested a resumption of sexual relations, evidence that the other spouse refused a single request to engage in sexual relations is insufficient to sustain a cause of action for a divorce on the ground of constructive abandonment. The plaintiff failed to establish a cause of action for a divorce on the ground of constructive abandonment as his testimony failed to support such a finding.

Admissibility of Hearsay in Custody Case Based on Abuse

In Heater v Heater, 2005 WL 425412 (N.Y.A.D. 3 Dept.) Petitioner filed a petition seeking modification of a prior order that had granted respondent visitation with the three children alleging that respondent had shown the five year old child a sexually explicit videotape in which petitioner was performing oral sex on respondent. Following a hearing, Family Court found that respondent had shown a sexually explicit videotape to her and indefinitely suspended all visitation by respondent with the children. The Appellate Division rejected Respondent’s argument that Family Court improperly based the termination of his visitation rights on the uncorroborated hearsay statements of the child. It held that in determining whether there is sufficient change in circumstances, a child's out-of-court statements may be considered so long as the statements are corroborated (citing Matter of Baxter v. Perico, 288 A.D.2d 717, 717 [2001] ). "[T]he standard for determining what constitutes sufficient corroboration is not overly stringent [and] Family Court has considerable discretion" in such a determination. Here the five-year-old child made consistent descriptive statements regarding the videotape to three different adults at various times. Petitioner testified that, before they separated, respondent had made such a videotape and that respondent kept possession of the videotape after they separated. Respondent's current paramour acknowledged that respondent had told her about such a videotape. While the child’s repetition of her statement was not by itself sufficient corroboration, the court found adequate corroboration in the testimony of petitioner and respondent's paramour acknowledging the existence of a videotape that was last in respondent's possession and depicted petitioner and respondent as described by the child. The evidence was thus sufficient to support Family Court's finding that the child had been shown a sexually explicit videotape by respondent and this constituted a change in circumstances justifying a modification of the visitation order. We note that the basis for the decision is found in FCA 1046 (a)(vi) which provides that in any hearing under Article 10 (abuse or neglect) previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect. Any other evidence tending to support the reliability of the previous statements, including, but not limited to the types of evidence defined in the statute is sufficient corroboration.

March 1, 2005

2004 Court of Appeals Roundup Continued

In Kazel v Kazel, 3 N.Y.3d 331, 819 N.E.2d 1036, 786 N.Y.S.2d 420 (2004) the Court of Appeals held that a judgment of divorce and qualified domestic relations order (QDRO) awarding an interest in the husband's pension plan do not automatically include preretirement death benefits available under the plan. If the intent is to distribute such benefits, that should be separately, and explicitly ,stated.

The parties 1991 divorce judgment distributed the marital property by, among other things, dividing the husband's pension plan between the parties pursuant to the equitable distribution formula established in Majauskas v Majauskas (61 NY2d 481 [1984]). The matrimonial court entered a QDRO directing that plaintiff wife begin to receive a fixed percentage of her former husband's monthly allowance either at such time as he "has retired from and is actually receiving a monthly allowance from his . . .Pension Plan" or, at plaintiff's option, "after the earlier to occur of the first date for payments allowed under the plan or after [he] reaches the earliest retirement age under the Plan." The husband died in 2001 before reaching retirement age, and never received any payments under the plan. Following his death, plaintiff sought to share with decedent's widow in preretirement death benefits payable under decedent's pension plan. Because the QDRO, by its plain terms, granted plaintiff an interest only in decedent's retirement annuity, and not in his death benefits, the plan administrator denied plaintiff any share of those benefits. Plaintiff sought to modify or supplement the QDRO to award her a share of such benefits. Supreme Court denied her motion, concluding that plaintiff had failed to establish that the intent of the underlying divorce decree had been to award her survivor benefits. The Court of Appeals noted that Employee Retirement Income Security Act of 1974 (29 USC 1001 et seq.) (ERISA) and the Internal Revenue Code of 1986 (IRC) require all pension plans to provide survivor benefits to a participant's surviving spouse (see ERISA [29 USC] 1055 [a]; Internal Revenue Code [26 USC] 401 [a] [11]; 417). Pursuant to a divorce, however, a QDRO can provide that a former spouse be treated as a surviving spouse--to the exclusion of the actually surviving spouse if, as here, the decedent had remarried--for purposes of ERISA and the joint and survivor rules of the IRC (see ERISA [29 USC] 1056 [d] [3] [F]; Internal Revenue Code [26 USC] 401 [a] [11]; 417, 414 [p] [5] [A]). Thus, a former spouse can overcome the right of an actually surviving spouse to receive a survivor annuity only if specifically awarded such benefits by the matrimonial court. Further, such an award must be reflected in a QDRO, evidenced by clear language designating the former spouse as the surviving spouse for purposes of the survivor benefits. The QDRO must reflect the intent of the underlying judgment of divorce, and must comply with its terms.

In Covington v Walker, 3 N.Y.3d 287, 819 N.E.2d 1025, 786 N.Y.S.2d 409 (2004) the Court of Appeals held that plaintiff's cause of action for divorce on the ground of imprisonment pursuant to Domestic Relations Law 170 (3), brought 16 years after the commencement of defendant's confinement, was not barred by the five-year statute of limitations as set forth in Domestic Relations Law 210. The statute of limitations is measured from the date of defendant's release from prison (see Domestic Relations Law 170 [3] [providing that an action for divorce may be maintained on the ground of the defendant's confinement in prison for a period of at least three consecutive years]). The Court concluded, based on the legislative history, and public policy, that the cause of action accrues on the date defendant completes his third consecutive year of incarceration, but the statute of limitations does not begin to run until the date he is released from prison. Thus, plaintiff's divorce action was not time-barred.

On May 12, 1983, plaintiff wife and defendant husband were married. In 1985 defendant was convicted of murder and robbery and sentenced to a prison term of 25 years to life. Defendant was incarcerated since the date of his arrest. Plaintiff was convicted of the same crimes as defendant and was incarcerated. On April 10, 2000, plaintiff commenced an action for divorce on the ground that defendant has been confined for a period of three or more consecutive years after their marriage ( Domestic Relations Law 170 [3]). Plaintiff moved for summary judgment of divorce and in opposition, defendant asserted defenses, including the five-year statute of limitations in Domestic Relations Law 210. Supreme Court dismissed plaintiff's action on summary judgment. The Appellate Division affirmed.

The Court of Appeals reversed. It held that a cause of action for divorce based on the ground of imprisonment continues to arise anew for statute of limitations purposes on each day the defendant spouse remains in prison for "three or more consecutive years" until the defendant is released. The purpose of the requirement that the defendant be incarcerated for three years prior to the commencement of an action for divorce is to give the convicted party an opportunity to obtain release from prison and to prevent the "natural but sometimes too rash inclination to dissolve a marriage" upon a spouse's conviction. Nothing in the legislative history suggests, however, that Domestic Relations Law 170 (3) was intended to start the statute of limitations running against the plaintiff spouse as early as possible so as to create the potential for a spouse, who may have missed the five-year window. The words "or more" in Domestic Relations Law 170 (3) suggest that divorce actions based on imprisonment are actions involving recurring injuries to the parties which implicate the continuous wrong doctrine. The rule is based on the principle that continuous injuries create separate causes of action barred only by the running of the statute of limitations against each successive trespass. The repeated offenses are treated as separate rights of action and the limitations period begins to run as to each upon its commission. Under a continuous wrong or violation rule, where a defendant spouse is incarcerated for a consecutive period exceeding three years, each day of continued confinement beyond three years inflicts new injury on the plaintiff spouse. Thus, although this ground for divorce arises originally at the conclusion of the third consecutive year of a defendant's incarceration, it continues to arise anew each day thereafter until the defendant is released from prison. An action based on this continuous wrong is barred only by the expiration of the five-year limitations period measured from the date upon Which the defendant is released from prison.

Procedure for Collecting Maintenance Clarified

In Matter of Balanoff v Niosi, \_\_AD2d\_\_, 2004 WL 3171130 (N.Y.A.D. 2 Dept.))the Second Department clarified the procedure for enforcing a judgment against an award of maintenance. The respondent Niosi and his former wife, Ditroia, were divorced pursuant to a judgment entered in the Supreme Court, Suffolk County, which provided that Niosi would make monthly maintenance payments to Ditroia. Upon Niosi's failure to make these payments, the Supreme Court, Suffolk County, entered an income execution for support directing Niosi's employer, the respondent Prospective Computer to deduct the maintenance payments from Niosi's income and to pay them over to Ditroia on a monthly basis. In July 2002, the petitioner obtained a judgment against Ditroia on her default in Supreme Court, Nassau County, for unpaid legal services. The petitioner served the respondents, Niosi and Prospective Computer, with restraining notices alleging that the respondents were in possession of property in which the petitioner had an interest, ie., Ditroia's monthly maintenance payments. When the respondents refused to pay the petitioner, he commenced a proceeding to enforce the restraining notices in Supreme Court, Nassau County, on notice to Ditroia. The Supreme Court held that the respondents did not violate the restraining notices because their payment of Ditroia's monthly maintenance was exempt from restraint pursuant to CPLR 5205(d)(3). The court further stated that any determination of the extent to which the maintenance was not exempt should be made by the court that issued the award (i.e., the Supreme Court, Suffolk County). It dismissed the petition and vacated the previously-issued restraining notices. The Appellate Division affirmed. It held that the petitioner took the wrong initial steps in his attempt to enforce his money judgment against Ditroia's award of maintenance. Ditroia's burden to claim and prove her exemption would not be triggered until the petitioner submits a proper application for an installment payment order to reach the amount of Ditroia's maintenance in excess of her reasonable requirements.

Under the CPLR an application for an installment payment order remains the expedient for accessing exempt salary and wages. Reinforcing this procedure, CPLR 5222(a) prohibits a judgment creditor from serving a restraining notice upon the judgment debtor's employer where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor (see CPLR 5222[a]; Silbert v. Silbert, 25 A.D.2d 570). Such restraining notices are not given any binding effect. The Second Department held that the same is true within the limited context of the case. Maintenance is a form of "income" that is exempt, just like 90% of a debtor's salary, and such clearly exempt income, when sought at its source, can only be divested of its exempt status upon proper application to a court for a determination of the judgment debtor's reasonable requirements (see CPLR 5205[d] ). In order to reach Ditroia's maintenance, the petitioner is required to make a motion for an installment payment order in the action in which he recovered judgment against Ditroia in the Supreme Court, Nassau County He must raise the issue of Ditroia's reasonable requirements in his motion papers. Upon this motion, the Supreme Court, Nassau County, must transfer the action to the Supreme Court, Suffolk County (the matrimonial court) for a determination of Ditroia's reasonable requirements pursuant to CPLR 5205(d)(3) In those proceedings Ditroia bears the ultimate burden of establishing her reasonable requirements and she may not continue to benefit from her default. Once the Supreme Court, Suffolk County, determines the amount in excess of Ditroia's reasonable requirements, the petitioner may also secure an order against third parties, like the respondents, to access payment of Ditroia's surplus maintenance at its source.

Trial Evidence Bits and Bytes

Valuation Methodology

Nasca v Nasca, AD2d , 754 NYS2d 502 (4th Dept.,2003) [Proper to value ring based on 1987 appraisal which was not disputed]

Braun v Braun, 11 AD3d 423, 782 NYS2d 785 (2d Dept.,2004) [Proper to award business to husband and house to wife where it was virtually impossible to value the husbands business because he was not forthcoming with all the necessary documents to make that evaluation.]

Cahen-Vorberger v Vorberger , 785 NYS2d 435 (1st Dept.,2004) [ Proper in valuing husbands business interest at $9.75 million for courts expert to formulate a fair indirect methodology because of inadequate documentation from husband. Proper to value increase in value of business from zero where defendant failed to offer evidence of its value at time of marriage and did not deny that wife contributed to appreciation in value of this separate property by being a homemaker and care giver.]

Spillman-Conklin v Conklin, 783 NYS2d 114 (3d Dept.,2004) [Proper to value timeshare based on value listed in net worth statement and included in proposed findings of fact. Proper to use purchase price, rather than market price, to determine value of jewelry, where no other proof offered by husband, leaving court free to credit wife’s testimony.]

Valuation Date Outside DRL 236[B][4] Parameters

Dashinaw v Dashinaw, 11 AD3d 732, 783 NYS2d 93 (3d Dept.,2004) [Proper to use purchase price of the rental properties, rather than their fair market value, in valuing husbands gift equity in them Proper to value certain personalty as of date of purchase, rather than date of commencement or trial, where only evidence was wife's testimony and no opposing proof from husband about fair market value.]

Preclusion For Failure to Disclose

Berk v Berk, 5 AD3d 165, 773 NYS2d 53 (1st Dept., 2004) [Proper for trial court to preclude husband from offering evidence on financial issues considering that he repeatedly violated orders, his persistent refusal to provide financial disclosure, his failure to pay his share of the fee for the neutral appraiser and his failure to appear for his deposition and a court appearance.]

Cahen-Vorberger v Vorberger , 785 NYS2d 435 (1st Dept.,2004) [Preclusion order and default judgment was supported by ample evidence of husbands contumacious failure to provide disclosure.]

Proof of Separate Property

Kenney v Lureman, 778 NYS2d 821 (4th Dept.,2004) [Wife sustained her burden of establishing that stockholdings were her separate property based upon her uncontroverted testimony that she either inherited them or purchased them with inherited funds]

Chiotti v Chiotti, 785 NYS2d 157 (3d Dept.,2004) [Inability to produce a complete paper trail from a gift or inheritance does not require a contrary finding where not evidence suggesting other possible sources of the funds and no contradictory evidence offered.]

Admissibility of Expert Opinion

Matter of D’Esposito v Kepler, 88 N.Y.S.2d 169, (2d Dept,2005) [Family Court improvidently exercised its discretion in admitting into evidence the report of the neutral forensic psychologist, since the report was not submitted under oath (citing 22 NYCRR 202.16[g][2] ) and relied on information other than that upon which an expert may properly base an opinion. Nevertheless, even without considering the experts report and testimony, it found that Family Court providently exercised its discretion in requiring that the residence of the subject child, who had been relocated by the appellant to California, be returned to New York by the mother

Jemmott v Lazofsky, 5 A.D.3d 558, 772 N.Y.S.2d 840) (2d Dept., 2004) ["It is well settled that, to be admissible, opinion evidence must be based on one of the following: first, personal knowledge of the facts upon which the opinion rests; second, where the expert does not have personal knowledge of the facts upon which the opinion rests, the opinion may be based upon facts and material in evidence, real or testimonial; third, material not in evidence provided that the out-of-court material is derived from a witness subject to full cross-examination; and fourth, material not in evidence provided the out-of-court material is accompanied by evidence establishing its reliability".]

Wagman v. Bradshaw, 292 A.D.2d 84, 86-87, 739 N.Y.S.2d 421. [The Court of Appeals has held that an expert witness may testify that he or she relied upon specific, inadmissible out-of-court material to formulate an opinion, provided (1) it is of a kind accepted in the profession as reliable as a basis in forming a professional opinion, and (2) there is evidence presented establishing the reliability of the out-of-court material referred to by the witness (see, Hambsch v. New York City Tr. Auth., 63 N.Y.2d 723, 480 N.Y.S.2d 195, 469 N.E.2d 516). While the expert witness's testimony of reliance upon out-of-court material to form an opinion may be received in evidence, provided there is proof of reliability, testimony as to the express contents of the out-of-court material is inadmissible. Expert opinion, based on unreliable secondary evidence, is nothing more than conjecture. Admission into evidence of a written report prepared by a non-testifying person would violate the rule against hearsay and the best evidence rule. Inasmuch as such a written report is inadmissible, logic dictates that testimony as to its contents is also barred from admission into evidence.

February 14, 2005

2004 Court of Appeals Family Law Roundup

In Frankel v Frankel, 2 NY 3d 601, 781 NYS2s 59 (June 29, 2004) the Court of Appeals held that a divorce lawyer discharged without cause by one spouse can still make an application for counsel fees against the other spouse pursuant to Domestic Relations Law §237(a) after the discharge. The wife retained a law firm which represented her in the parties divorce action for more than three years. She then fired her attorneys and hired different counsel, who negotiated a settlement with the husband, which stipulated that each side would be responsible for its own legal fees. The wife’s former attorneys, owed some $94,000, moved under §237(a) for a counsel fee award from the husband. The Second Department held that the Domestic Relations Law was drafted to protect the non-monied client, not the non-monied client's former lawyer. It held that the statute applies only to the current attorney of record and that "former counsel has no standing to pursue the adversary spouse within the matrimonial action" (309 AD2d 65, 69 [2d Dept 2002]). The Court of Appeals reversed. Judge Albert M. Rosenblatt, writing for the Court, said a decision to the contrary would undermine public policy and legislative intent by giving the more affluent spouse an upper hand. He pointed out that Domestic Relations Law § 237 (a) provides, in pertinent part, that "[i]n any action or proceeding ... for a divorce ... the court may direct either spouse ... to pay such sum or sums of money directly to the attorney of the other spouse to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties." The statute goes on to say that "[a]ny applications for counsel fees and expenses may be maintained by the attorney for either spouse in counsel's own name in the same proceeding." Although the provision is silent as to whether an attorney who has been discharged without cause has the right in the same proceeding to seek counsel fees, reading the provision in light of precedents and the policy interests surrounding the statute, the Court held that Domestic Relations Law § 237 (a) allows an attorney who was discharged without cause to proceed against the other spouse in the matrimonial litigation.In Holterman v Holterman, 3 NY 3d 1, 781 NYS2s 458 ( 2004) the New York Court of Appeals, in a 5-2 opinion, held that the Supreme Court did not err by declining to adjust defendant’s child support obligation to account for the distributive award payments he was obligated to pay plaintiff for her share of the future enhanced earnings attributable to his medical license. The majority, in an opinion by Judge Graffeo, agreed with the Appellate Division, and found no statutory authority for deducting enhanced earning contributions from the child support calculus. The opinion held that "... the husband's proposed reallocation formula -- or any formula that requires a deduction of a distributive award paid over a period of years from the licensed spouse's income for purposes of calculating child support -- is impermissible under the CSSA," the Child Support Standards Act. Judge Graffeo wrote. "Had the Legislature intended to make distributive awards deductible from one parent's income and includable in the other's, it could easily have so provided." Notably, the Court agreed with husband that a distributive award to be paid by one parent to the other pertains to the financial resources of the parties and is an appropriate paragraph (f) factor that the trial court may consider, in determining whether the application of the child support guidelines amount is "unjust or inappropriate" when awarding child support. Here, in determining whether to apply the child support percentage of 25% to all income in excess of $80,000, Supreme Court expressly indicated that it considered the distributive award and maintenance obligations, the substantial disparity in gross income between the parties, as well as the upper middle-class lifestyle the children would have enjoyed had the parties not divorced. The family had taken frequent vacations, the children received allowances and engaged in extracurricular pursuits, and the daughter, who is musically talented, had taken private music lessons and had traveled with the Empire State Youth Orchestra. Under these circumstances, The Court could not say Supreme Court abused its discretion by applying the statutory percentage of 25% to husband’s income in excess of $80,000. Judge Robert S. Smith dissented in an opinion with Judge Susan Phillips Read. He said :"It makes no sense at all to calculate child support as if no such distribution had occurred -- as though the transferring spouse still owned the asset and received the income it generated," \*\*\* "Yet the majority concludes that this irrational procedure is required by the CSSA -- as indeed it would be, except that the CSSA expressly permits departure from its formula to avoid an 'unjust or inappropriate' result."

In Wilson v McGlinchey, 2 NY3d 375, 779 NYS2d 159 (2004) the Court of Appeals affirmed an order which granted the parents' request to terminate grandparents visitation based on a change in circumstances, because it agreed with the Appellate Division that terminating visitation was in the child's best interest. Judge Graffeo, writing for the Court, stated that although there are benefits which devolve upon the grandchild from grandparent visitation, which cannot be derived from any other relationship, that interest must yield where the circumstances of the child's family including the worsening relations between the litigants and the strenuous objection to grandparent visitation by both parents render the continuation of visitation with the grandparents not in the child's best interest. The Court noted that in light of its ruling it did not address the Petitioners' argument challenging the constitutionality of Domestic Relations Law § 72.

Grandparents given "custody rights". New York’s Domestic Relations Law was amended effective January 5, 2004 to give the grandparent or the grandparents of a child residing in New York state custody rights where the grandparent or grandparents can demonstrate the existence of "extraordinary circumstances". An "extended disruption of custody" constitutes an extraordinary circumstance. "Extended disruption of custody" is defined to include a prolonged separation of the respondent parent and the child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents. The court may find that extraordinary circumstances exist where the prolonged separation has lasted for less than twenty-four months, and based upon other circumstances. (DRL § 72 , subdivision 2 as added by L.2003, c. 657, § 2, eff. Jan. 5, 2004.)

Trial Evidence Bits and Bytes

Separate Property Presumed to Become Marital Property Where Commingled

Garner v Garner, AD2d , 761 NYS2d 414 (3rd Dept.,2003) [personal injury recovery deposited into a joint account of the parties is presumed to be marital property]

Chiotti v Chiotti, 785 NYS2d 157 (3d Dept.,2004) [Separate property which is commingled with marital property or subsequently titled in both names is presumed to be marital property. Once converted to marital property the property does not resume its status as separate, even if all the marital funds are removed from the account. ]

Separate Property Becomes Marital Property For No Apparent Statutory Reason

Dashinaw v Dashinaw, 11 AD3d 732, 783 NYS2d 93 (3d Dept.,2004) [Wife made significant economic and noneconomic contributions sufficient to render rental properties given to husband by his father and brother marital assets.]

Parise v Parise, \_\_\_AD3d\_\_\_, 2004 WL 2952731 (2d Dept.,2004) [ Proper to award wife share of appreciation of husbands separate residential real estate where he failed to satisfy his burden of establishing that the wife's indirect efforts did not contribute, in some degree, to the appreciation.]