

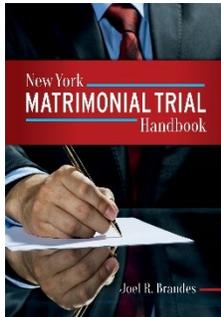


Bits and Bytes™

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Joel R. Brandes Consulting Services, Inc. is a creative writing and publishing company. We provide expert matrimonial and family law content for client newsletters, law firm websites and attorney and law firm blogs. We also assist lawyers with drafting articles for legal journals and preparing presentations and materials for lectures and seminars.



The **New York Matrimonial Trial Handbook** by Joel R. Brandes is available in Bookstores and online in the print edition **at the Bookbaby Bookstore, Amazon, Barnes & Noble and Goodreads.** It is available **in Kindle ebook editions and epub ebook editions in our website bookstore.**

The **New York Matrimonial Trial Handbook** by **Joel R. Brandes** was written for both the attorney who has never tried a matrimonial action and for the experienced litigator. It is a “how to” book for lawyers. This 836 page handbook focuses on the procedural and substantive law, as well as the law of evidence, that an attorney must have at his or her fingertips when trying a matrimonial action. It is intended to be an aide for preparing for a trial and as a reference for the procedure in offering and objecting to evidence during a trial. The handbook deals extensively with the testimonial and documentary evidence necessary to meet the burden of proof. There are thousands of suggested questions for the examination of witnesses at trial to establish each cause of action and requests for ancillary relief, as well as for the cross-examination of difficult witnesses.

September 1, 2018

Recent Legislation

Laws of 2018, Chapter 218, Amended CPLR 2305

Chapter 218 amended CPLR 2305, effective August 24, 2018 to add a new subdivision (d) which gives counsel the option of having trial material delivered to the attorney or self-represented party at the return address set forth in the subpoena, rather than to the clerk of the court. Existing subdivision 2 provides: “Any person may comply with a subpoena duces tecum for a trial, hearing or examination by having the requisite books, documents or things produced by a person able to identify them and testify respecting their origin, purpose and custody.”

CPLR 2305(d) provides as follows:

(d) Subpoena duces tecum for a trial; service of subpoena and delivery for records. Where a trial subpoena directs service of the subpoenaed documents to the attorney or self-represented party at the return address set forth in the subpoena, a copy of the subpoena shall be served upon all parties simultaneously and the party receiving such subpoenaed records, in any format, shall deliver a complete copy of such records in the same format to all opposing counsel and self-represented parties where applicable, forthwith.

The amendment was effective immediately and applies to all actions pending on or after such effective date.

Laws of 2018, Chapter 217 added CPLR 4540-a

Chapter 217 added CPLR 4540-a effective January 1, 2019 to eliminate the authentication burden often encountered by litigants who seek to introduce into evidence documents or other items authored or otherwise created by an adverse party who produced those materials in the course of pretrial disclosure.

According to the Legislative memorandum in support of the legislation the genuineness of a document or other physical object must be established as a prerequisite to its admissibility when the relevance of the item depends upon its source or origin. But evidence of such authenticity should not be required if the party who purportedly authored or otherwise created the documents at issue has already admitted their authenticity. And if a party has responded to a pretrial litigation demand for its documents by producing those documents, the party has implicitly acknowledged their authenticity. Thus, in such cases, the presentation of evidence of authenticity is a waste of the court's time and an unnecessary burden on the proponent of the evidence.

New CPLR 4540-a creates a rebuttable presumption that material produced by a party in response to a demand pursuant to article thirty- one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. The presumption recognized by the statute applies only to the issue of authenticity or genuineness of the item. A party is free to assert any and all other objections that might be pertinent in the case, such as lack of relevance or violation of the best evidence rule. The Legislative memorandum noted that the adoption of the proposed new CPLR 4540-a would not preclude establishing authenticity by any

other statutory or common law means. See CPLR 4543 ("Nothing in this article prevents the proof of a fact or a writing by any method authorized by any applicable statute or by the rules of evidence at common law.").

CPLR 4540-a, effective January 1, 2019 reads as follows:

Rule 4540-a. Presumption of authenticity based on a party's production of material authored or otherwise created by the party. Material produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility.

Laws of 2018, Chapter 235 adds new privileged communications

Chapter 235 amended judiciary law section 498, effective August 24, 2018 by renumbering subdivision 2 as subdivision 3 and adding a new subdivision 2 that deems communications between a consumer of legal services and a legal or lawyer referral service to be privileged, similar to the attorney-client privilege.

Judiciary Law §498, new subdivision 2 reads as follows:

2. The communications between a member or authorized agent of an association or society of attorneys or counselors at law and any person, persons or entity communicating with such member or authorized agent for the purpose of seeking or obtaining a professional referral shall be deemed to be privileged on the same basis as the privilege provided by law for communications between attorney and client. Such privilege may be waived only by the person, persons or entity who has furnished information to the association or society, its members or authorized agents.

Appellate Division, First Department

Adoption Subsidy Should Be Considered as A Resource of The Child When Determining Child Support

In *Barbara T v Acquinetta T*, --- N.Y.S.3d ----, 2018 WL 3789133, 2018 N.Y. Slip Op. 05736 (1st Dept., 2018), a support proceeding, the Appellate Division held that Family Court erred in determining that the Children's Law Center (CLC) which had been appointed as attorney for the child with no limitations on the scope of its representation did not have standing to file objections in Family Court. It rejected the argument that Family Court Act § 439(e) restricts the filing of objections to a "party or parties." That section does not prohibit children's attorneys, where appointed, from filing or rebutting objections to a Support Magistrate's order. It found that the child's attorney had standing to file objections to the Support Magistrate's order. CLC also had standing to bring the appeal. The final order of a Support Magistrate is appealable after objections have been

reviewed by a judge (FCA § 439[e]). In addition, the Court has discretion to entertain an appeal of any Family Court order other than an order of disposition (FCA § 1112).

The child was born on December 21, 2000. In or about 2010, he was removed from his birth mother's home and placed in non-kinship foster care with respondent Acquinetta M. (mother or Ms. M), who thereafter adopted him. When the adoption became final she began to receive a monthly adoption subsidy for him, which was administered by the Administration for Children's Services (ACS). On December 2, 2015, the petitioner in the proceeding, the child's godmother, Barbara T. (guardian or Ms. T), filed a petition for guardianship and in or about February 2016, the child began living with her full-time. Ms. M did not contest the petition, and it was granted on March 28, 2016. In March 2016, Ms. M advised ACS that the child was no longer living with her and that she wished to stop receiving the subsidy. Based solely on her request, ACS issued a notice to the mother stating that the subsidy had been "suspended" effective April 14, 2016 at her request. On March 31, 2016, the child's guardian filed a petition seeking child support from Ms. M.

The Appellate Division held, inter alia, that Family Court properly determined that an adoption subsidy should be considered as a resource of the child when determining child support. The Court observed that foster parents apply for the subsidy prior to adoption (18 NYCRR 421.24 [b], [c][1]), and sign a contract with ACS (18 NYCRR 421.24[c][3]). The minimum provisions of such contracts are set by regulation (18 NYCRR 421.24[c][3]). The applicable regulations further provide that the written agreement "will remain in effect until the child's 21st birthday. No payments may be made if [ACS] determines that the adoptive parents are no longer legally responsible for the support of the child or the child is no longer receiving any support from such parents. Such written agreement must state that it will be the responsibility of the adoptive parent(s) to inform the appropriate State or local official when they are no longer legally responsible for the child or no longer providing any support to the child" (18 NYCRR 421.24[c][5]). Similarly, the Social Services Law provides that, once approved, subsidy payments "shall be made until the child's twenty first birthday" (SSL § 453 [1][a]) and that payment of the subsidy may only be suspended if ACS "determines that the adoptive parents are no longer legally responsible for the support of the child or the child is no longer receiving any support from such parents" (SSL § 453[1][c]; see also 42 USC § 673[a][4][A][ii], [iii]). The Appellate Division held that Family Court erred in determining that receipt of the subsidy, once the contract is entered into, is at the adoptive parent's election or that the subsidy terminates when the adoptive parent "opts" not to receive it. The mother's claim that she was no longer eligible to receive the subsidy once the child no longer resided with her was contrary to the applicable statutes and regulations and the required language of the adoption subsidy agreement.

The Appellate Division held that although the statute does not presently permit anyone other than an adoptive parent to receive the subsidy on the child's behalf, there is no statutory or regulatory requirement that the child continue to reside with the adoptive parent in order for the subsidy to continue. Accordingly, Family Court erred when it determined that it is "inappropriate, if not illegal, for a person to apply for and receive adoption subsidies for a minor who is not in said person's care." The subsidy may be considered in determining whether the non-custodial parent's statutory child support obligation is "unjust or inappropriate" (FCA § 413 [1][f]). Adoptive parents, just like biological parents, remain legally responsible for the support of their children until they are 21 (FCA § 413[1][a]). The adoption subsidy (see 18 NYCRR 421.24) is not income

that can be imputed to the adoptive parent (see *A.E. v. J.I.E.*, 179 Misc. 2d 663, 686 N.Y.S.2d 613).

However, Family Court erred in determining that a deviation based on the subsidy would be improper because it would “force” the mother to take steps to undo the subsidy’s suspension. Awarding child support in the amount of the subsidy is not unlike awarding support based on a parent’s historic earning potential, which similarly requires the parent to do what the court has determined he or she is capable of doing based on past performance. Family Court further erred in failing to properly consider the 10 factors set forth in FCA § 413(1)(f) to determine whether the mother’s basic child support obligation is unjust or inappropriate.” Considering these factors, it found that awarding child support in at least the amount of the subsidy for so long as the mother was eligible to receive it on the child’s behalf was an appropriate deviation from the basic child support obligation (see *Smith*, 75 A.D.3d 802, 903 N.Y.S.2d 758). However, it was not clear from the record whether the mother may obtain the subsidy retroactive to the date on which it was suspended and remanded for further proceedings.

To Extent Defendant Promised Plaintiff, In Contemplation of Marriage, That She Would Raise Any Children They Had as Vegetarians, The Promise Is Not Binding

In *Kesavan v Kesavan*, 162 A.D.3d 445, 78 N.Y.S.3d 345, 2018 N.Y. Slip Op. 04088 (1st Dept., 2018) in the parties parenting agreement, the parties agreed to jointly determine all major matters with respect to the child, including “religious choices.” The 24–page agreement did not otherwise mention the child’s religious upbringing and made no reference at all to dietary requirements. Although the parenting coordinator found that the child’s diet was a day-to-day choice within the discretion of each party, the trial court explicitly determined that the child’s diet was a religious choice, and dictated the child’s diet by effectively prohibiting the parties from feeding her meat, poultry or fish. The Appellate Division held that this was an abuse of discretion (see *De Arakie v. De Arakie*, 172 A.D.2d 398, 399, 568 N.Y.S.2d 778 [1st Dept. 1991]). To the extent defendant promised plaintiff, in contemplation of marriage, that she would raise any children they had as vegetarians, the promise is not binding (*Stevenot v. Stevenot*, 133 A.D.2d 820, 520 N.Y.S.2d 197 [2d Dept. 1987]), particularly in view of the parenting agreement, which omits any such understanding. Nor was there support in the record for a finding that a vegetarian diet is in the child’s best interests.

Appellate Division, Second Department

In proceeding pursuant to FCA § 661(a) there is no express statutory fingerprinting requirement, or express requirement to submit documentation to OCFS.

In *Matter of A v P*, 161 A.D.3d 1068, 78 N.Y.S.3d 189, 2018 N.Y. Slip Op. 03674 (2d Dept., 2018) the mother commenced a proceeding pursuant to Family Court Act article 6 to be appointed guardian of the child for the purpose of obtaining an order declaring that the child is dependent on the Family Court and making specific findings so as to enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (SIJS) pursuant to 8 USC § 1101(a)(27)(J). The mother

also moved for the issuance of an order making the requisite declaration and specific findings so as to enable the child to petition for SIJS. Family Court denied the mother's motion without a hearing and dismissed the guardianship petition for "failure to prosecute," respectively.

The Appellate Division reversed. It held that in a proceeding such as this pursuant to Family Court Act § 661(a) for "[g]uardianship of the person of a minor or infant," there is no express statutory fingerprinting requirement, or any express requirement to submit documentation pertaining to the Office of Children and Family Services. Further, under the circumstances of this case, the court erred in dismissing the petition and denying the motion for "failure to prosecute" based upon the mother's failure to submit documentation regarding, inter alia, the child's enrollment in school. Since the Family Court dismissed the guardianship petition and denied the mother's motion without conducting a hearing or considering the child's best interests, it remitted the matter to the Family Court for a hearing and a new determination thereafter of the petition and the motion.

Second Department Holds that cases such as Matter of Angelo O., 41 A.D.3d 605, 836 N.Y.S.2d 421 should no longer be followed. Family Court's Determinations Following A Permanency Hearing Must Be Made 'In Accordance with The Best Interests and Safety of The Child

In Matter of Victoria B, --- N.Y.S.3d ----, 2018 WL 3748220, 2018 N.Y. Slip Op. 05675 (2d Dept., 2018) after issuing the order of fact-finding of neglect and disposition, the Family Court held a permanency hearing. In a permanency hearing order dated August 30, 2017, the court changed the permanency goal from reunification to placement for adoption and continued the child's placement in the custody of the Commissioner until the completion of the next permanency hearing or pending further order of the court. The order also directed the filing of a petition to terminate the father's parental rights.

The Appellate Division held that the father's appeal was academic insofar as the permanency hearing order dated August 30, 2017, continued the child's placement with the Commissioner. This portion of the order had already expired. However, it concluded that the portions of the August 30, 2017, permanency hearing order which changed the permanency goal from reunification to placement for adoption and directed the filing of a petition to terminate the father's parental rights was not academic. It agreed with the First and Third Departments that since the permanency goal was changed so as to alter the objectives to be sought by the petitioner in the course of future permanency proceedings from working toward reunification to working toward permanent placement and termination of parental rights, any new orders would be the direct result of the order appealed from, and the issue of whether the order appealed from was proper will continue to affect the father's rights (see Matter of Jacelyn TT. [Tonia TT. —Carlton TT.], 80 A.D.3d 1119, 1120, 915 N.Y.S.2d 732; see also Matter of Justyce HH. [Andrew II.] 136 A.D.3d 1181, 26 N.Y.S.3d 376; accord Matter of Alexander L. [Andrea L.], 109 A.D.3d 767, 972 N.Y.S.2d 229). To the extent that cases such as Matter of Angelo O., 41 A.D.3d 605, 836 N.Y.S.2d 421 are to the contrary, they should no longer be followed.

In affirming the order upon its review, the Appellate Division observed that Article 10-A "establishes a system of 'permanency hearings' for children who have been

removed from parental custody”. The hearings are “scheduled at six-month intervals” (see Family Ct Act § 1089[a][3]). “At the conclusion of each hearing, Family Court enters an order of disposition, schedules a subsequent hearing, and may also consider whether the permanency goal should be approved or modified”. Permissible permanency goals include returning the child to a parent or placing the child for adoption (Family Ct Act § 1089[d][2][i]). “At a permanency hearing, the petitioner bears the burden of establishing the appropriateness of a permanency goal, or a goal change, by a preponderance of the evidence” The Family Court’s determinations following a permanency hearing “must be made ‘in accordance with the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if returned to the parent’”

Appellate Division, Fourth Department

Family Court Does Not Have Authority to Compel Child to Participate in Permanency Hearing When Child Has Waived Right to Participate Following Consultation with Attorney

In *Matter of Shawn S*, 163 A.D.3d 31, 77 N.Y.S.3d 824, 2018 N.Y. Slip Op. 042081(4th Dept., 2018), the Family Court, directed 14-year-old child to be present for any permanency hearing, despite the child’s waiver of right to participate in hearing. The Appellate Division reversed. It held that the Family Court does not have the authority to compel a child to participate in a permanency hearing when that child has waived his or her right to participate following consultation with his or her attorney (see Family Ct Act § 1090–a [a][2]). The question was one of statutory interpretation. Here, the statutory language was clear and unambiguous. Although the permanency hearing must include “an age appropriate consultation with the child” (Family Ct Act § 1090–a [a][1]), that requirement may not “be construed to compel a child who does not wish to participate in his or her permanency hearing to do so” (Family Court act§ 1090–a [g]). The choice belongs to the child. “A child age fourteen and older shall be permitted to participate in person in all or any portion of his or her permanency hearing in which he or she chooses to participate” (§ 1090–a [b][1]). Moreover, “a child who has chosen to participate in his or her permanency hearing shall choose the manner in which he or she shall participate, which may include participation in person, by telephone or available electronic means, or the issuance of a written statement to the court” (§ 1090–a [c]). Although the court may limit the participation of a child under the age of 14 based on the best interests of the child (see § 1090–a [a][3]; [b][2]), the court lacks the authority to compel the participation of a child who has waived his or her right to participate in a permanency hearing after consultation with his or her attorney (see § 1090–a [a][2]; [g]).

August 16, 2018

Appellate Division, Second Department

Second Department Holds That Request at Trial for Judgment for Arrears of Temporary Maintenance Must Be Made on Notice

In *Cravo v Diegel*, --- N.Y.S.3d ----, 2018 WL 3559159, 2018 N.Y. Slip Op. 05447 (2d Dept., 2018) in affirming the judgment of divorce, the Appellate Division held, inter alia, that Supreme Court did not improvidently exercise its discretion in failing to the husband him maintenance arrears accruing under a pendente lite order dated December 29, 2014, because he failed to make an application for such an award. A party to a matrimonial action may make an application for a judgment directing payment of maintenance arrears at any time prior to or subsequent to the entry of a judgment of divorce (see Domestic Relations Law § 244). However, an application for a judgment directing payment of maintenance arrears must be made “upon such notice to the spouse or other person as the court may direct” (Domestic Relations Law § 244). Here, the defendant made no such application (see Domestic Relations Law § 244; *Matter of Fixman v. Fixman*, 31 A.D.3d 637, 637–638, 819 N.Y.S.2d 770).

Appellate Division, Fourth Department

Fourth Department Holds That Comity Requires Recognition of Property Rights Arising from Civil Union in Vermont

In *O'Reilly- Morshead v O'Reilly-Morshead*, --- N.Y.S.3d ----, 2018 WL 3567116, 2018 N.Y. Slip Op. 05419 (4th Dept., 2018) Plaintiff and defendant were residents of New York who, on June 9, 2003, traveled to Vermont and entered into a civil union under the laws of that state. On June 9, 2006, they were married in Canada. In 2014, plaintiff commenced this action seeking dissolution of the marriage and defendant counterclaimed for, inter alia, dissolution of the civil union and the equitable distribution of property acquired during the civil union. The Appellate Division held that Supreme Court properly declined to treat the civil union as equivalent to a marriage for the purposes of the equitable distribution of property under the Domestic Relations Law. It observed that when the New York State Legislature enacted the Marriage Equality Act, it granted same-sex couples the right to marry, but it did not grant those couples who had entered into civil unions the same rights as those who marry. The Domestic Relations Law provides that “[a] marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex” (DRL§ 10–a [1]). While the word “marriage” is not defined in the Domestic Relations Law, the disposition of property in a matrimonial action is dependent on whether that property is “[m]arital property” (DRL§ 236[B][5][c]). The Domestic Relations Law defines “ ‘marital property’ ” as property acquired “during the marriage” (DRL§ 236[B][1][c]) and, as relevant here, “separate property” is defined as “property acquired before marriage” (§ 236[B][1][d][1]). The parties were married on June 9, 2006, and thus the property at issue was acquired prior to the parties’ marriage.

However, the Appellate Division concluded that the court erred in denying defendant’s request to apply principles of comity to the civil union and recognize that both parties have rights with respect to property acquired during the civil union. In *Debra H. v. Janice R.*, 14 N.Y.3d 576, 904 N.Y.S.2d 263, 930 N.E.2d 184 (2010) the Court of Appeals left open the question whether New York should extend comity to the civil union for purposes other than parentage. The Appellate Division concluded that comity does

require the recognition of property rights arising from a civil union in Vermont. One of the consequences of the parties' civil union in Vermont was that they would receive "all the same benefits, protections, and responsibilities under law ... as are granted to spouses in a civil marriage" (Vt. Stat. Ann, tit. 15, § 1204[a]), including rights with respect to "divorce ... and property division" (§ 1204 [d]; see *DeLeonardis v. Page*, 188 Vt. 94, 101, 998 A.2d 1072, 1076 [2010]). That rule is consistent with the public policy of New York, inasmuch as the laws of Vermont and New York both "predicate [] [property rights] on the objective evidence of a formal legal relationship," i.e., legal union between the parties. In other words, under the laws of both Vermont and New York, property acquired during a legal union of two people—in Vermont a civil union or marriage, and in New York, a marriage—is subject to equitable distribution under the governing statutes of the state. The relevant New York and Vermont statutes both provide similar factors for the court to consider when determining the equitable distribution of the property. It concluded that, under the principles of comity, the property acquired during the civil union and prior to the marriage is subject to equitable distribution, and such property will therefore be equitably distributed after trial, along with the property acquired during the marriage.

Terms of agreement are to be interpreted consistently corresponding statutory scheme

In *Burns v Burns*, --- N.Y.S.3d ----, 2018 WL 3569023, 2018 N.Y. Slip Op. 05411 (4th Dept., 2018) the parties settlement agreement pursuant to Domestic Relations Law § 236(B)(3) which was incorporated into their judgment of divorce provided that "[a]ll matters affecting interpretation of this [a]greement and the rights of the parties [t]hereto shall be governed by the laws of the State of New York." The agreement obligated the husband to pay "rehabilitative maintenance" to the wife pursuant to a schedule, until November 30, 2010 but was silent regarding the effect, if any, of the wife's remarriage upon the husband's maintenance obligation. The wife remarried in December 2015. In April 2016, the husband emailed the wife to inform her that he would stop paying maintenance as a result of her remarriage. The wife then moved to, inter alia, recover a monetary judgment for the amount outstanding and hold the husband in contempt for ending the maintenance payments. The Appellate Division rejected the wife's argument that "a plain reading of ... the agreement [] leads to only one conclusion: [the husband's] rehabilitative maintenance obligation survives [her] remarriage." because "[o]ther than November 30, 2020, no termination events are identified in the agreement.

The Appellate Division held that when parties enter into an agreement authorized by or related to a particular statutory scheme, the courts will presume—absent something to the contrary—that the terms of the agreement are to be interpreted consistently with the corresponding statutory scheme (*Dolman v. United States Trust Co. of N.Y.*, 2 N.Y.2d 110, 116, 157 N.Y.S.2d 537, 138 N.E.2d 784 [1956]). The statutory scheme corresponding to the agreement in this case is Domestic Relations Law § 236, which includes the following caveat: any maintenance award "shall terminate upon the death of either party or upon the payee's valid or invalid marriage". As thus defined, the concept of maintenance is unequivocally limited to payments made to an unmarried ex-spouse. And unless the parties contract otherwise, the statutory limitation is incorporated directly into a divorce settlement agreement "as though it were expressed or referred to therein". It rejected the wife's argument that the statutory definition of maintenance embodied in Domestic Relations Law § 236(B)(1)(a) is irrelevant simply because the parties chose to settle the terms of their divorce in a written agreement. The concept of "maintenance,"

is explicitly limited by statute to payments made to an unmarried payee.

August 1, 2018

Appellate Division, Second Department

Party Moving for Attorney's Fees Must Make Prima Facie Showing of Substantial Compliance With 22 NYCRR 1400.2 And 1400.3

In *Matter of Tarpey v Tarpey*, --- N.Y.S.3d ----, 2018 WL 3371501, 2018 N.Y. Slip Op. 05178 (2d Dept., 2018) the Appellate Division reversed an order which granted the mother's petition for an upward modification of child support and attorneys fees. It pointed out that an attorney may recover fees from a client or the client's spouse only if the attorney has substantially complied with 22 NYCRR 1400.2 and 1400.3, which, inter alia, require counsel to provide the client with "written, itemized bills at least every 60 days" (*Gahagan v. Gahagan*, 51 A.D.3d 863, 864, 859 N.Y.S.2d 218). The party moving for attorney's fees must make a prima facie showing of substantial compliance with 22 NYCRR 1400.2 and 1400.3 (see *Gottlieb v. Gottlieb*, 101 A.D.3d 678, 679, 957 N.Y.S.2d 132). It held that the Support Magistrate erred in awarding the mother attorney's fees, as the mother did not demonstrate, prima facie, substantial compliance with 22 NYCRR 1400.2 or 1400.3. The mother failed to submit appropriate evidence in support of her application for attorney's fees

Recording Call Placed on Speaker at Request of Party to Conversation Is Not Eavesdropping

In *Perlman v Perlman*, --- N.Y.S.3d ----, 2018 WL 3371321, 2018 N.Y. Slip Op. 05212 (2d Dept., 2018) the Appellate Division, inter alai, affirmed an order denying defendant's motion to preclude the plaintiff from offering a tape recording of a telephone call into evidence at trial. Generally, "[t]he contents of any overheard or recorded communication, conversation or discussion, or evidence derived therefrom, which has been obtained by conduct constituting the crime of eavesdropping, as defined by section 250.05 of the penal law, may not be received in evidence in any trial, hearing or proceeding before any court or grand jury" (CPLR 4506[1]). "A person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication" (Penal Law § 250.05). It found that the plaintiff's actions in recording a telephone call, which apparently took place between the defendant and the children after the defendant requested that the children place the call on speaker so that the plaintiff could hear what he had to say, did not constitute the crime of eavesdropping. The plaintiff's actions did not amount to "mechanical overhearing of a conversation [,]" as she was present at, and a party to, the conversation at issue (Penal Law § 250.00[2]; cf. *People v. Badalamenti*, 27 N.Y.3d 423, 432, 34 N.Y.S.3d 360, 54 N.E.3d 32). Thus, the recordings of that conversation were admissible pursuant to CPLR 4506(1) (see CPLR 4506[1]; Penal Law §§ 250.05, 250.00[1], [2]).

Provision of Postnuptial Agreement Waiving Right to Seek Attorney's Fee Held Unenforceable

In *Maddaloni v Maddaloni*, --- N.Y.S.3d ----, 2018 WL 3450169, 2018 N.Y. Slip Op. 05295 (2d Dept., 2018) the Appellate Division affirmed an order which, among other things, granted the plaintiffs motion for post judgment and interim appellate counsel fees. The parties' 1988 postnuptial agreement provided that in the event that either of the parties was unable or unwilling to continue the marriage arrangement, neither of the parties would be entitled to counsel fees. It observed that "[t]he 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" (*Kessler v. Kessler*, 33 A.D.3d 42, 48, 818 N.Y.S.2d 571; see *Abramson v. Gavares*, 109 A.D.3d 849, 851, 971 N.Y.S.2d 538). Here, based on the disparity between the financial positions of the parties, and all of the circumstances of this matter, the provision of the parties' postnuptial agreement waiving the right to seek an award of an attorney's fee was unenforceable.

Appellate Division, Third Department

Net Loss on Rental Property Excluded from Income for Child Support Calculation

In *DeSouza v DeSouza*, --- N.Y.S.3d ----, 2018 WL 3383635, 2018 N.Y. Slip Op. 05237 (3d Dept., 2018) the Appellate Division held that where a net loss is sustained on rental property for a given year, such rental income is properly excluded from the calculation of the parties' total gross income for child support purposes (see Domestic Relations Law § 240[1-b] [b][5][ii]).

July 16, 2018

Rules of Professional Conduct amended effective June 1, 2018

— The Judicial Departments of the Appellate Division of the New York State Supreme Court, amended Title 22 of the Official Compilation of Code, Rules, and Regulations of the State of New York Part 1200 (Rules of Professional Conduct, Rule 8.4[g]) and Part 1210 (Statement of Client's Rights) to prohibit discrimination in the practice of law on the basis. of, gender identity. or gender expression, as follows:

Part 1200. Attorney Rules of Professional Conduct

•••

Rule 8.4. Misconduct

A lawyer or law firm shall not:

•••

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis. of age, race, creed, color, national origin, sex, disability, marital status, sexual orientation, gender identity. or gender expression. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on

unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

Part 1210. Statement of Client's Rights
§ 1210.1. Posting

Every attorney with an office located in the State of New York shall insure that there is posted in that office, in a manner visible to clients of the attorney, a statement of client's rights in the form set forth below. Attorneys in offices that provide legal services without fee may delete from the statement those provisions dealing with fees. The statement shall contain the following:

STATEMENT OF CLIENT'S RIGHTS ...

10. You may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, gender identity, gender expression, age, national origin, or disability.

Statewide Practice Rules of the Appellate Division Amended and Local Rules Adopted

22 NYCRR Part 1250, Statewide Practice Rules of the Appellate Division were adopted by the four Judicial Departments of the Appellate Division on December 12, 2017 and revised by joint order on June 29, 2018, to take effect on September 17, 2018. See: Joint Order of the Departments of the New York State Supreme Court, Appellate Division

22 NYCRR Part 1250 applies to all matters that are commenced in the Appellate Division, or in which a notice of appeal to the Appellate Division is filed, on or after September 17, 2018. Unless otherwise ordered by the Court upon a showing that application of part 1250 to the matter would result in substantial prejudice to a party or would be manifestly unjust or impracticable under the circumstances, part 1250 applies to each matter pending in the Appellate Division on September 17, 2018.

Due to the differences inherent in practice among the four departments of the Appellate Division, each department has also adopted a set of local rules.

The Appellate Division, First Judicial Department rescinded 22 NYCRR Part 600 and adopted a new 22 NYCRR Part 600 to supplement the statewide Practice Rules of the Appellate Division, effective on September 17, 2018.

The Appellate Division, Second Judicial Department rescinded 22 NYCRR Part 670 and adopted a new 22 NYCRR Part 670, effective September 17, 2018.

The Appellate Division, Third Department rescinded 22 NYCRR Part 850 and adopted a new 22 NYCRR Part 850 effective September 17, 2018.

The Appellate Division, Fourth Department repealed in its entirety 22 NYCRR Part 1000, governing practice before the Court and enacted a new 22 NYCRR Part 1000, effective September 17, 2018.

Appellate Division, Second Department

Mother Did Not Consent to Reference Merely by Participating in The Proceeding Without Requesting Judge to Hear Case

In *Matter of Rose v Simon*, --- N.Y.S.3d ----, 2018 WL 3131427, 2018 N.Y. Slip Op. 04736 (2d Dept., 2018) the father filed a petition for sole physical custody of the child. During the pendency of the custody proceeding, the mother filed a family offense petition against the father. The matters were heard before a Court Attorney Referee, who, after a consolidated hearing, granted the father's petition and dismissed the mother's family offense petition. The Appellate Division observed that a referee derives authority from an order of reference by the court (see CPLR 4311, 4317). The order of reference did not authorize the Court Attorney Referee to hear and report or to hear and determine a contested family offense petition. The Court Attorney Referee therefore lacked jurisdiction to dismiss the mother's family offense petition.

With respect to the determination of custody, the order of reference recited that, upon the parties' stipulation, a court attorney referee is authorized to hear and determine the parties' rights to custody of and visitation with the child, including the determination of motions and temporary orders of custody. A review of the record revealed that the parties had not stipulated to the reference in the manner prescribed by CPLR 2104, and, absent such stipulation, the Court Attorney Referee had the power only to hear and report her findings. It further found that the mother did not consent to the reference merely by participating in the proceeding without expressing her desire to have the matter tried before a judge. The order of reference was therefore deemed an order to hear and report. Thus, the Court Attorney Referee had no jurisdiction to determine, but only to hear and report, with respect to the parties' respective rights of custody and visitation. The portion of the order, which determined custody and visitation, was deemed a report (see CPLR 4320[b]), and the custody matter was remitted for further proceedings pursuant to CPLR 4403 before a judge of the Family Court.

Attorney Sanctioned for Submissions Filled with Half Truths, Distortions of Facts, Facts Taken Out of Context, And Omissions of Material Facts and Relevant Decisions

In *Matter of Ermini v Vittori*, --- N.Y.S.3d ----, 2018 WL 3295635, 2018 N.Y. Slip Op. 05038 (2d Dept., 2018) after Family Court, issued a final order of protection in favor of the mother and the children and against the father, the attorney for the children moved pursuant to Family Court Act § 842 to extend that order of protection. The father cross-moved, in effect, to enforce certain purported orders of an Italian Court pertaining to visitation, and to remove the attorney for the children. The attorney for the children cross-moved, inter alia, pursuant to 22 NYCRR 130-1.1 for an award of an attorney's fee. The mother's attorney made an application pursuant to 22 NYCRR 130-1.1 for an award of an attorney's fee. Family Court, inter alia, granted the cross motion of the attorney for the children, and the separate application of the mother's attorney, pursuant to 22 NYCRR 130-1.1 for an award of attorneys' fees to the extent of directing the father's

attorney, to pay the sum of \$2,000 to each attorney. On the issue of attorney's fees pursuant to 22 NYCRR 130-1.1, the court concluded, in part, that the father's "submissions are filled with half truths, distortions of facts, facts taken out of context, and most distressingly, omissions of material facts and relevant decisions" and that most of the father's "submissions were an attempt to revise and re-litigate facts that were already decided." The father and his attorney appealed from those portions of the order. The Appellate Division affirmed.

Appellate Division, Third Department

Procedures mandated by FCA § 1017 must be strictly followed. Placement order must be set aside if a failure to comply with statute prejudiced either the rights of a relative to seek placement or the child's right to be placed with a suitable relative

In *Matter of Richard HH v Saratoga County of Social Services*, --- N.Y.S.3d ----, 2018 WL 3276162, 2018 N.Y. Slip Op. 04990 2018 WL 3276162 (3d Dept., 2018) in September 2014, the children were removed from the mother's care and placed in the custody of respondent (DSS) after neglect petitions were filed against the mother and the children's father. In February 2015, Family Court issued an order finding the children to be neglected and continuing their placement in the custody of DSS. In October 2015, petitioner, the children's maternal uncle, filed two petitions seeking custody of the children and for permission to intervene in the neglect proceedings pursuant to Family Ct. Act § 1035 (f). Family Court's denial of the uncle's motion to intervene was reversed on appeal and upon remittal, the uncle was joined and two permanency hearings were conducted with respect to the younger child. Following a trial on the uncle's custody petition and a Lincoln hearing, Family Court dismissed the uncle's petition. The Appellate Division reversed.

The Appellate Division held that the uncle was prejudiced by DSS's failure to comply with Family Ct. Act § 1017, which provides, as relevant here, that when a court determines that a child must be removed from his or her home based on neglect, the court shall direct the local commissioner of social services to conduct an immediate investigation to locate relatives who may be a placement resource and to provide any such individuals with written notice of the pendency of the neglect proceeding and the opportunity to seek custody of the child (see Family Ct. Act § 1017[1][a]). After the investigation is completed, the court must determine whether there is a relative with whom the child may appropriately reside (see Family Ct. Act § 1017[1][c]). If a suitable relative exists, the court is required to "either place the child with that relative or with the local commissioner of social services with directions to allow the child to reside with that relative pending his or her approval as a foster parent," and, notably, only if no suitable relative can be located should Family Court consider another placement. The statute, in short, is intended to guard not only the rights of relatives of a child who is removed from his or her home, but also to protect the rights and interests of children to be placed with their relatives". It accomplishes this purpose by requiring that the initial placement of children who must be removed from their homes be made, whenever possible, with a relative, thereby allowing them to form or maintain bonds with family members rather than with foster parents. A placement order must be set aside if a failure to comply with

[Family Ct. Act § 1017] prejudiced either the rights of a relative to seek placement or the child's right to be placed with a suitable relative.

The Appellate Division found that the uncle testified that he received a single telephone call from DSS personnel approximately four months after the children were placed in DSS custody asking whether he would be a custodial resource if the mother's parental rights were terminated, and that he responded affirmatively. He stated that DSS did not contact him again until after he filed the instant custody petition—more than one year after the children were first removed from the mother's home—when it sent him the New York State Handbook for Relatives Raising Children. In its appellate brief, DSS admitted that it did not timely provide the uncle with the required information but criticized him for not sooner seeking custody. Notably, the statute did not impose a duty on the uncle to have affirmatively sought placement based solely upon DSS's inquiry regarding his willingness to be a custodial resource if the mother's parental rights were terminated and before he was advised of the procedures by which he could do so. Rather, the statute imposed a duty on DSS to "immediately" conduct an investigation to locate relatives and provide the required information, in writing (Family Ct. Act § 1017[1][a]).

The Appellate Division found that the failure of Family Court and DSS to strictly follow the statutory mandate to seek initial placement with a relative in this case created the very harm the statute was intended to prevent—long-term placement in foster care rather than with a suitable relative. Not only did DSS fail to identify the uncle as a custodial resource and to provide him with the mandated information, it ignored his initial expression of willingness to serve as a custodial resource for the child. Moreover, when the uncle filed his custody petition, he was treated as an unwelcome interloper by both DSS and Family Court, which erroneously denied his motion to intervene in the Family Ct Act article 10 proceeding and contemplated staying an investigation regarding the uncle's suitability as a custodial resource that was being conducted in Texas pursuant to the Interstate Compact on the Placement of Children (see Social Services Law § 374-a [hereinafter ICPC]). Family Court's conclusion that "[h]ad the [u]ncle requested that [the child] be placed with him in September, 2014, when she was initially placed in foster care, DSS may very well have placed [the child] with the [u]ncle" ignored the fact that DSS failed to fulfill its statutory duty to inform the uncle of the methods by which he could seek placement of the child. These failures were especially egregious given that Family Court and DSS now agreed that the uncle and his wife were able to provide a good home for the child. The procedures mandated by Family Ct. Act § 1017 are to be strictly followed.

July 1, 2018

Appellate Division, First Department

First Department Holds Brooke's Reasoning Applies with Equal Force Where Child Is Legally Adopted by One Partner and Other Partner Claims He or She Is A "Parent" With Co-Equal Rights Because Of Preadoption Agreement. Observes Equitable Estoppel Requires Close Scrutiny of Child.

In re K.G., v. C.H., --- N.Y.S.3d ----, 2018 WL 3118937 (1st Dept., 2018) petitioner (KG) claimed that she was a parent with standing to seek custody of and visitation with A., the adopted child of respondent (CH), her now ex-partner. KG was not biologically related to A., who was born in Ethiopia, nor did she second adopt the child. KG's claim of parental standing was predicated upon the Court of Appeals decision in *Matter of Brooke S.B. v. Elizabeth A.C.C.* (28 NY3d 1 [2016]), which expansively defined who is a "parent" under Domestic Relations Law § 70. On appeal, KG primarily claimed that in 2007, before A. was identified and offered to CH for adoption, the parties had an agreement to adopt and raise a child together. CH did not deny that the parties had an agreement in 2007 but claimed that the 2007 agreement terminated when the parties' romantic relationship ended in 2009, before A. was first identified and offered for adoption to CH in March 2011. After a 36-day trial, Supreme Court held that notwithstanding the parties' agreement to adopt and raise a child together, KG did not remain committed to their agreement, which terminated before the adoption agency matched A. with CH. The court denied KG standing to proceed and dismissed the petition for custody and visitation.

The Appellate Division observed that in *Brooke*, the Court of Appeals overruled *Matter of Alison D. v. Virginia M.* (77 N.Y.2d 651 [1991]) and abrogated *Debra H. v. Janice R.* (14 NY3d 576 [2010], cert denied 562 U.S. 1136 [2011]), its earlier precedents, thereby greatly expanding the definition of who can obtain status as a parent and have standing to seek custody and visitation of a child. The *Brooke* Court placed the burden of proving standing, by clear and convincing evidence, on the party seeking it. The Court recognized that there could be a variety of avenues for a movant to prove standing. It expressly rejected the premise that there is only one test that is appropriate to determine whether a former same-sex nonbiological, nonadoptive party has parental standing. In *Brooke* and its companion case of *Matter of Estrellita A. v. Jennifer L.D.*, the Court of Appeals recognized each petitioner's status as a parent but did so applying two completely different tests. The Court of Appeals also left open the possibility that a third "test," involving the application of equitable principles, such as the doctrine of equitable estoppel, could be utilized to confer standing in certain circumstances. In *Brooke*, the Court of Appeals recognized that where a former same-sex partner shows by clear and convincing evidence that the parties had jointly agreed to conceive a child that one of them would bear, and also agreed to raise that child together once born, the nonbiological, nonadoptive partner has standing, as a parent, to seek custody and visitation with the child, even if the parties' relationship has ended. The Court referred to these circumstances as the parties having a preconception agreement and applied the "conception test"). In *Estrellita*, the Court resolved the question of standing differently, applying the doctrine of judicial estoppel. In *Estrellita*, the child's biological parent (Jennifer L.D.) had previously petitioned Family Court for an order requiring *Estrellita A.*, the nonbiological, nonadoptive partner to pay child support. Jennifer L.D.'s support petition was granted and she was successful in obtaining child support from *Estrellita A.* Subsequently, *Estrellita A.* sought custody and visitation with the child, but Jennifer L.D. denied that *Estrellita A.* had standing as a parent. The Court of Appeals determined that Jennifer L.D. had asserted an inconsistent position in the support action, because Jennifer L.D. had successfully obtained a judgment of support in her favor and therefore, was judicially estopped denying *Estrellita A.*'s status as a parent given Family Court's prior determination that *Estrellita A.* was in fact, a legal parent to the child (*id.* at 29).

In deciding *Brooke*, the Court rejected the argument that it should adopt only one, uniform test to determine standing as a parent. The Court observed that a different test

might be applicable in circumstances where, for instance, a partner did not have any preconception agreement with the legal parent. In *Brooke* it concluded that where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child.

The First Department held that although *Brooke* was decided in the context of children who were planned and conceived through means of artificial insemination, the Court's reasoning applies with equal force where, as here, a child is legally adopted by one partner and the other partner claims he or she is a "parent" with co-equal rights because of a preadoption agreement.

The Appellate Division found ample support in the record for the trial court's factual conclusion that the parties' 2007 agreement to adopt and raise a child together had terminated before A. was identified by the agency and offered to CH for adoption. Nor was the trial court's consideration of whether the plan was in effect at the time the particular child in this proceeding was identified for adoption an impermissible reformulation or restriction on the plan test originally enunciated in *Brooke*.

Although the original petition did not expressly state that KG was claiming standing under Domestic Relations Law § 70 under an alternative theory of equitable estoppel, the issue was raised early on in the proceeding by the trial court itself.

The Court found that the record was incomplete precluding it from reaching the merits of the parties' respective substantive claims on the issue of equitable estoppel on the appeal. It observed that equitable estoppel requires careful scrutiny of the child's relationship with the relevant adult and is ultimately based upon the best interest of the child. In the context of standing under Domestic Relations Law § 70, equitable estoppel concerns whether a child has a bonded and de facto parental relationship with a nonbiological, nonadoptive adult. The focus is and must be on the child (Brooke, 28 NY3d at 27). It is for this reason that the child's point of view is crucial whenever equitable estoppel is raised. Although the appointment of an attorney for the child is discretionary, it is commonplace and should be the norm where the issue raised is equitable estoppel. This is because equitable estoppel necessarily involves an analysis and determination of what is in the best interests of the child. Even if a court denies the appointment of an attorney for the child, there are alternative means to obtaining this information, including a forensic evaluation or a Lincoln hearing. Here, the child's voice was totally silent in this record.

In view of its conclusion that the record was incomplete, the Court did not reach CH's argument that because CH did not consent to holding KG out as a parent, KG cannot prove equitable estoppel. It only held that that the record developed at trial did not permit it to make the full consideration necessary to finally determine the issue of equitable estoppel at this point. Because the record on equitable estoppel was incomplete, it remanded the matter for further proceedings consistent with the decision.

Appellate Divison, Second Department

Income tax liability of the parties is subject to equitable distribution

In *Greenberg v Greenberg*, --- N.Y.S.3d ----, 2018 WL 3041099, 2018 N.Y. Slip Op. 04539 (2d Dept., 2018) the parties were married in 1995 and had four children. During the marriage, the defendant owned an Internet-based business, which he sold in approximately January 2009. In June 2009, the Federal Trade Commission commenced a civil action against, among others, the defendant, in connection with the operation of his Internet company. In August 2009, the plaintiff commenced the action for a divorce. In January 2014, the defendant was convicted in federal court of, among other things, wire fraud, aggravated identity theft, and money laundering. In the ongoing divorce action, Supreme Court conducted a hearing in June and July 2014 with respect to the parties' finances and equitable distribution. The defendant was sentenced in federal court on October 31, 2014, to seven years' imprisonment and ordered to pay restitution in the sum of \$1,125,022.58.

After trial Supreme Court, inter alia, found that in all respects the defendant was not credible. It imputed an income of \$100,000 per year to the defendant for the purposes of calculating child support obligations. As to equitable distribution, the court found that the only assets available for equitable distribution were two adjacent properties in Lawrence. The properties had been the marital residence and had no present value but might generate income. The court awarded the plaintiff the two properties upon

considering a number of factors, including that the real estate was acquired during the marriage; the defendant's income increased substantially during the marriage, while the plaintiff delayed her own career advancement and remained at home caring for the parties' four children; the businesses, which were marital property and would have been subject to equitable distribution, could not be evaluated because the defendant failed to keep appropriate records; the defendant caused the businesses acquired and created during the marriage to be completely destroyed through his criminal activity; and it was likely that the defendant had transferred business assets without fair consideration. In light of the equitable distribution award and the circumstances of the case, the court declined to award the plaintiff maintenance. It also determined that the defendant would be responsible for any marital debt, including an FTC judgment against him for more than \$2,000,000. Finally, the court awarded \$50,000 to the plaintiff's attorney for outstanding counsel fees and \$25,000 to the plaintiff for counsel fees previously paid by her, because the defendant had engaged in dilatory tactics and failed to comply with prior orders, causing the plaintiff to incur additional legal expenses. In an amended judgment of divorce entered February 6, 2015, the Supreme Court, among other things, directed the defendant to pay a pro rata share of child support and certain expenses of the children based on the imputed income, awarded the plaintiff the two properties, directed that the defendant would be responsible for any taxes, interest, penalties, and deficiencies that result as a direct consequence of his actions, and directed the defendant to pay the total sum of \$75,000 in counsel fees to the plaintiff and her attorney. The defendant appeals.

The Appellate Division affirmed. It held that under the circumstances of the case, the Supreme Court did not improvidently exercise its discretion with regard to the awards. The Court observed that the income tax liability of the parties is subject to equitable distribution. Where a party "shared equally in the benefits derived from the failure to pay, she [or he] must share equally in the financial liability arising out of tax liability" (Conway v. Conway, 29 A.D.3d at 725-726, 815 N.Y.S.2d 233; see Lago v. Adrion, 93 A.D.3d at 700, 940 N.Y.S.2d 287). "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". Here, the Supreme Court deemed the defendant responsible for, inter alia, all of the parties' tax liabilities incurred during the marriage, including the plaintiff's own failure to file tax returns for her personal income or to pay taxes on her income, of which failings she had reason to be aware by virtue of notices she received from the Internal Revenue Service. Under these circumstances, it was not equitable to hold the defendant, rather than the plaintiff, liable for any taxes, interest, penalties, and deficiencies that resulted from the plaintiff's failure to file income tax returns and to pay taxes on income that she individually earned during the marriage.

Family Court

Family Court Suggests That Legislature Consider Revising Family Court Act §812 (3) To Balance the Root of Its Intent with What Has Become Its Perverted Application

In Matter of Maliha A., v. Onu M., 2018 WL 3074532 (Fam Ct., 2018) Ms. A. testified that she and Mr. M. had been dating on and off for approximately 5 years. She told the Court that in Fall of 2017, they had a difficult separation and there remained unresolved issues between them. She stated that when the parties ended their relationship, they agreed that they would no longer communicate with each other. Thereafter, Ms. A. posted a series of tweets on her Twitter account indicating that the two were never compatible and her life had improved since their breakup. Ms. A. testified that she never mentioned Mr. M.'s name in the Tweets but acknowledged that it would have been obvious to anyone that knew them that she had been referring to Mr. M. Ms. A. told the Court that after the texts were posted, Mr. M. texted her three times asking her to stop speaking about him on social media. She stated that she was puzzled as to why he would contact her if they had agreed not to communicate, and she deleted his texts immediately. Ms. A. testified that Mr. M.'s fiancé then contacted her to tell her that she was trying to calm Mr. M. because he was upset about the Tweets. Ms. A. stated that Mr. M.'s fiancé told her that she had been speaking with Mr. M. in an effort to keep the peace between him and Ms. A. Ms. A. told the Court that during that time period, her uncle sent her a screenshot of a text that Mr. M. had sent to him in which Mr. M. said, "it's a wrap." Ms. A. testified that she received that message poorly, believing that it was a threat, even though the text was not sent directly to her. Ms. A. testified that she wanted an order of protection against Mr. M. because "there is no telling what he might say or do." At the close of Ms. A.'s case, the Court dismissed her petition since Ms. A. did not meet her burden of proving conduct that rose to the level of a family offense.

Family Court observed that it did not appear that a non-violent, bad break-up was ever intended by the framers of the Family Court Act to be the basis for invoking the family court's authority to issue orders of protection where none are necessary. The Court noted that Family Court Act § 812(3) provides that no court official or law enforcement official "shall discourage or prevent any person who wishes to file a petition or sign a complaint from having access to any court for that purpose." The application of this statute nowadays allows individuals claiming to have some kind of "intimate" relationship to freely file, without vetting, family offense petitions on any set of alleged facts they wish, regardless of whether those facts, if actually proven, would ultimately make out a family offense. The unintended consequence is that family offense petitions can be filed on factual allegations by ex-girlfriends and ex-boyfriends that amount to nothing more than name-calling that results in hurt feelings, and disrespectful behavior manifested by ill-advised posts on social media or extreme text messages. It is time for the statute to be revisited in light of modern technology and the expansion of family court jurisdiction to "intimate relationships." All too often in these types of cases, the family court does not act as a legal authority but as an informal mediator, an unofficial "minister of bitter breakups," whose judicial function is to preside over the dissolution of a dating relationship that ends poorly, perhaps artlessly, but not criminally. Sometimes the apparent goal of the petitioner is not protection from, but rather a continued connection with, the respondent through repeated court proceedings that continue a temporary order of protection in their favor, thereby imposing a power dynamic placing the petitioner in control. At other times, the court is asked to mend the relationship so that the parties can start anew, or failing that, to bring some type of closure to a broken relationship. None of these functions are judicial in nature. The overburdened family court could certainly benefit from the Legislature's closer look at revising the statute to balance the root of its intent with what has become its perverted application.

June 16, 2018

Appellate Division, First Department

First Department Holds law firm not entitled to a money judgment against defendant, its former client, on a motion to fix charging lien pursuant to Judiciary Law § 475

In *Bernard v De Rham*, --- N.Y.S.3d ----, 2018 WL 2435717, 2018 N.Y. Slip Op. 03891 (1st Dept., 2018) the Appellate Division held that the law firm was not entitled to a money judgment against defendant, its former client, on a motion pursuant to Judiciary Law § 475. Such a motion seeks a lien upon the client's cause of action, which does not provide for an immediately enforceable judgment against all his assets, but is a security interest against a single asset, i.e., a judgment or settlement in his favor. To obtain a money judgment, the law firm must commence a plenary action.

The Appellate Division further held that Judiciary Law § 475 does not preclude the attachment and enforcement of a charging lien on an award in his favor, which may include an award of legal fees from his ex-wife (citing *Cohen v. Cohen*, 160 A.D.2d 571, 572, 554 N.Y.S.2d 525 [1st Dept. 1990] [holding that “[a]lthough a charging lien does not attach to an award of alimony and maintenance, section 475 does not preclude the enforcement of such lien upon any other award made in the action”; *Rosen v. Rosen*, 97 A.D.2d 837, 468 N.Y.S.2d 723 [2nd Dept. 1983] [holding that “(w)hile a charging lien does not attach to an award of alimony and maintenance, section 475 of the Judiciary Law does not preclude the enforcement of such a lien upon another award made in the action, such as an award of counsel fees to either the client or subsequent counsel”])

Appellate Division, Second Department

Equitable Distribution of a Portion of a Contingency Fee That the Plaintiff Was Paid After Commencement of The Action for Work Performed Before Its Commencement

In *Weidman v Weidman*, --- N.Y.S.3d ----, 2018 WL 2709520, 2018 N.Y. Slip Op. 04027 (2d Dept., 2018) the plaintiff and the defendant were married in 2000, and had one minor child. The plaintiff, who was admitted to the New York State Bar in 1986, was a solo practitioner with a general law practice. After the birth of the parties' child, the defendant did not return to her full-time teaching position but worked on a part-time basis earning approximately \$30,000 annually. In September 2011, the plaintiff commenced this action for a divorce and ancillary relief. The Appellate Division, among other things, saw no reason to disturb the Supreme Court's equitable distribution of a portion of a contingency fee that the plaintiff was paid after commencement of the action (see *Block v. Block*, 258 A.D.2d 324, 325, 685 N.Y.S.2d 443; *Blechman v. Blechman*, 234 A.D.2d 693, 695–696, 650 N.Y.S.2d 456). The plaintiff had agreed to accept a lump sum payment of \$34,971, as well as a \$240,000 structured settlement, as his attorney's fee in a case on which he worked from January 2004, through the beginning of January 2013. The court found that only the \$240,000 structured settlement earned prior to commencement was

marital property, to reflect that the defendant was not entitled to compensation for the work the plaintiff performed after the commencement of this action. The court properly determined that the defendant's equitable share of the structured settlement payments was 50%, and that her distributive award should be reduced by 15% to account for the plaintiff's income tax liability. Moreover, the plaintiff's contention that the court engaged in "double counting" by distributing a portion of the contingency fee to the defendant in addition to maintenance was without merit, as the plaintiff's income for purposes of determining maintenance was based on imputation of his income admitted for purposes of child support. The contingency fee in the form of a structured settlement was treated as a one-time bonus outside the \$100,000 of imputed income.

Second Department Joins Third and Fourth Departments in Holding that Court may award visitation-physical access "as agreed by the parties"

In *Matter of Samuel v Sowers*, --- N.Y.S.3d ----, 2018 WL 2709799, 2018 N.Y. Slip Op. 03984 (2d Dept., 2018) after a hearing, the Family Court granted the father's custody petition and awarded the mother physical access "as agreed amongst the parties." The Appellate Division affirmed observing that notwithstanding the litigation between these parties, the father expressed, both through his words and his actions, a strong commitment to ensuring physical access between the mother and the children. Under these circumstances, awarding the mother physical access "as agreed amongst the parties" was not an improvident exercise of discretion. It observed that should the mother be unable to obtain physical access by agreement, she may file a petition seeking to enforce or modify the order.

Editors note: To the same effect see *Alleyne v Cochrane*, 119 A.D.3d 1100, 990 N.Y.S.2d 289, 2014 N.Y. Slip Op. 05221 (3d Dept., 2014); *Thomas v Small*, 142 A.D.3d 1345, 38 N.Y.S.3d 461 (Mem), 2016 N.Y. Slip Op. 06340 (4th Dept., 2016); *Pierce v Pierce*, 151 A.D.3d 1610, 56 N.Y.S.3d 703, 2017 N.Y. Slip Op. 04594 (4th Dept., 2017).

Doctrine of Judicial Estoppel, Also Known as Estoppel Against Inconsistent Positions, Bars Constructive Trust Action

In *Bihn v Connelly*, --- N.Y.S.3d ----, 2018 WL 2709955, 2018 N.Y. Slip Op. 03956 (2d Dept., 2018) the plaintiff commenced an action against the defendant Susan Connelly and her husband, inter alia, to impose a constructive trust on certain Chaucer Street property. The defendants moved for summary judgment dismissing the complaint, and to impose sanctions pursuant to 22 NYCRR 130-a.1(a). They contended that in 2011, the plaintiff represented in a bankruptcy petition that he had no interests in real property. Therefore, he was judicially estopped from contending that he had an interest in the Chaucer Street property. The Supreme Court granted the defendants' motion. The Appellate Division affirmed. It agreed with the Supreme Court's determination that the action was barred by the doctrine of judicial estoppel. Under the doctrine of judicial estoppel, also known as estoppel against inconsistent positions, a party may not take a position in a legal proceeding that is contrary to a position he or she took in a prior proceeding, simply because his or her interests have changed. The doctrine applies only

where the party secured a judgment in his or her favor in the prior proceeding. This doctrine “rests upon the principle that a litigant ‘should not be permitted ... to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise’”. “The doctrine is invoked to estop parties from adopting such contrary positions because the judicial system cannot tolerate this playing fast and loose with the courts” (Ford Motor Credit Co. v. Colonial Funding Corp., 215 A.D.2d at 436, 626 N.Y.S.2d 527). Tthe plaintiff’s contention that he had an interest in the Chaucer Street property based on promises that Susan made to the plaintiff in 2007 and 2009 was contrary to his representation to the United States Bankruptcy Court in 2011 that he had no interest in real property. Based upon the plaintiff’s representations to the Bankruptcy Court, his debts were discharged. Therefore, the action was barred by the doctrine of judicial estoppel.

Moreover, the Supreme Court did not improvidently exercise its discretion in awarding sanctions in the form of attorney’s fees and costs to the defendants upon a finding that the action was completely without merit in law and could not be supported by a reasonable argument for an extension, modification, or reversal of existing law.

Appellate Division, Third Department

Third Department Holds That Stepgrandparent Is Not Related to A Stepgrandchild By Marriage for Purposes of Family Ct. Act § 1056(4).

In Matter of Makayla I, --- N.Y.S.3d ----, 2018 WL 2726019, 2018 N.Y. Slip Op. 04047 (3d Dept.,2018) the order adjudicating the subject children to be abused and/or neglected was affirmed. Respondent Caleb K. was the father of Annabella J. (born 2009) and Caleb J. (born 2012), and the stepfather of Makayla I. (born 2004). Respondent Harold J. was Caleb K.’s father, and was the biological grandfather of Annabella J. and Caleb J. and the stepgrandfather of Makayla I. In December 2013, petitioner commenced a Family Ct Act article 10 proceeding against Caleb K., alleging that he allowed Harold J. to sexually abuse Makayla and derivatively abused the other two children. Petitioner thereafter commenced a Family Ct Act article 10 proceeding against Harold J., alleging that he sexually abused Makayla and derivatively abused the other two children. After a fact-finding hearing, Family Court held that Makayla was abused by Harold J. and Caleb K., Annabella was abused by Caleb K. and derivatively abused by Harold J., and Caleb J. was derivatively abused by both respondents. Following a dispositional hearing, the court issued three orders of protection barring Harold J. from having any contact with the children until their eighteenth birthdays. Harold J. appeals the fact-finding order and the orders of protection. Caleb K. appeals the fact-finding order only. The Appellate Division observed that Harold J. was not Makayla’s biological grandfather, but rather was related to her through his son’s marriage to Makayla’s mother. This raised the issue of whether a stepgrandparent is related to a stepgrandchild by marriage for the purposes of Family Ct. Act § 1056(4). The Appellate Division concluded that they are not. This conclusion was supported by the specific language in the statute, “related by ... marriage” (Family Ct. Act § 1056[4]), rather than the broader and more inclusive concept of “affinity,” which is used elsewhere in the Family Ct Act (cf. Family Ct. Act § 812[1][a]). Further, a stepgrandparent has no enforceable legal right to have contact with a

stepgrandchild as a stepgrandparent lacks standing to pursue visitation. Thus, although Family Ct. Act § 1056(4) limits the duration of orders of protection against a stepparent who is related to a child by and through his or her own marriage to the child's mother or father, these limitations do not apply to a stepgrandparent, whose relationship to the child is attenuated. Therefore, because Harold J.'s relationship to Makayla was not established by his own marriage, but rather through his son's marriage, it was statutorily permissible, in this regard, for Family Court to issue an order of protection until Makayla's eighteenth birthday. Family Ct. Act § 1056(4) prohibits orders of protection until a child's eighteenth birthday if the order is against someone who is related by blood or marriage to a member of the child's household. Therefore, if, at the time of disposition, Makayla resided in the same household as Annabella and Caleb J., the order of protection as to Makayla could not exceed one year (see Family Ct. Act § 1056[4]). The matter must be remitted for the purpose of making this determination. The order adjudicating the subject children to be abused and/or neglected was affirmed.

Appellate Division, Fourth Department

Law of The Case Doctrine Forecloses Re-Examination of Holding That Petitioner Had Standing to Seek Custody or Visitation Absent A Showing of New Evidence or A Change in The Law.

In *Matter of Renee P.-F v Frank G.*, --- N.Y.S.3d ----, 2018 WL 2425251, 2018 N.Y. Slip Op. 03839 (2d Dept., 2018) Joseph P. and Frank G. were domestic partners., They asked Joseph's sister, Renee P.-F., to act as a surrogate. Renee executed a surrogacy contract in which she agreed to be impregnated with Frank's sperm and to terminate her parental rights in order for Joseph to adopt the child or children. In February 2010, Renee gave birth to fraternal twins. During the first four years of the children's lives, Joseph and Frank equally shared the rights and responsibilities of parenthood, although Joseph did not legally adopt the children. The children regarded both Joseph and Frank as their parents. During that period, Renee frequently saw the children. In early 2014, Joseph and Frank separated, and the children continued to reside with Frank. Joseph, acting in a parental role, visited and cared for the children on a daily basis. In May 2014, Frank suddenly refused to allow Joseph or Renee to have any access to the children. In December 2014, Frank moved to Florida with the children without informing Joseph or Renee or commencing a proceeding for custody of the children. Renee petitioned for custody of the children, and Joseph petitioned to be appointed guardian of the children. In March 2015, Frank petitioned for custody of the children and for permission to relocate with the children to Florida. In an order dated April 8, 2015, the Family Court denied that branch of Frank's motion which was for permission to relocate with the children to Florida. In June 2015, Joseph withdrew his guardianship petition and filed a petition for custody of the children. Frank then moved, in effect, to dismiss Joseph's custody petition on the ground, inter alia, that Joseph lacked standing under Domestic Relations Law § 70. In an order dated August 21, 2015, the court, after a hearing, denied Frank's motion to dismiss and determined that Joseph had standing to seek custody of or physical access with the children. Frank appealed from the orders dated April 8, 2015, and August 21, 2015. While Frank's appeals were pending, the Court of Appeals, in *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 39 N.Y.S.3d 89, 61 N.E.3d 488,

overruled *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27. Based upon the evidence adduced at the hearing before the Family Court and in light of *Matter of Brooke S.B.*, the Appellate Division determined that Joseph established standing to seek custody or physical access and remitted the matter to the Family Court, Orange County, for a full hearing on the custody petitions (see *Matter of Giavonna F.P.–G. [Frank G.–Renee P.–F.]*, 142 A.D.3d 931, 36 N.Y.S.3d 892; *Matter of Frank G. v. Renee P.–F.*, 142 A.D.3d 928, 37 N.Y.S.3d 155). On remittitur, the Family Court, after a hearing, issued an order dated February 14, 2017, granting Joseph custody of the children and denying Frank’s petition. The Appellate Division held that Family Court properly determined that Joseph had standing to seek custody of the children pursuant to *Matter of Brooke S.B.*, 28 N.Y.3d 1, 39 N.Y.S.3d 89, 61 N.E.3d 488. On Frank’s prior appeal from the order dated August 21, 2015, the Appellate Division determined that Joseph established standing to seek custody or physical access pursuant to the standard set forth in *Matter of Brooke S.B.* and remitted the matter to the Family Court, Orange County, for a full hearing on Joseph’s petition for custody or visitation with the children (see *Matter of Frank G. v. Renee P.–F.*, 142 A.D.3d at 930–931, 37 N.Y.S.3d 890). “The law of the case doctrine foreclosed re-examination of issues decided on a prior appeal in the same action, absent a showing of new evidence or a change in the law”. Here, Frank had a full and fair opportunity before the Family Court and on the prior appeal to contest the issue of Joseph’s standing. Frank had neither presented new evidence that would change the determination in the prior appeal nor demonstrated that there had been a subsequent change in the law. Under these circumstances, Frank was barred from raising the same argument again on these appeals

June 1,2016

Appellate Division, First Department

Purpose of Counsel Fees Is to Prevent More Affluent Spouse from Considerably Wearing Down the Opposition. Court Should Not Unduly Rely Upon Financial Circumstances at Time of Decision Rather Than Weighing Historical and Future Earning Capacities of Both Parties

In *Matter of Brookelyn M., v Christopher M.*, --- N.Y.S.3d ----, 2018 WL 2406234, 2018 N.Y. Slip Op. 03801(1st Dept.,2018) the Appellant mother and respondent father had a child together. The father filed a custody petition in 2014. The mother cross-moved for custody and sought interim counsel fees. The father cross-moved for counsel fees and filed an affirmation in opposition to the mother’s application for interim counsel fees. The parties arrived at a settlement that resolved the issues in the custody matter, but left counsel fees to the court’s determination. The mother sought counsel fees of \$174,000, which the mother claims are attributable to the custody matter. The court denied the mother’s request for counsel fees because, among other reasons, she retained private counsel although she was unemployed at the onset of the litigation. At the time the decision was rendered, she earned an annual gross income of \$44,000, and the father was unemployed. The court also held that the conduct of the parties throughout the

custody matter did not support an award of counsel fees because it found no evidence that the father unnecessarily prolonged the litigation or that he caused undue fees to accrue in the litigation. The Appellate Division remanded the matter for a fee hearing. It observed that the purpose of awarding counsel fees is to further the objectives of “litigational parity” and prevent a more affluent spouse from considerably wearing down the opposition. In its dismissal of the mother’s motion for counsel fees, the court unduly relied upon the financial circumstances of the parties at the time it rendered its decision rather than weighing the historical and future earning capacities of both parties. Although the father was unemployed at the time the court’s decision was rendered, and the mother had secured employment, the father earned considerably more than the mother during the course of their relationship and had significantly more expected earning capacity than the mother. The financial and tax documents in the record supported such a conclusion. However, the father was entitled to a hearing so that the relative financial positions of the parties and the value and extent of the counsel fees requested could be examined. While an evidentiary hearing is not required prior to making an interim award, it was required here since the mother was seeking fees following the final resolution of the case. The fees here were significant and the father has raised questions about the bills. Moreover, in assessing the father’s contentions that the mother overlitigated this matter, the court would need to consider what the father spent on legal fees. That information could not be ascertained on the record.

Appellate Division, Second Department

Consideration of Relevant Factors, Including Fact That Wife Was Suffering from Psychiatric Condition and was Unable, For Foreseeable Future, To Be Self-Supporting, Warranted Non-Durational Maintenance Award

In *Greco v Greco*, --- N.Y.S.3d ----, 2018 WL 2225174, 2018 N.Y. Slip Op. 03510 (2d Dept., 2018) the parties were married in 1999 and had two children together. In May 2010, the plaintiff commenced the action for a divorce. Following a custody trial, the Supreme Court awarded the plaintiff full custody of the children based upon the defendant’s psychiatric condition. Thereafter, a trial was held on the financial issues. The court, *inter alia*, awarded the defendant monthly maintenance in the sum of \$4,500 for a period of three years and the sum of \$114,555.50, representing her equitable share of the appreciated value of the marital residence. The Appellate Division held that, the amount of maintenance awarded by the Supreme Court was consistent with the purpose and function of a maintenance award considering, among other things, the equitable distribution award and the absence of child-rearing responsibilities because the plaintiff was awarded full custody of the children. However, taking into consideration all the relevant factors, including the fact that the defendant was suffering from a psychiatric condition and was unable, for the foreseeable future, to be self-supporting, it was an improvident exercise of the court’s discretion to limit the maintenance award to a period of three years. It modified the duration of the defendant’s maintenance should be until her remarriage or cohabitation, or the death of either party, or until the defendant begins to draw Social Security benefits or reaches the age of 67 or such age that she would qualify for full Social Security benefits, whichever occurs first, at which time the maintenance award would be reduced to \$2,000 per month.

The Appellate Division held that similarly, the Supreme Court improvidently exercised its discretion in failing to direct the plaintiff to pay the defendant's health insurance premiums. The court should have directed the plaintiff to pay for the defendant's health insurance premiums until the earliest of such time as the defendant is eligible for Medicaid or Medicare, or she obtains health insurance through employment, or remarries or cohabitates.

Attorneys Failure to Send Client A Bill At Least Every 60 Days Warranted Denial of Post Trial Counsel Fee Application. Expert Fees May Not Be Awarded Where No Affidavit Submitted from Expert.

In *Greco v Greco*, --- N.Y.S.3d ----, 2018 WL 2225194, 2018 N.Y. Slip Op. 03509 (2d Dept., 2018) following the conclusion of the trial on financial issues, the defendant moved for awards of counsel fees and expert witness fees. The court awarded counsel fees of \$70,000 payable to Lawrence J. Glynn and \$37,500 payable to John A. Gemelli, and expert witness fees of \$12,700 payable to the defendant

The Appellate Division modified. It observed that court rules impose certain requirements upon attorneys who represent clients in domestic relations matters, and the failure to substantially comply with the rules will preclude an attorney's recovery of a fee from his or her client or from the adversary spouse. A showing of substantial compliance must be made on a prima facie basis as part of the moving party's papers. Here, the evidence proffered by the defendant in support of an award for work performed by Glynn demonstrated that Glynn failed to substantially comply with the rules requiring periodic billing statements at least every 60 days (see 22 NYCRR 1400.2, 1400.3[9]; *Montoya v. Montoya*, 143 A.D.3d at 866, 40 N.Y.S.3d 151; *Rosado v. Rosado*, 100 A.D.3d at 856, 955 N.Y.S.2d 119; *Gahagan v. Gahagan*, 51 A.D.3d 863, 859 N.Y.S.2d 218). Accordingly, Supreme Court erred in granting Glynn's counsel's fees.

The Appellate Division reversed the award of expert fees. It noted that absent affidavits from the expert witnesses at issue, the Supreme Court lacks a sufficient basis to grant a motion for the award of such fees. As the defendant failed to submit such expert affidavits Supreme Court improvidently exercised its discretion in awarding the defendant expert witness fees.

Family Court

Court Found May Not Validate Illegal Surrogacy Contract by Approving Adoption. Family Court Holds That There Is No Authority for A Parent to Adopt Their Biological Child

In *Matter of Adoption of A*, 72 N.Y.S.3d 811, 2018 N.Y. Slip Op. 28088 (Fam Ct, 2018) J.G. ("Mr. G") filed a petition seeking to adopt his biological son, J., born on October 9, 2017. According to the petition, J. was conceived through a surrogacy

arrangement in New York in which it was agreed that Mr. G would be J.'s only parent. The petition stated after transferring frozen embryos of an unknown egg donor into the surrogate's womb, Mr. G's sperm was used to artificially inseminate those embryos. Family Court denied the petition. It noted that, surrogacy was outlawed in New York. See DRL § 121 et seq., it is well-settled that a party to a surrogacy contract may not seek a court's assistance to enforce the agreement, nor will such contract be deemed viable for any other claims arising under its arrangement. See *Itskov*, 11 Misc. 3d at 69–70, 813 N.Y.S.2d 844. The court found that it may not validate a patently illegal surrogacy contract by approving Mr. G's adoption of J. Surrogacy agreement aside, the Court found that there is no authority for a parent to adopt their biological child. See DRL § 110; see also *Matter of Zoe D.K.*, 26 A.D.3d 22, 25, 804 N.Y.S.2d 197 (4th Dep't 2005). DRL § 110 sets forth categories of persons who may adopt, and a natural parent does not fall within them. Mr. G's adoption of J. was unwarranted, and the Court declined to approve the adoption.

May 16, 2018

Appellate Division, First Department

An Award of Counsel Fees Under DRL §§237 and 238 Cannot Be Made Merely to Punish A Party For Its Litigation Conduct

In *Roddy v Roddy*, --- N.Y.S.3d ----, 2018 WL 2049379, 2018 N.Y. Slip Op. 03225 (1st Dept., 2018) the Appellate Division reversed an order of the [Supreme Court which rejected the recommendation of the special referee that plaintiff not be required to reimburse defendant for counsel fees, and directed that plaintiff pay a portion of defendant's counsel fees. It pointed out that the Domestic Relations Law permits the court to direct a party to pay counsel fees "to enable the other party 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" . (DRL§ 237(a)) These provisions are intended "to ensure a just resolution of the issues by creating a more level playing field with respect to the parties' respective abilities to pay counsel and permit consideration of many factors, but focus primarily upon the paramount factor of financial need" (*Silverman v. Silverman*, 304 A.D.2d 41, 48, 756 N.Y.S.2d 14 [1st Dept. 2003]; *Wells v. Serman*, 92 A.D.3d 555, 555, 938 N.Y.S.2d 439 [1st Dept. 2012] [an award of counsel fees under these provisions "cannot be made merely to punish a party" for its litigation conduct]). Where a party's inappropriate litigation conduct has adversely affected the other party but both are able to pay their own counsel fees, the appropriate remedy may be a sanction (22 NYCRR 130–1.1), not an award of attorneys' fees. The court awarded legal fees to defendant based upon its consideration of the merits of plaintiff's positions in the parties' custody litigation. The court also adopted the special referee's findings that neither party was the "monied spouse," that each was capable of paying his or her own counsel fees, and that both parties are genuinely concerned for and "deeply care about their children." Under these circumstances, the award of counsel fees under the Domestic Relations Law was improper (*Wells v. Serman*, 92 A.D.3d 555, 938 N.Y.S.2d 439).

Appellate Division, Fourth Department

When Supreme Court exercises jurisdiction over a matter which Family Court might have exercised jurisdiction, it is required to advise an unrepresented party of right to have counsel assigned by the court where he or she is financially unable to obtain the same.

In *DiBella v DiBella*, --- N.Y.S.3d ----, 2018 WL 2048993, 2018 N.Y. Slip Op. 03186 (3d Dept., 2018) the mother appealed from the divorce judgment contending that she was deprived of her statutory right to counsel when Supreme Court compelled her to proceed with the continuation of trial without the aid of counsel. The mother was represented by counsel at the first four days of trial in May, June and July 2014. In October 2014, however, the mother appeared before Supreme Court and indicated that she was discharging her attorney and intended to hire replacement counsel to represent her for the remainder of the trial. The mother represented to Supreme Court that she would need at least two or three months to make arrangements for hiring a new attorney because the normal retainer for an attorney was \$3,000. Supreme Court thereafter cautioned the mother to procure new counsel “sooner rather than later.” Supreme Court adjourned the case and scheduled two additional trial dates on May 27, 2015 and June 3, 2015. On May 27, 2015, the mother appeared in court, explaining that, although she had retained new counsel, he was unable to attend that day and, therefore, she requested the court to “extend” or “hold off” proceeding with the continuation of the trial until June 3, 2015. Supreme Court denied the mother’s request for an adjournment, indicating that no notice of appearance had been filed by the mother’s replacement counsel and that it could not rely solely upon her statement that she may be represented by counsel going forward. Supreme Court then proceeded with the trial, informing the mother that, under the circumstances, she was going to have to proceed pro se.

The Appellate Division observed that pursuant to Judiciary Law § 35(8), when Supreme Court exercises “jurisdiction over a matter which the [F]amily [C]ourt might have exercised jurisdiction had such action or proceeding been commenced in [F]amily [C]ourt or referred thereto pursuant to law,” Supreme Court is required to abide by the requirements set forth in Family Ct Act § 262 (see *Carney v. Carney*, ---A.D.3d ----, ----, --- N.E.3d ----, 2018 N.Y. Slip Op. 02034, *3 [2018]) Family Ct Act § 262(a) provides, in relevant part, that a parent of any child seeking custody must be advised “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” (see Family Ct Act § 262[a][v]). The deprivation of a party’s statutory right to counsel “requires reversal, without regard to the merits of the unrepresented party’s position. There was nothing in the record to indicate that Supreme Court ever advised the mother of her rights pursuant to Family Ct Act § 262(a). It was incumbent upon the court—particularly in light of the mother’s expressed need for several months to obtain the necessary retainer fee—to advise her of the right to assigned counsel in the event that she could not afford same. In the absence of the requisite statutory advisement of her right to counsel (see Family Ct Act § 262[a][v]) or a valid waiver of such right the mother was deprived of her fundamental right to counsel (see Family Ct Act §§ 261, 262[a][v]; Judiciary Law § 35[8]. Under the circumstances, it remitted the matter to Supreme Court for a new trial on the issues of custody, visitation and child

support.

Courts Failure to Comply with DRL § 75-i [2] and DRL § 75-i [4] requires reversal of Custody determination regarding Jurisdiction.

In Matter of Beyer v Hofmann, --- N.Y.S.3d ----, 2018 WL 2075877, 2018 N.Y. Slip Op. 03259 (4th Dept., 2018) the children were born in New York and lived with both parties in New York until December 29, 2015, when the parties moved with the children to State College, Pennsylvania. In April 2016 the children and respondent mother moved to York, Pennsylvania without the father, and the father thereafter returned to New York. He commenced a proceeding on June 6, 2016, and the mother commenced a custody proceeding in Pennsylvania on August 9, 2016. The Appellate Division observed that under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), adopted by New York (Domestic Relations Law art 5-A) and Pennsylvania (23 Pa Cons Stat Ann § 5401 et seq.), Family Court had jurisdiction to make an initial custody determination at the time the father commenced the instant proceeding (see Domestic Relations Law §§ 75-a [7]; 76[1][a]) and Pennsylvania had such jurisdiction at the time the mother commenced the proceeding in that state (see 23 Pa Cons Stat Ann §§ 5402, 5421[a][1]). It held that Family Court erred in declining to exercise jurisdiction and dismissing the proceeding without following the procedures required by the UCCJEA. The court, after determining that another child custody proceeding had been commenced in Pennsylvania, properly communicated with the Pennsylvania court (see Domestic Relations Law § 76-e [2]). The court erred, however, in failing either to allow the parties to participate in the communication (see § 75-i [2]), or to give the parties “the opportunity to present facts and legal arguments before a decision on jurisdiction [was] made” (§ 75-i [2]). The court also violated the requirements of the UCCJEA when it failed to create a record of its communication with the Pennsylvania court (see § 75-i [4]). The summary and explanation of the court’s determination following the telephone conference with the Pennsylvania court did not comply with the statutory mandate to make a record of the communication between courts.

The Appellate Division found that there were insufficient facts in the record to make a determination, (see Domestic Relations Law § 76-f [2][a] -[h]), regarding which state was the more convenient forum to resolve the issue of custody. It reversed the order, reinstated the petition and remit the matter to Family Court for further proceedings on the petition. It noted that the events subsequent to the entry of the order it was reversing may be relevant to and can be considered on remittal (Andrews, 44 A.D.3d at 1111, 844 N.Y.S.2d 147).

Supreme Court

[[International Child Abduction][Hague Convention] Dominican Republic] [Habitual Residence][Grave risk of harm]

In LM v JF, 2018 WL 2171080 (Sup. Ct., 2018) the Court granted the mothers Hague Convention Petition for an order directing the return of the parties son to the Dominican Republic.

The parties were never married. The Mother was a citizen of the Dominican Republic and the Father was a citizen of the United States. The parties met in 2010 in the Dominican Republic where both were enrolled in medical school. The Child was born in the Dominican Republic, was raised in the Dominican Republic and spent time each year visiting the Father's family whom resided in Levittown, New York. Prior to the Child's first visit to the United States the parties obtained a United States passport and United States citizenship for the Child. During a stay in New York in or about April, 2013, the parties obtained a social security card on behalf of the Child listing the Levittown, New York, address as the Child's residence.

The Mother graduated from medical school in 2011. In August, 2014, the Mother left for Rochester, New York to begin studies for a Masters Degree while the Father remained in the Dominican Republic with the Child. The Mother visited the Child and communicated with the Child via "Skype" while in Rochester. In August of 2015, the Father learned that the Mother had become romantically involved with another man while in Rochester, New York. The Mother completed her Master's Degree and returned to the Dominican Republic in February, 2016. Upon her return, the Mother stated that the Father did not allow her to see the Child until four days later. She sought the assistance of the Dominican Republic courts and the parties agreed to an "informal arrangement" where the Mother would be permitted to spend time with the Child. In March, 2016, the Mother filed documents with the authorities in the Dominican Republic to prevent the Father from leaving the Country with the Child without her consent. On March 15, 2016, there was an altercation between the parties wherein the Father alleged the Mother had pushed her way inside his home and physically lunged at him. The parties returned to court and obtained a reciprocal "order of protection."

On October 19, 2016, both parties, while represented by counsel, appeared in court and agreed to an order wherein they would equally share time with the Child. On November 30, 2016, the Father, the Child and the Paternal Grandmother, traveled to the Father's parent's home in Levittown, New York, with no intention of returning. On December 5, 2016, the Father filed a custody petition in Family Court which granted the Father's application for sole legal and residential custody of the Child upon the default of the Mother. The Mother commenced this proceeding on August 23, 2017 by Order to Show Cause seeking an Order directing the Child's return to the Dominican Republic.

Supreme Court found that the Dominican Republic was the child's habitual residence under the analysis established by *Gitter v. Gitter*, 396 F.3d 124, 133 (2d Cir. 2005) as follows: "First, the court should inquire into the shared intent of those entitled to fix the child's residence (usually the parents) at the latest time that their intent was shared. In making this determination the court should look, as always in determining intent, at actions as well as declarations. Normally the shared intent of the parents should control the habitual residence of the child. Second, the court should inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent."

Based upon the testimony the court concluded that, the Dominican Republic was the Child's habitual residence. Although the Child enjoyed frequent visits to New York

where he stayed in the home of the Father's parents, the majority of his life was spent in the Dominican Republic. It was where his home was, where he attended preschool, where he attended church and where his medical doctors were. There is a distinction to be made between a child who goes somewhere for a temporary duration and a child permanently moving to a new location. A Child who goes somewhere for a temporary duration, such as summer camp, is not considered to have acquired a new habitual residence because "he already has an established habitual residence elsewhere and his absence from it—even from an entire summer—is not indication that he means to abandon it." *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005) (quoting *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001)). There was no evidence that the Child unequivocally acclimated to a location other than the Dominican Republic so as to allow the Court to disregard the intent of the parties. The fact that Child may have acclimated to the United States from the time he was removed on November 30, 2016 until now is not the acclimation intended under this habitual resident analysis: The change in geography must occur before the questionable removal; here, the removal precipitated the change in geography. If we were to determine that by removing Thomas from his habitual residence without Mr. Friedrich's knowledge or consent Ms. Friedrich 'altered' Thomas's habitual residence, we would render the Convention meaningless." (*Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993) Supreme Court also found that the Mother had rights of custody at the time the Father and Child left the country and she was exercising her custody rights when the Child was removed. It found that the Mother had met her burden and established by a preponderance of the evidence that the Child was wrongfully removed from his place of habitual residence.

Supreme Court noted that with regard to the grave risk of harm defense the parent opposing the Child's return must show that the risk to the child is grave, not just serious, and the harm must be more than a potential harm. There must be a direct threat to the Child upon his return to the Dominican Republic in order for this exception to apply. The Court considered the testimony of the Father and the Paternal Grandmother regarding allegations that the Mother abused or neglected the Child and that the Dominican Republic authorities did not satisfactorily address these allegations. The Father presented photographs of the Child depicting unclean fingernails, an ear infection, mosquito bites, scabbing, cuts, burns and rashes. The Father testified that was the condition the Child was in when he returned from the Mother's care in 2016. The Father testified that he went to court representatives with the Child, to the police and to child protective services but that no assistance was provided to him. The Father did not provide any records of said reports. On cross examination, the Father testified that the child is considered to be hypersensitive to mosquito bites and that the scars on his body were caused by scratching scabies. He testified that the Child had only one ear infection and although he did not know with certainty what caused it, he concluded it was the Mother's fault. The Child's medical records were reviewed and the Father testified that the pediatrician's records stated that the Child was regularly brought to his office as a healthy child who was at times afflicted by allergies to insect bites. There was no mention of any burns or any child abuse. The Father testified that since November, 2017, the Child cried, screamed and begged the Father to not make him see the Mother before the Mother's parenting time. He testified that the Child returned from visits with the Mother angry and sad. The Father also testified that he did not believe the court in the Dominican Republic did or would do anything about his concerns. However, the Father offered no credible evidence that the courts failed to act on a legitimate threat to safety

of the Child. He offered no basis for this Court to conclude that the Dominican Republic authorities had not and will not act in the best interests of the Child.

The Father offered the testimony of an expert in the field of forensic evaluations and children's mental health who never interviewed or observed the Mother. She concluded that the Child was suffering trauma due to the relationship with the Mother but testified that the cause of that trauma could not be clinically ascertained. On cross examination, the witness testified that the trauma could be because the Child was used to being with both of his parents, or it could be because he did not see the Mother, or it could be some other reason. The Court was not convinced that the Child's reaction to the mention of the Mother was because of abuse or neglect at the hands of the Mother. The expert agreed on cross examination that while she believed the Child's trauma related to the Mother, it could be because of the trauma of the removal or some other reason.

The Court found that the Child's comfort in his current environment was not a basis for the Child to remain in the United States. Whatever re-adjustment period the Child may have to undergo in the Dominican Republic is not considered a "grave harm" under the Convention. It is well established that the "harm" set forth in the grave harm exception must be "greater than would normally be expected on taking a child away from one parent and passing him to another." *Madrigal v. Tellez*, 848 F.3d 669 (5th Cir. 2017); *Nunez-Escudero*, 58 F.3d 374 (8th Cir. 1995).

The Court held that the Father had not established, by clear and convincing evidence, that the Child will be subjected to a grave risk of harm if he returned to the Dominican Republic or any other affirmative defense.

May 1, 2016

Recent Legislation

Family Court Act §812 (1) amended

The opening paragraph of Family Court Act §812 (1) has been amended to add coercion in the third degree as one of the crimes that constitutes a family offense. It now reads as follows:

The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, criminal obstruction of breathing or blood circulation, strangulation in the second degree, strangulation in the first degree, assault in the second degree, assault in the third degree, an attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand

larceny in the fourth degree, grand larceny in the third degree, coercion in the second degree or coercion in the third degree as set forth in subdivisions one, two and three of section 135.60 of the penal law between spouses or former spouses, or between parent and child

or between members of the same family or household except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. In any proceeding pursuant to this article, a court shall not deny an order of protection, or dismiss a petition, solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the petition, the conclusion of the fact-finding or the conclusion of the dispositional hearing. For purposes of this article, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this article, "members of the same family or household" shall mean the following:

Laws of 2018, Ch 55, Part NN, §5, Effective as provided in § 10 on November 1, 2018.

Appellate Division, Second Department

Mother's Summer Visitation Reduced, Due to Child's Changing Circumstances, as he Grew Older

In *Miller v Shaw*, --- N.Y.S.3d ----, 2018 WL 1734617, 2018 N.Y. Slip Op. 02471 (2d Dept., 2018) the Appellate Division found that the child's changing needs as he grew older constituted a change in circumstances warranting modification of the visitation schedule so as to reduce the mother's summer visitation with the child. It noted, among other things, that a child's expressed preference, while not determinative, may also be indicative of the child's best interests. In weighing this factor, the court must consider the age and maturity of the child and the potential for influence having been exerted on the child. Despite expressing his love for his mother and his desire not to hurt her, the child unequivocally expressed his desire not to have extended visitation with the mother, articulating legitimate reasons in support of this preference. The child noted his schooling and preparation for college, as well as the numerous activities in which he participates in Florida, as some of the reasons why he wanted to spend less time in New York. The child was 16 years old and had a notable level of maturity, which clearly enabled him to form and express his own desires, and there is nothing in the record to indicate that influence was exerted on him by anyone. Accordingly, the Family Court's determination was supported by a sound and substantial basis in the record.

Respondents Statement That He Would "Kick [The Petitioner's] Ass" Is Not A Family Offense

In *Benjamin v Benjamin*, --- N.Y.S.3d ----, 2018 WL 1833135, 2018 N.Y. Slip Op. 02631 (2d

Dept., 2018) the Appellate Division reversed an order which determined that the appellant, the child's grandfather, in effect, had committed the family offense of harassment in the second degree and issued an order of protection. It found that petitioner failed to establish by a fair preponderance of the evidence that the appellant, in effect, committed the family offense of harassment in the second degree. The testimony at the hearing established only that the appellant stated that he would "kick [the petitioner's] ass" when he saw him on the street. Such conduct does not establish the family offense of harassment in the second degree as there was no evidence that the statement was "either serious [or] should reasonably have been taken to be serious" (People v. Dietze, 75 N.Y.2d 47, 53, 550 N.Y.S.2d 595, 549 N.E.2d 1166).

Appellate Division, Third Department

Court Has No Authority To Modify Unincorporated Settlement Agreement.

In *Abdelrahman v Mahdi*, --- N.Y.S.3d ----, 2018 WL 1864537, 2018 N.Y. Slip Op. 02698 (3d Dept, 2018) while an action for a divorce was pending the parties executed a written agreement adopting an oral stipulation that had been placed on the record providing for payment of child support and durational maintenance, and subsequently executed an addendum. On March 7, 2016, the husband an affidavit in support of a motion seeking a reduction, and temporary suspension, of his child support and maintenance obligations on the basis that he had been terminated from his employment in February 2016. The agreement and the addendum each provided for incorporation, without merger, in the judgment of divorce; however, neither an order governing child support and maintenance nor a judgment of divorce had been entered when the husband made his motion or when the wife served her answering papers. The Appellate Division reversed the order of Supreme Court while found that the husband did not cause the loss of his employment and that he had been diligently seeking employment and granted the husband's motion to the extent of suspending his child support and maintenance obligations for 90 days or until he secured employment, whichever first occurred, and forgiving all arrears that had accrued prior to August 11, 2016—the date that the hearing was held. It held that inasmuch as the record did not establish the existence of an order governing child support and maintenance or a judgment of divorce, the separation agreement was the sole source of the husband's obligation to pay child support and maintenance. On this record, there was no valid basis for Supreme Court to suspend the husband's contractual obligation to pay child support and maintenance. The husband sought modification of the terms of the agreement with respect to his child support and maintenance obligations, by motion, on the ground that his loss of employment constituted a change in circumstances that warranted modification—a standard that applies to modification of orders and judgments (see Domestic Relations Law § 236[B][9][b])—but he made no argument that the settlement agreement was invalid. Supreme Court may, upon a proper showing establishing a change in circumstances, modify an order or judgment of divorce that incorporates a settlement agreement. However, the court had no authority under the present circumstances to grant the husband's motion by modifying the settlement agreement.

April 16, 2018

Appellate Division, First Department

First Department Holds Support Magistrate Acted Outside Bounds of Authority When, He Deferred Issue of a Recommendation as To the Father's Incarceration to A "Post-Dispositional Hearing"

In *Matter of Carmen R. v Luis I*, --- N.Y.S.3d ----, 2018 WL 1720655, 2018 N.Y. Slip Op. 02422 (1st Dept., 2018) the Appellate Division held that the Support Magistrate acted outside the bounds of his authority when, after issuing a written fact-finding order in which he determined that the father had willfully violated a child support order, he deferred the issue of a recommendation as to the father's incarceration to a "post-dispositional hearing." The Support Magistrate's decision contravened Family Court Rule § 205.43(g)(3), which states that, upon a finding of willful violation, the findings of fact shall include "a recommendation whether the sanction of incarceration is recommended," and Rule § 205.43(f), which requires that the written findings be issued within five court days after completion of the hearing. Here, instead of issuing such recommendation in his March 7, 2017 fact-finding order after completion of the hearing on the violation petition that day, the Support Magistrate improperly set the matter down for "post-dispositional review" to commence on May 1, 2017, 54 days later. That hearing lasted several months. During this time, the father continued to violate the support order. The Family Court then compounded the Support Magistrate's error of law by denying the mother's objections as premature, leaving her with no recourse to effectively challenge the further delay that ensued.

The Family Court denied the mother's objections to the Support Magistrate's fact-finding order because it found that the order was not "final." The order cited Family Court Act Section 439(e), which permits objections to a "final" order of a Support Magistrate, and Section 439(a), which provides that a "determination by a Support Magistrate that a person is in willful violation of an order ... and that recommends commitment ... shall have no force and effect until confirmed by a judge of the court." This was error. First, under the plain language of the statute, the Support Magistrate's fact-finding order was not an order that "shall have no force and effect until confirmed by a judge of the court," since it did not recommend incarceration. The Support Magistrate's failure to make a recommendation as to incarceration upon his finding of willfulness essentially constituted a recommendation against incarceration, since the mother could not seek that remedy without a recommendation from the Support Magistrate. Moreover, the parties were entitled to a complete written fact-finding order, including a recommendation as to incarceration, within five court days following completion of the hearing on the mother's violation petition (22 NYCRR § 205.43[f], [g]). Accordingly, the Family Court should have considered the mother's objections, and, upon doing so, should have exercised its authority to remand the matter to the Support Magistrate for an immediate recommendation as to incarceration, or to make, with or without holding a new hearing, its own findings of fact and order based on the record (Family Court Act § 439[e]).

The Family Court's order cited to trial court cases finding that Family Court may consider objections to nonfinal orders where irreparable harm would result from denial of permission to file such objections. It nevertheless found that "a delay in the disposition of a violation of child support petition is not an irreparable harm." However, under the circumstances of this case, the mother made a prima facie showing that she suffered irreparable harm. A litigant has a right to bring a violation petition to an expeditious final disposition (Family Court Act § 439-a). The mother was deprived of the "expedited process" guaranteed by statute and the Family Court Rules when the support magistrate conducted protracted unauthorized "post-dispositional" proceedings.

Appellate Division, Third Department

Wife Carried Burden of Raising Material Issue of Fact to Defeat Husbands Motion for Summary Judgment with Regard to Validity of Prenuptial Agreement. Concurring Opinion Says Court Established Dramatically Lower Standard for Challenging Prenuptial Agreements.

In *Carter v Fairchild-Carter*, 2018 WL 1525180 (3d Dept., 2018) the Appellate Division found that the wife carried her burden of raising a material issue of fact to defeat the husband's motion for summary judgment with regard to the validity of the parties prenuptial agreement. In opposition to the husband's motion, the wife submitted an affidavit in which she stated that shortly before the wedding day, the husband presented her with a prenuptial agreement. The wife, on the advice of her counsel, told the husband that she could not sign it or marry him unless he made some changes—namely, that she would get half the value of the land and house where they resided and 50% of everything they acquired during the marriage. The wife further averred that, on "the very day before the wedding" and as she was making final preparations for the wedding, the husband presented her with a revised prenuptial agreement, told her that he had made the requested changes and assured her that she would be taken care of for the rest of her life. The wife stated that she was given this new prenuptial agreement while standing outside the County Clerk's office and that the husband "didn't really give [her] time to even read the document, let alone take it back to the lawyer to look at it again." She stated that she was feeling stressed and pressured with the wedding planning and "just signed the document." It held that these facts, if credited, give rise to the inference of overreaching (citing *Leighton v. Leighton*, 46 A.D.3d 264, 265, 847 N.Y.S.2d 64 [2007]). Accordingly, Supreme Court properly denied the husband's summary judgment motion.

Justice Rumsey, concurring, expressed his concern that at the majority's determination that the wife met her burden based upon allegations that she was pressured into signing the prenuptial agreement on the day prior to the wedding without reading it established a dramatically lower standard for challenging prenuptial agreements that contravenes our long-standing precedent. He observed that the Court had upheld the validity of a prenuptial agreement that was executed under circumstances strikingly similar to those that the majority holds may now be used to establish overreaching—namely, (1) the husband requested the prenuptial agreement, (2) the agreement was prepared by the husband's attorney at his direction,(3) the agreement

was executed only a few hours prior to the parties' wedding, and (4) the wife did not read the agreement or seek to have it reviewed by her counsel before she signed it (Matter of Garbade, 221 A.D.2d 844, 845, 633 N.Y.S.2d 878 [1995], lv denied 88 N.Y.2d 803, 645 N.Y.S.2d 446, 668 N.E.2d 417 [1996]). It found that such circumstances established “nothing more than [the wife’s] own dereliction in failing to acquaint herself with the provisions of the agreement and to obtain the benefit of independent legal counsel[, and a]lthough this dereliction may have caused her to be ignorant of the precise terms of the agreement, the fact remains that, absent fraud or other misconduct, parties are bound by their signatures” He further noted that the case on which the majority primarily relied in finding that the wife’s allegations regarding the circumstances surrounding execution of the agreement on the eve of the wedding establish the existence of overreaching—Leighton v. Leighton, 46 A.D.3d 264, 265, 847 N.Y.S.2d 64 [2007], appeal dismissed 10 N.Y.3d 739, 853 N.Y.S.2d 281, 882 N.E.2d 894 (2008)—was a 3–2 decision of the First Department that, in his view, contravened the Courts own precedent.

Use of Funds Withdrawn from Account That Is Separate Property to Pay Marital Expenses Does Not Change the Character of The Account to Marital Property.

In *Giannuzzi v Kearney*, --- N.Y.S.3d ----, 2018 WL 1629752, 2018 N.Y. Slip Op. 02378 (3d Dept., 2018) Plaintiff (wife) and defendant (husband) were married in 1998 and had no children. In 2013, the wife commenced this action for divorce. Prior to the marriage, the wife inherited IBM stock from her grandfather worth in excess of \$1 million. Supreme Court granted the wife a divorce and, in relevant part, determined that the wife’s IBM stock was her separate property.

The Appellate Division rejected the husband’s contention on appeal that Supreme Court erred in determining that the wife’s IBM stock was her separate property. Property acquired by a spouse prior to the marriage is separate property, unless it is transmuted into marital property during the course of the marriage (see Domestic Relations Law § 236[B][1][d]; *Spera v. Spera*, 71 A.D.3d 661, 664, 898 N.Y.S.2d 548 [2010]; *Sherman v. Sherman*, 304 A.D.2d 744, 744, 758 N.Y.S.2d 667 [2003]). The IBM stock, including any reinvestment thereof, remained in accounts maintained exclusively in the wife’s name throughout the marriage. It rejected his argument that the IBM stock became marital property because the parties filed joint income tax returns reporting income derived from the IBM stock, the parties utilized dividends received from the IBM stock to maintain the marital standard of living, and the IBM stock was pledged as collateral to secure the loan that the parties obtained to finance the purchase of several of the Florida properties.

The Appellate Division noted that a party to litigation is precluded from taking a position contrary to affirmative elections or representations made on an income tax return that are material to the characterization or taxation of any income derived from the separate property (see *Mahoney–Buntzman v. Buntzman*, 12 N.Y.3d 415, 422, 881 N.Y.S.2d 369, 909 N.E.2d 62 [2009]; *Winship v. Winship*, 115 A.D.3d 1328, 1330, 984 N.Y.S.2d 247 [2014]). For example, income realized from the sale, during the marriage, of corporate stock that was separate property was properly classified as marital property because it had been reported on a federal income tax return as ordinary income, rather than as capital gains realized upon the sale of an asset, and income earned during the

marriage is marital property (see *Mahoney–Buntzman v. Buntzman*, 12 N.Y.3d at 422, 881 N.Y.S.2d 369, 909 N.E.2d 62). Similarly, the argument that a farm was separate property because it had been inherited by one spouse in 2010 was inconsistent with the fact that the parties had depreciated property and equipment used to operate the farm on joint returns that they filed from 2000 through 2008, because a party cannot depreciate property that he or she does not own (see *Winship v. Winship*, 115 A.D.3d at 1329–1330, 984 N.Y.S.2d 247). By contrast, the mere reporting of income earned from the separate assets of one spouse on a joint return does not transmute the separate property to marital property because both spouses are required to report all of their income, whatever the source, on a joint return. It agreed that a contrary rule “would force married persons to file separate income tax returns, and to pay higher income taxes, simply to protect the non-marital status of their separate property” (*Holden v. Holden*, 667 So.2d 867, 869 [Fla. Dist. Ct. App. 1996]). Here, the wife’s assertion that the IBM stock was her separate property was not contrary to any position that she had taken by reporting income derived from her IBM stock on the parties’ joint income tax returns as dividends and capital gains.

It is also well-settled that the use of funds withdrawn from an account that is separate property to pay marital expenses does not change the character of the account to marital property. Thus, the use of dividends earned on the wife’s IBM stock to pay marital expenses was insufficient to transform the stock to marital property. Similarly, the pledge of the IBM stock as collateral for the loan used to acquire several parcels of real property located in Florida did not transmute all or any portion of the stock to separate property. This conclusion is illustrated by the fact that a spouse who contributes separate property toward the purchase of a marital asset, or whose separate property is used to pay a marital debt that was incurred to acquire a marital asset, is entitled to a credit for the separate property contribution.

April 1, 2018

Court Rules

Appellate Divisions Adopt Uniform Rules for Practice

“Practice Rules of the Appellate Division” have been Approved by Joint Order of the Departments of the New York State Supreme Court, Appellate Division on December 12, 2017. The Practice Rules are effective September 15, 2018.

Appellate Division, Second Department

Separation agreement evidencing parties’ agreement to live separate and apart complies with Domestic Relations Law § 110 requirements for adoption.

In *Matter of Jason*, --- N.Y.S.3d ----, 2018 WL 1404086, 2018 N.Y. Slip Op. 01922 (2d Dept, 2018) the petitioner commenced a proceeding to adopt her grandson, who was placed with her in foster care and freed for adoption. The SCO Family of Services, which placed the child with the petitioner, approved the adoption. The petitioner had been separated from her spouse since June 2016, and a separation agreement was executed by the petitioner and her spouse and duly acknowledged on May 12, 2017. The Family Court determined that the separation agreement was insufficient to comply with the requirements of Domestic Relations Law § 110 because it was merely an agreement by the parties to live separately and apart and did not contain any substantive provisions settling marital issues. The court concluded that the petitioner lacked standing under Domestic Relations Law § 110 to adopt without her spouse and dismissed the petition without prejudice based on lack of standing. The Appellate Division reversed. It noted that Domestic Relations Law § 110 dictates who has standing to adopt. As relevant here, an “adult married person who is living separate and apart from his or her spouse ... pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded ... may adopt another person” without his or her spouse (Domestic Relations Law § 110). The court noted that a separation agreement may contain substantive provisions settling marital issues such as equitable distribution and maintenance. However, the agreement is ‘simply intended as evidence of the authenticity and reality of the separation. Thus, for example, where the substantive provisions of a separation agreement have been invalidated as unconscionable, the agreement “generally ... may still be accepted for the sole purpose of evidencing the parties’ agreement to live separate and apart, thus satisfying the statutory requirement in respect to a separation agreement” in providing grounds for a conversion divorce under Domestic Relations Law § 170(6) (*Christian v. Christian*, 42 N.Y.2d at 70). Here, the separation agreement evidenced the parties’ agreement to live separate and apart; it was in writing, subscribed by the parties thereto, and acknowledged in the form required to entitle a deed to be recorded (see Domestic Relations Law § 110). Therefore, it satisfied the statutory requirement of the adoption statute with respect to a separation agreement.

Statements made during preliminary conference are not admissible at fact-finding hearing on order of protection

In *Almaguer v Almaguer*, 2018 WL 1404102 (Mem), 2018 N.Y. Slip Op. 01916 (Mem) (2d Dept., 2018) the Appellate Division reversed an order of protection granted to the wife and remitted for a new hearing. The parties were married, lived together for over 20 years, and were the parents of three children. The wife commenced a proceeding by filing a petition alleging, inter alia, that the husband committed the family offense of harassment in the second degree by threatening to kill her if she filed for divorce. The Appellate Division held that in making its determination, the Family Court erred in considering and relying upon statements made by the husband during a preliminary conference and in proceedings prior to the hearing. Statements made during a preliminary conference are not admissible at a fact-finding hearing (see Family Ct Act § 824). Moreover, the court may not rely upon evidence of an incident not charged in the petition in sustaining a charge of harassment (see *Matter of Czop v. Czop*, 21 A.D.3d 958, 801 N.Y.S.2d 63).

Appellate Division, Fourth Department

Courts may not impute income to a party in determining the party's eligibility for assigned counsel.

In *Carney v Carney*, --- N.Y.S.3d ----, 2018 WL 1441079, 2018 N.Y. Slip Op. 02034 (4th Dept., 2018) the Appellate Division held that courts may not impute income to a party in determining the party's eligibility for assigned counsel.

Defendant appeared pro se and requested that counsel be appointed for him given his status as an unemployed graduate student and his lack of a full-time job. Defendant admitted that his living expenses were "next to nothing," except for his car payment and insurance, because he had been residing with his parents for 6½ years. The court expressed reservation about appointing counsel because of defendant's advanced degree and demonstrated "high level of skills," stated that its "obligation is to protect the taxpayers of this state," and questioned whether it could impute income to defendant before making a decision on his request for assigned counsel. The court determined that there was no authority restricting its ability to impute income to an applicant for assigned counsel. The court then created a framework for an adversarial hearing by appointing the Public Defender's Office to represent defendant for the limited purpose of supporting his application for assigned counsel and appointing special counsel to present the facts in favor of imputation. The court ordered an evidentiary hearing to determine defendant's eligibility for assigned counsel based on any imputed income. Following the evidentiary hearing, the court issued the order in appeal No. 2 in which it determined that \$50,000 in income should be imputed to defendant and that defendant was not eligible for the appointment of counsel in the pending proceeding (*Carney v. Carney*, 55 Misc.3d 1220[A], 2017 N.Y. Slip Op. 50667[U], *16, 2017 WL 2271317 [Sup. Ct., Monroe County 2017]).

The Appellate Division reversed. It observed that as pertinent here, any person seeking custody of his or her child or "contesting the substantial infringement of his or her right to custody of such child" (FCA § 262[a][v]), as well as "any person in any proceeding before the court in which an order ... is being sought to hold such person in contempt of the court or in willful violation of a previous order of the court" (§ 262[a][vi]), has "the right to have counsel assigned by the court in any case where he or she is financially unable to obtain the same" (§ 262[a]; see County Law § 722; Judiciary Law § 770;. Where, as here, Supreme Court exercises jurisdiction over a matter over which Family Court might have exercised jurisdiction had the proceeding been commenced there, Supreme Court must appoint counsel if required under Family Court Act § 262 (see Judiciary Law § 35[8]). "Where a party indicates an inability to retain private counsel, the court must make inquiry to determine whether the party is eligible for court-appointed counsel. In fulfilling that obligation, the court may inquire into the person's financial circumstances, including, but not limited to, his or her income, expenses, obligations and other relevant financial information and, in furtherance of that inquiry, the court may require the submission of documentation. Here, the submissions in support of the motion for the assignment of counsel confirmed a lack of income and assets. In light of

these financial circumstances defendant qualified for assigned counsel pursuant to the Public Defender's Office eligibility guidelines.

The Appellate Division held that the court had no authority to deprive defendant of his constitutional and statutory right to counsel on the basis of imputed income, and it therefore lacked the authority to conduct a hearing on that issue, requiring reversal.

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In *Matter of Kelly v Fifield*, --- N.Y.S.3d ----, 2018 WL 1441971, 2018 N.Y. Slip Op. 02110 (4th Dept., 2018) the Appellate Division held that where, as here, a prior order provides for visitation as the parties may mutually agree, a party who is unable to obtain visitation pursuant to that order "may file a petition seeking to enforce or modify the order". It agreed with the father that the court erred in dismissing the modification petition without a hearing inasmuch as the father made "a sufficient evidentiary showing of a change in circumstances to require a hearing" The father adequately alleged a change of circumstances insofar as the visitation arrangement based upon mutual agreement was no longer tenable given that the mother purportedly denied the father any contact with the child. In addition, it noted that there is a rebuttable presumption that visitation is in the child's best interests

Where the UIFSA and the FFCCSOA conflicted when applied to the facts, Appellate Division concluded that the FFCCSOA preempted the UIFSA.

In *Matter of Reynolds v Evans*, --- N.Y.S.3d ----, 2018 WL 1441435, 2018 N.Y. Slip Op. 02077 (4th Dept., 2018) the Appellate Division held that Family Court erred in dismissing the fathers petition to modify a New Jersey child support order based upon lack of subject matter jurisdiction. The father and respondent mother previously resided in New Jersey with the child, and a New Jersey court issued a child support order in 2001. The mother and child thereafter relocated to Tennessee, and the father relocated to New York. In 2004, the New Jersey child support order was registered in New York for purposes of enforcement. In 2016, the father filed a instant petition in New York seeking a downward modification of his child support obligation. In order to modify an out-of-state child support order under the Uniform Interstate Family Support Act ([UIFSA] Family Ct Act art 5–B), the order must be registered in New York and, in relevant part, the following conditions must be present: "(i) neither the child, nor the obligee who is an individual, nor the obligor resides in the issuing state; (ii) a petitioner who is a nonresident of this state seeks modification; and (iii) the respondent is subject to the personal jurisdiction of the tribunal of this state" (§ 580–611 [a][1]). Although the New Jersey child support order was registered in New York, the father was the petitioner and he was a resident of New York. Therefore, under the UIFSA, the father could not properly bring the petition for modification of the New Jersey child support order in New York. The father could, however, properly bring the petition for modification in New York under the Full Faith and Credit for Child Support Orders Act ([FFCCSOA] 28 USC § 1738B.. Under the FFCCSOA, a New York court may modify an out-of-state child support order if "the court has

jurisdiction to make such a child support order pursuant to [28 USC § 1738B] subsection (i)” and, in relevant part, “the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child’s State or the residence of any individual contestant” (28 USC § 1738B [e][1], [2][A]). Here, neither the parties nor the child continued to reside in New Jersey, and New Jersey therefore ceased to have continuing, exclusive jurisdiction (see Family Ct Act § 580–205[a][1]; 28 USC § 1738B [d]). Although the UIFSA and the FFCCSOA “have complementary policy goals and should be read in tandem” (Matter of Spencer v. Spencer, 10 N.Y.3d 60, 65–66, 853 N.Y.S.2d 274, 882 N.E.2d 886 [2008]), the UIFSA and the FFCCSOA conflict when applied to these facts, and the Appellate Division concluded that the FFCCSOA preempted the UIFSA here.

Court exceeded its authority in directing petitioner to find foster care for respondents’ cat.

In Matter of Ruth H, --- N.Y.S.3d ----, 2018 WL 1357868, 2018 N.Y. Slip Op. 01840 (4th Dept., 2018) the Petitioner commenced this neglect proceeding seeking, inter alia, the temporary removal of respondents’ two children from their custody. Respondents consented to the temporary removal of the children and, after a hearing pursuant to Family Court Act § 1027, Family Court determined, inter alia, that the temporary removal of the children while the neglect petition was pending was in the children’s best interests based upon respondents’ failure to provide adequate nutrition for the children and the uninhabitable condition of respondents’ home. The court also determined that petitioner failed to make reasonable efforts to prevent the removal of the children from respondents’ custody, and ordered petitioner to find a foster home for respondents’ cat. The Appellate Division reversed the finding of lack of “reasonable efforts”, and agreed with petitioner that the court lacked the authority to order it to find a foster home for respondents’ cat. Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute , or by the New York Constitution). Inasmuch as animals are property (see generally Mullaly v. People, 86 N.Y. 365, 368 [1881]), and Family Court does not have jurisdiction over matters concerning personal property, it concluded that the court exceeded its authority in directing petitioner to find foster care for respondents’ cat.

March 16, 2018

2018 Child Support Standards Chart Issued

The 2018 poverty income guidelines amount for a single person as reported by the United States Department of Health and Human Services is \$12,140 and the 2018 self-support reserve is \$16,389. The combined parental income amount is \$148,000. See Child Support Standards Chart LDSS 4515 (3/18), <https://www.childsupport.ny.gov/dcse/pdfs/CSSA.pdf> (last accessed March 1, 2018)

Appellate Division, Second Department

Order dismissing Custody Petition Reversed Where Right to Self-Representation Denied.

In *Matter of Aeman v Lansch*, 2018 WL 1076261 (2d Dept., 2018) the Appellate Division reversed an order which denied, without a hearing, the fathers modification petitions seeking custody of the children. It noted that where a party unequivocally and timely asserts the right to self-representation, the court must conduct a searching inquiry to ensure that the waiver of the right to counsel is knowing, intelligent, and voluntary (see *Matter of Kathleen K. [Steven K.]*, 17 N.Y.3d at 385, 929 N.Y.S.2d 535, 953 N.E.2d 773). There must be a showing that the party was aware of the dangers and disadvantages of proceeding without counsel. The Court of Appeals has stated that the better practice is to ask the party about his or her age, education, occupation, previous exposure to legal procedures, and other relevant factors bearing on a competent, intelligent, and voluntary waiver (see *People v. Arroyo*, 98 N.Y.2d 101, 104, 745 N.Y.S.2d 796, 772 N.E.2d 1154). The father unequivocally and timely asserted his right to represent himself in the Family Court proceedings. The Family Court engaged in a searching inquiry of the father, which revealed that he knowingly, intelligently, and voluntarily waived his right to counsel, and that it was his desire and personal choice to proceed pro se. The court properly warned him of the perils of self-representation, which he acknowledged. It found that the father was a tax attorney, and held that his relative ignorance of family law did not justify the court's denial of his request, as mere ignorance of the law is insufficient to deprive one of the right to self-representation. Further, the court's belief that counsel for the father would be helpful in these matters was an insufficient reason to deprive the father of his right of self-representation. The father did not engage in any disruptive conduct that would prevent the fair and orderly exposition of the issues. Accordingly, the Family Court should not have deprived the father of his right to self-representation. In light of the court's unreasonable refusal to honor the father's right to self-representation, which was accompanied by increasing intolerance towards the father, it remitted the matters to a different judge for a new hearing.

Second Department Holds DRL § 236(B)(2)(b) and 22 NYCRR § 202.16-a, in tandem (automatic orders), constitute unequivocal mandates of the court for purposes of contempt. But Contempt not available after entry of judgment.

In *Spencer v Spencer*, --- N.Y.S.3d ---, 2018 WL 1075362, 2018 N.Y. Slip Op. 01348 (2d Dept, 2018) the Appellate Division, Second Department reversed an order which held the former husband in contempt. It held, as a matter of first impression that the provisions of Domestic Relations Law § 236(B)(2)(b) and Uniform Rules for Trial Courts (22 NYCRR) § 202.16-a, in tandem (automatic orders), constitute unequivocal mandates of the court for the purposes of holding a party in civil contempt pursuant to Judiciary Law § 753. It also held that civil contempt is not an available remedy for a violation of the automatic orders when that civil contempt is sought after entry of a judgment of divorce.

After the judgment of divorce had been entered, the plaintiff learned that, while the trial was pending, defendant sold a warehouse in Brooklyn, which was a marital asset (Property), without her consent and without the consent of the Supreme Court during the pendency of the action. Domestic Relations Law § 236(B)(2)(b) and 22 NYCRR 202.16–a which virtually mirror each other, precludes either of the parties in a matrimonial action from transferring or in any way disposing of marital assets such as the Property without the written consent of the other party or order of the court, except under certain circumstances not applicable to this case (see Domestic Relations Law § 236[B][2][b]; 22 NYCRR 202.16–a). The automatic orders are binding upon a plaintiff upon commencement of the matrimonial action and upon a defendant upon service of the summons or summons and complaint (see Domestic Relations Law § 236[B][2][b]).

Although the judgment of divorce had already been entered, plaintiff filed an order to show cause seeking, inter alia, pursuant to Judiciary Law § 753, a finding of civil contempt against the defendant. Supreme Court then held a hearing during which the defendant admitted that he sold the Property for \$1.6 million during the pendency of the divorce trial and after paying the mortgage and other encumbrances on the Property, he received proceeds from the sale in the amount of \$300,000, which he spent paying debts that he owed. Supreme Court held the defendant in civil contempt, finding the defendant's sale of the Property in violation of the automatic orders and his expenditure of the proceeds for his own benefit defeated, impaired, impeded, or prejudiced the rights of the plaintiff. The court directed that, unless the defendant purged the contempt by paying \$150,000 to the plaintiff on or before December 16, 2016, the defendant would be incarcerated every weekend for a period of six months.

The Appellate Division held that the legislative history of Domestic Relations Law § 236(B)(2)(b) supported the conclusion that the automatic orders constitute unequivocal mandates of the court. It rejected defendant's contention that Domestic Relations Law § 236(B)(2)(b) constitute a legislative, not a court, mandate for the reason that it is contrary to the express language of 22 NYCRR 202.16–a, against public policy, and without merit. Notwithstanding the foregoing, it found that where a judgment of divorce has already been entered, the remedy of civil contempt is not available for a violation of the automatic orders after the judgment of divorce has been entered. The automatic orders are temporary and exist only "in full force and effect" during the pendency of the action until "terminated, modified or amended by further order of the court or upon written agreement between the parties" (22 NYCRR 202.16–a[b]). Upon entry of a judgment of divorce, the purpose of the automatic orders ends, and, when the life of the automatic orders thus expires, the statutory remedies for their enforcement fall at the same time (see *Mittman v. Mittman*, 263 App.Div. 384, 385, 33 N.Y.S.2d 211). Here, after the judgment of divorce was entered, the automatic orders ceased to exist for the purposes of enforcement (see 22 NYCRR 202.16–a). The Court noted that the unavailability of civil contempt as a remedy to enforce the terms of the automatic orders after the entry of the judgment of divorce did not render this plaintiff without available remedies. For example, vacatur of the judgment of divorce based on newly discovered evidence, a civil contempt motion for a violation of the judgment of divorce, a proceeding to enforce the terms of the judgment of divorce or to obtain an order directing the payment of 50% of the value

of the Property which was awarded to the plaintiff in the judgment of divorce, or amendment of the judgment of divorce are all remedies that the plaintiff could have sought.

A Court Must Determine Whether A Proposed Adoption Is in The Best Interests of The Child and Should Consider All the Relevant Factors.

In *Matter of Isabella*, 2018 WL 1075864 (Mem), 2018 N.Y. Slip Op. 01309 (2d Dept., 2018) the petitioner, who has been the legal guardian of Isabella, since 2011, filed a petition to adopt her in 2015. Her father consented to the adoption and following a hearing, the Family Court found that the consent of Isabella's mother was not required because she had abandoned the child. The court dismissed the petition on the ground that the petitioner has a lengthy criminal record, refusing to make any further inquiry into any other factor bearing on whether the adoption would be in the child's best interests. The Appellate Division reversed. It pointed out that a court must determine whether a proposed adoption is in the best interests of the child (see Domestic Relations Law §§ 114[1]; 116[4]). The court should consider all the relevant factors. Perfection is not demanded of adoptive parents and "even an unacceptable record of misconduct by adoptive parents may be mitigated by evidence that the proposed adoptive child is healthy and happy and considers petitioners to be his [or her] parents. It held that Family Court erred in determining that the adoption was not in the child's best interests based solely on the petitioner's criminal history. The court should have received evidence and considered other factors relevant to the issue. This was particularly true since the petitioner had been appointed the child's permanent guardian and had served in that role for over five years, which was most of the child's life, and all of the petitioner's convictions occurred more than 20 years before he commenced this proceeding. The matter was remitted to the Family for further proceedings on the petition, before a different judge.

Appellate Division, Third Department

Error to Award Custody Based Upon Information Provided at Family Court Appearance by Persons Not Under Oath

In *Matter of Richard T v Victoria U*, --- N.Y.S.3d ----, 2018 WL 1093499, 2018 N.Y. Slip Op. 01364 (3d Dept., 2018) the Appellate Division held that Family Court erred in granting the father's custody petition without conducting an evidentiary hearing. Custody determinations should generally be made only after a full and plenary hearing and inquiry (S.L. v. J.R., 27 N.Y.3d 558, 563, 36 N.Y.S.3d 411, 56 N.E.3d 193 [2016]) A court's final custody determination must be based on admissible evidence and not on, as relevant here, "information provided at court appearances by persons not under oath" The Family Court's ultimate custody and visitation determination was made only after a few preliminary court appearances in which no witness gave sworn testimony or documentary evidence was received, and there was no indication that Family Court

considered the various factors relative to the best interests of the children. The matter was remitted for a full hearing because Family Court “did not possess sufficient information to render an informed determination that was consistent with the children’s best interests”

Where settlement agreement not merged into divorce judgment a postjudgment motion within the matrimonial action is not proper vehicle to challenge agreement

In *Matula v Matula*, --- N.Y.S.3d ---, 2018 WL 1093474, 2018 N.Y. Slip Op. 01365 (3d Dept., 2018), the parties entered into a stipulated settlement agreement, and, in September 2015, a judgment of divorce was entered, which incorporated, but did not merge with, the settlement agreement. In January 2016, the husband, an attorney admitted to practice in this state, moved, inter alia, to enjoin the wife from enforcing, and challenging the validity of, certain provisions of the settlement agreement. The wife cross-moved to dismiss the husband’s motion and requested counsel fees. Supreme Court denied the husband’s requested relief and granted the wife’s application. The Appellate Division affirmed. It noted that in cases where a settlement agreement is not merged into a judgment of divorce, a postjudgment motion within the matrimonial action is not the proper vehicle for challenging or annulling the settlement agreement or the support obligations included therein. Inasmuch as the proper vehicle for challenging the propriety of the support provisions contained in that agreement was a separate plenary action, Supreme Court properly denied the husband’s postjudgment motion. The existence of related proceedings in Family Court did not provide Supreme Court with a proper basis to entertain the husband’s attempt to invalidate the settlement agreement by postjudgment motion in Supreme Court.

March 1, 2018

Court of Appeals

Court of Appeals Establishes Guidelines for Disclosure Disputes involving Social Media Materials.

In *Forman v. Henkin*, __NY3d__ (2018), a personal injury case, the Court of Appeals rejected the notion that the account holder’s so-called “privacy” settings govern the scope of disclosure of social media materials. It agreed with other courts that commencement of a personal injury action renders a party’s entire Facebook account automatically discoverable. It held that rather than applying a one-size-fits-all rule, courts addressing disputes over the scope of social media discovery should employ well-established rules, there is no need for a specialized or heightened factual predicate to avoid improper “fishing expeditions.” In the event that judicial intervention becomes necessary, courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second,

balancing the potential utility of the information sought against any specific “privacy” or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials.

The Court noted that in a personal injury case it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate, for example, the court should consider whether photographs or messages posted years before an accident are likely to be germane to the litigation.

The Court observed that to the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court (see CPLR 3103[a]). Here, for example, Supreme Court exempted from disclosure any photographs of plaintiff depicting nudity or romantic encounters.

Plaintiff suggested that disclosure of social media materials necessarily constitutes an unjustified invasion of privacy. The Court assumed for purposes of resolving the narrow issue before it that some materials on a Facebook account may fairly be characterized as private. It indicated that even private materials may be subject to discovery if they are relevant. For purposes of disclosure, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information.

Appellate Division, Second Department

Parties’ Inability to Agree on The Child’s Religious Training, An Issue That Had Not Been Addressed in The Parties’ Stipulation Of Settlement, Constituted A Change In Circumstances Warranting Modification of Custody

In *Balla v Balla*, --- N.Y.S.3d ----, 2018 WL 846199, 2018 N.Y. Slip Op. 01050 (2d Dept., 2018) prior to the marriage, the mother was Christian and the father was Muslim, but the mother converted to Islam and they were married in a religious ceremony. When the parties separated, the mother returned to Christianity. Pursuant to the parties’ stipulation of settlement and their judgment of divorce, the parties had joint legal custody of the child and the mother had primary physical custody of the child, who was approximately 2 ½ years old when the parties separated. The stipulation stated that the parties would consult with each other regarding the child’s religious training, but did not specify in which religious tradition the child would be raised. As the child’s primary custodian, the mother taught the child Christian values and practices in accordance with her beliefs. When the child was approximately 7 ½ years old, she complained to the mother that the father was pressuring her to adopt Muslim practices and had threatened to abscond with her to his native Morocco, where he retained citizenship in addition to his U.S. citizenship, if she failed to follow Muslim practices and customs. The child asked the mother to call the police and also sought help from school personnel. The mother responded by filing a petition seeking sole legal custody of the child. The Appellate Division held that the Family Court properly exercised its discretion in awarding custody

to the mother. The parties' inability to agree on the child's religious training, which was an issue that had not been addressed in the parties' July 2009 stipulation of settlement, constituted a change in circumstances. The change in the child's relationship with the father based on the child's fear of his displeasure if she were not a "true Muslim," and her belief that he threatened to abscond with her to Morocco, also contributed to the change in circumstances warranting modification. The record supported the conclusion of the Family Court that it was in the child's best interests to award sole legal custody to the mother. The award to the mother of sole decision-making authority with respect to religion was in the child's best interests, and the award of parenting time to each parent on his or her respective religious holidays would continue to allow the child to be exposed to both parents' religions. Similarly, the father's actual or perceived insistence that the child follow Islam and actual or perceived threats to abscond to Morocco with the child had a serious adverse effect on the child's relationship with him and, thus, made an award of sole custody to the mother appropriate. The child was 10 years old at the time of the hearing and, accordingly, the Family Court properly considered her wishes, weighed in light of her age and maturity.

Second Department Holds Defective Acknowledgement in Prenuptial Agreement Can be Cured by Extrinsic Proof of Notary who took signature.

In *Koegel v Koegel*, --- N.Y.S.3d ----, 2018 WL 736117, 2018 N.Y. Slip Op. 00833 (2d Dept., 2017), the Appellate Division observed that the Court of Appeals, in *Galetta*, left open the issue of whether a defective acknowledgment can be cured by extrinsic proof provided by the notary public who took a party's signature, and held that under the circumstances of this case such proof remedied the defective acknowledgment.

At the outset it pointed out that *Matisoff v Dobi*, 90 N.Y.2d 127, 681 N.E.2d 376, 659 N.Y.S.2d 209, (1997) was not controlling here. In *Matisoff*, a case involving a postnuptial agreement in which the parties waived any rights of election provided by the EPTL, "it [wa]s undisputed...that the document was not acknowledged by the parties or anyone else" (90 NY2d at 130). The case at bar differed from *Matisoff* since here, there were certificates of acknowledgment of the signatures of Irene and the decedent, but the certificates did not contain the required language for acknowledgment as currently required by the Real Property Law. Similarly, reliance on *D'Elia* was misplaced since the agreement in that case was not acknowledged at the time of execution. The statement in *D'Elia* that "[i]t is uncontroverted that the parties' postnuptial agreement was not properly acknowledged at the time that it was executed" (14 AD3d at 478) was not referring to a defective acknowledgment, but instead, to the absence of any acknowledgment,

In *Galetta v Galetta*, 21 N.Y.3d 186, 991 N.E.2d 684, 969 N.Y.S.2d 826 (2013) the parties executed a prenuptial agreement before different notaries at different times one week before their wedding took place in July 1997 (21 NY3d at 189). As here, it was undisputed that the signatures on the document were authentic and there was no claim that the agreement was procured through fraud or duress. The certificate of acknowledgment relating to the wife's signature contained the proper language (see *id.*

at 190). However, in the acknowledgment relating to the husband's signature, the certificate failed to indicate that the notary "confirmed the identity of the person executing the document or that the person was the individual described in the document" (id.). The husband filed for divorce and the wife separately filed for divorce and for a declaration that the prenuptial agreement was unenforceable (see id.). The wife moved for summary judgment on her cause of action seeking declaratory relief, contending that the agreement was invalid because the certificate of acknowledgment relating to the husband's signature did not comport with the Real Property Law requirements. The husband opposed the motion on the basis that the language of the acknowledgment substantially complied with the Real Property Law. He also submitted an affidavit from the notary who had witnessed his signature in 1997 and executed the certificate of acknowledgment (see id.). "The notary, an employee of a local bank where the husband then did business, averred that it was his custom and practice, prior to acknowledging a signature, to confirm the identity of the signer and assure that the signer was the person named in the document. He stated in the affidavit that he presumed he had followed that practice before acknowledging the husband's signature" (id. [emphasis added]). The Supreme Court denied the wife's motion, finding that the acknowledgment substantially complied with the requirements of the Real Property Law. A divided Fourth Department affirmed the order albeit on the different ground that, although the acknowledgment was defective, the deficiency could be cured after the fact and that the notary's affidavit raised a triable issue of fact as to whether the agreement had been properly acknowledged when executed (see 96 AD3d 1565, revd 21 NY3d 186).

With respect to the issue of whether the certificate of acknowledgment accompanying the husband's signature was defective, the Court of Appeals determined that without stating "to me known and known to me," the certificate failed to indicate either that the notary knew the husband or had ascertained through some form of proof that the husband was the person described in the prenuptial agreement (21 NY3d at 193). The Court noted that: "At the time the parties here signed the prenuptial agreement in 1997, proper certificates of acknowledgment typically contained boilerplate language substantially the same as that included in the certificate accompanying the wife's signature: before me came (name of signer) to me known and known to me to be the person described in and who executed the foregoing instrument and duly acknowledged to me that s/he executed the same" (id. [footnote omitted]). The Court pointed out that the "to me known and known to me to be the person described in the document" language "satisfied the requirement that the official indicate that he or she knew or had ascertained that the signer was the person described in the document" (id.). It also observed that "[t]he clause beginning with the words and duly acknowledged' established that the signer had made the requisite oral declaration" (id.). Given the failure to include this language in the acknowledgment of the husband's signature, the Court of Appeals agreed with the Fourth Department that the acknowledgment did not conform with statutory requirements (see id. at 194).

Since the Court of Appeals determined that the certificate was defective, it then turned to address the question of "whether such a deficiency can be cured and, if so, whether the affidavit of the notary public prepared in the course of litigation was sufficient to raise a question of fact precluding summary judgment in the wife's favor" (id.). However, in looking at the proof submitted by the husband, the Court of Appeals stated that it "need not definitively resolve the question of whether a cure is possible

because, similar to what occurred in *Matisoff*, the proof submitted here was insufficient” (id. at 197).

The Court of Appeals analyzed in detail the affidavit of the notary submitted by the husband in opposing the wife’s summary judgment motion. The Court pointed out that the notary only recognized his own signature and had no independent recollection of notarizing the subject document (see id.). Given these statements, the Court found that the husband could not rely on the notary’s custom and practice to fill in the evidentiary gaps because “the averments presented by the notary public in this case [we]re too conclusory to fall into this category” (id.). Further, the Court stated that if the notary had recalled acknowledging the husband’s signature, “he might have been able to fill in the gap in the certificate by averring that he recalled having confirmed [the husband’s] identity, without specifying how” (id. at 198). However, since the notary did not recall acknowledging the husband’s signature and was attempting to rely on custom and practice evidence, the Court stated that “it was crucial that the affidavit describe a specific protocol that the notary repeatedly and invariably used — and proof of that type is absent here” (id.).

In *Koegel*, the Appellate Division found that the situation at bar was akin to the hypothetical described by the Court of Appeals in *Galetta*, where the notaries here, the decedent’s law partner and Irene’s attorney, actually recalled acknowledging the signatures at issue. In such a situation, the Court of Appeals explained that the confirmation of the identity of the signer, through an affidavit, is sufficient without having to explain how the identity was confirmed (see id.). Although, in support of her motion, Irene submitted the prenuptial agreement with the defective acknowledgments to demonstrate that the agreement was invalid, the Surrogate’s Court properly declined to dismiss the petition on the basis of documentary evidence in light of John’s submission in opposition to her motion. To supplement the allegations of the petition, in opposition, John submitted affidavits which showed that the petition may be meritorious in spite of the documentary evidence. In response to the assertion that the prenuptial agreement was invalid as improperly acknowledged, the affidavits of Donovan and Jacobsen specifically stated that each observed the document being signed, took the acknowledgment in question, and personally knew the individual signer signing before him. In so doing, the defect in the acknowledgment was cured in order to give vitality to the expressed intent of the parties set forth in the prenuptial agreement. Accordingly, the Surrogate’s Court properly denied Irene’s motion pursuant to CPLR 3211(a)(1) and Domestic Relations Law §236(B)(3) to dismiss the petition. Therefore, the order was affirmed.

Second Department Joins First and Third Department Holding Presumption of legitimacy applicable to Same-Sex Marriages

New York has a strong policy in favor of legitimacy. *Matter of Anonymous*, 74 Misc.2d 99, 104, 345 N.Y.S.2d 430 [1973]. At common law there is a rebuttable presumption that the child, a child born to a married woman, is the legitimate child of both parties. *Matter of Findlay*, 253 N.Y. 1, 7, 170 N.E. 471 [1930]. The presumption that a child born to a marriage is the legitimate child of both parents ‘is one of the strongest

and most persuasive known to the law.” State of New York ex rel. H. v. P., 90 A.D.2d 434, 437, 457 N.Y.S.2d 488 [1982]; Matter of Findlay, 253 N.Y. 1, 7, 170 N.E. 471 [1930].

The presumption of legitimacy as codified in Domestic Relations Law §24 is that a child “born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid”, is the legitimate child of both birth parents. See also Family Ct Act § 417.

In Matter of Maria-Irene D. (Carlos A. v. Han Ming.), 153 A.D.3d 1203, 1205 (1st Dept., 2017) the Appellate Division, first department held that the “presumption of legitimacy”, applies to a child born to a same-sex married couple. There the court applied the presumption of legitimacy to a married gay male couple, one member of whom wanted to vacate the adoption of their child by the other man’s new partner.

In Matter of Christopher YY. v Jessica ZZ., _____ AD3d _____, 2018 NY Slip Op 00495, *5-6 (3d Dept., 2017) the Third Department held that the “presumption of legitimacy” applied to a a married lesbian couple and that, therefore, a paternity petition filed by the male sperm donor must fail. The court pointed out that typically the presumption is rebuttable in the law” upon clear and convincing evidence excluding the [spouse] as the child’s [parent] or otherwise tending to prove that the child was not the product of the marriage,” quoting Matter of Beth R. v. Ronald S., 149 A.D.3d at 1217. In cases involving opposite-gender spouses, the rebuttal happens, for instance, with “proof that a husband did not have ‘access to’ his wife at the time that she conceived a child and he acknowledged that he was not the biological father, combined with testimony that the child was conceived during a trip with the putative father with whom his wife was in a monogamous relationship,” citing Matter of Beth R. v. Ronald S. But applying case law on rebuttal to same-gender spouses is “inherently problematic, as it is not currently scientifically possible for same-gender couples to produce a child that is biologically the product of the marriage,” and the “changing legal and social landscape requires reexamination of the traditional analysis governing the presumption of legitimacy.”

In Matter of Joseph O. v Danielle B. ,2018 NY Slip Op 01192 (2d Dept., 2018) the Appellate Division, Second Department observed that it is an established legal presumption that every child born during a marriage is the legitimate child of both spouses (see Domestic Relations Law § 24[1]; Family Ct Act § 417) and that the respondents correctly contended that because the child was conceived and born to the lesbian respondents during their marriage, there was a presumption that the child is the legitimate child of both respondents (see Domestic Relations Law § 24[1]; Family Ct Act § 417; Matter of Christopher YY. v Jessica ZZ., _____ AD3d _____, 2018 NY Slip Op 00495, *5-6; Matter of Maria-Irene D. [Carlos A.-Han Ming T.], 153 AD3d 1203, 1205). The presumption of legitimacy is rebuttable (see Matter of Findlay, 253 NY 1, 7), and thus its application alone did not warrant the summary denial of a paternity petition brought by the sperm donor. However, the Appellate Division found that the respondents were entitled to dismissal of the paternity petition on the ground of equitable estoppel and it was not necessary to determine if the presumption of legitimacy was rebutted.

Supreme Court

Supreme Court Dismisses Pleading as Spoliation Sanction

In *Crocker C. v Anne R.* 2018 WL 846746 (Sup. Ct., 2018) Unreported Disposition Supreme Court found that that the plaintiff knowingly and purposefully violated the defendant's attorney-client privilege through an ongoing course of conduct of intercepting hundreds of her attorney-client communications and "listening in" on her attorney-client privileged consultations. It also found that the plaintiff engaged in spoliation of evidence when he installed multiple data "wiping" applications and used them to destroy much of the spyware data on his computing devices. Here, plaintiff commenced legal action against defendant, monitored her communications and physical whereabouts in real-time using spyware, 51 violated her attorney-client privilege and then willfully destroyed the only remaining evidence that would reveal the extent of his violation of that privilege

The Court observed that historically, New York courts have applied strong spoliation sanctions even for inadvertent, negligent spoliation of evidence. In *Kirkland v New York City Hous. Auth.*, the Appellate Division, First Department held that dismissal of the case was appropriate where the spoliation was intentional or negligent (236 AD2d 170, 666 NYS2d 609, 611 [1 Dept.,1997]; see also *Standard Fire Ins. Co. v Federal Pacific Elec. Co.*, 14 AD3d 213, 786 NYS2d 41 [1 Dept.,2004]). In *Kirkland*, the Appellate Division, First Department found that the severe sanction of dismissal was appropriate on the basis of the patent "unfairness (in) allowing a party to destroy evidence and then to benefit from the conduct or omission" (666 NYS2d at 611). The Court of Appeals in *Ortega v City of New York*, citing favorably to the *Kirkland* and *Standard Fire Ins. Co.* decisions, held that: New York courts therefore possess broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference...Where appropriate, a court can impose the ultimate sanction of dismissing the action or striking responsive pleadings, thereby rendering a judgment by default against the offending party (9 NY3d 69, 75, 845 NYS2d 773 [2007]). In 2015, the New York Court of Appeals in *Pegasus Aviation I, Inc. v. 41 Varig Logistica S.A.*, adopted the standards set forth by the Appellate Division, First Department in the *VOOM* decision holding that a party seeking sanctions for spoliation of evidence must show: (1) that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, (2) that the evidence was destroyed with a "culpable state of mind," which would include negligence, and (3) that the destroyed evidence was relevant to, or would have supported, the seeking party's claim or defense (26 NYS3d 543, 26 NYS3d 218 [2015]). In addressing the second prong of the test in *Pegasus* the Court of Appeals held that if the evidence is determined to have been "intentionally or willfully destroyed" then the relevancy of that evidence to the seeking party's claim is presumed under the third prong of the inquiry. Certainly, while the determination of the appropriate sanction is within the discretion of the trial court the Court of Appeals in *Pegasus* made it abundantly clear that one of the key distinctions to guide the trial court is whether the destruction of evidence deprives the other party of the ability to establish his or her defense and whether the destruction of evidence was in bad faith. Evidence

can be spoliated along a full range of state of mind culpability: If the Court determines that the spoliation of evidence was “negligent” the party seeking spoliation sanctions must establish that the destroyed materials were relevant to their claim or defense (id. at 547-48; see also *Atilas v Golub Corp.*, 141 AD3d 1055, 36 NYS3d 533 [3 Dept.,2016] (court applied *Pegasus* and ruled that video footage sought “was not ‘relevant to [plaintiffs]’ claim...” after determining that “plaintiffs failed to prove that defendants intentionally or willfully destroyed [portion of] video while under obligation to present it...”). innocently, negligently, recklessly, intentionally, or in bad faith. A review of the New York case law related to the remedies correlating to the state of mind of the spoliator supported a general approach that as the culpability of the spoliating party decreases (from bad faith and intentional to negligent and unintentional) so too does the appeal of the punitive and deterrent purpose underlying the spoliation doctrine. The rationale was obvious. Where a party intentionally destroys evidence, the conduct raises a strong inference that the party thought the evidence would be so harmful to its case that the risk of getting caught destroying the evidence outweighed the risk of the opposing party obtaining the evidence and the possibility that the Court could have the evidence to consider. It appeared that the Court of Appeals decision in *Pegasus* intended to draw the distinction in a way that corresponds the sanction to the intent of the spoliator when possible so that less drastic sanctions are possible for spoliators who were not acting in bad faith so long as the spoliation did not result in insurmountable prejudice to the innocent party (26 NYS3d 543, 26 NYS3d 218 [2015]).

Based upon the totality of the facts and circumstances, including the plaintiff’s total and on-going violation of the defendant’s attorney-client privilege for more than four (4) months which included purloining hundreds of her attorney-client privileged communications and “listening in” on her attorney-client meetings, together with the allegation that he also “listened in” on her sessions with her treating psychiatrist, together with his intentional and bad faith spoliation of the only evidence that would have allowed the defendant and the Court to assess the extent of any negative inference, and in the interest of justice, the Court found that the appropriate remedy was to strike the plaintiff’s pleadings related to all financial relief except for the issue of child support, which is the right of the children. The Court struck plaintiff’s pleading seeking spousal support, equitable distribution and counsel fees. The Court did not strike the plaintiff’s pleadings relating to any request for child support if he is awarded custody inasmuch as child support is the right of the children and it would prejudice the children to strike his request for children support if he is awarded custody.

February 22, 2018

Table of Effective Dates of Changes to Poverty Income Guidelines Amount, Self-Support Reserve, Combined Parental Income Amount and Income Cap Since 2003.

The maintenance and child support provisions of Domestic Relations Law §§ 236 and 240, and Family Court Act §§ 412 and 413 refer to “income cap” with regard to maintenance and temporary maintenance awards, and “combined parental income” with

regard to child support awards. These statutes also refer to the terms “self-support reserve” and the “poverty income guidelines amount for a single person.”

For purposes of Child support awards pursuant to Domestic Relations Law § 240 the poverty income guidelines amount, self-support reserve, and combined parental income amount change yearly on March 1. For purposes of Maintenance and Temporary Maintenance awards pursuant to Domestic Relations Law § 236[B][5] and [B][5-a] the Income Cap for Maintenance and Temporary maintenance changes yearly on January 31. Different versions of Domestic Relations Law §§ 236 and 240 apply in matrimonial actions depending upon the date of the commencement of an action, and different amounts apply depending upon the date of the application. The following table has been created to enable counsel to quickly find the amount applicable to actions commenced since 2003 and is available for download, with footnote references and links to charts, on our website at www.nysdivorce.com

Table of Poverty Income Guidelines Amount, Self-support reserve, Combined Parental Income and Income Cap amounts since 2003.

Table I. Poverty Income Guidelines Amount, Self-support reserve, and Combined Parental Income

April 1, 2003

The poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services was \$8,980. The self-support reserve was \$12,123. The Combined Parental Income Amount was \$80,000.

April 1, 2004

The poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services was \$9,310. The self-support reserve was \$12,569. The Combined Parental Income Amount was \$80,000.

April 1, 2005

The poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services was \$9,570. The self-support reserve was \$12,920. The Combined Parental Income Amount was \$80,000.

April 1, 2006

The poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services was \$9,800. The self-support reserve was \$13,230. The Combined Parental Income Amount was \$80,000.

April 1, 2007

The poverty income guidelines amount poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services was \$10,210. The self-support reserve was \$13,783. The Combined Parental Income Amount was \$80,000.

April 1, 2008

The poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services was \$10,400. The self-support reserve was \$14,040. The Combined Parental Income Amount was \$80,000.

April 1, 2009

The poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services was \$10,830. The self-support reserve was \$14,620. The Combined Parental Income Amount was \$80,000.

April 1, 2010

The poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services was \$10,830. The self-support reserve was \$14,620. As of January 31, 2010, the Combined Parental Income Amount was \$130,000.

April 1, 2011

The poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services was \$10,890. The self-support reserve was \$14,702. The Combined Parental Income Amount was \$130,000.

April 1, 2012

The poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services was \$11,170. The self-support reserve was \$15,080. The combined parental income amount was \$136,000.

April 1, 2013

The poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services was \$11,490. The self-support reserve was \$15,512. The Combined Parental Income Amount was \$136,000.

April 1, 2014

The poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services was \$11,670. The self-support reserve was \$15,755. As of January 31, 2014, the Combined Parental Income amount was \$141,000.

March 1, 2015

The poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services was \$11,770. The self-support reserve was \$15,890. The Combined Parental Income amount was \$ 141,000.

April 1, 2016

The poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services was \$11,880. The self-support reserve was \$16,038. The Combined Parental Income Amount was \$143,000.

April 1, 2017

The 2017 poverty income guidelines amount for a single person was \$12,060. The 2017 self-support reserve was \$16,281. The Combined Parental Income Amount was \$143,000.

Table II. Income Cap

October 12 2010

DRL § 236[B][5-a], Temporary Maintenance Guidelines - Income Cap on Temporary Maintenance The “income cap” on temporary maintenance was \$500,000.

January 31, 2012

As of January 31, 2012, the “income cap” of the maintenance payor for temporary maintenance was up to and including \$524,000 of the payor’s annual income. DRL § 236[B][5-a] [b][5].

January 31, 2014

As of January 31, 2014, the “income cap” of the maintenance payor for temporary maintenance was up to and including \$543,000 of the payor’s annual income. DRL § 236[B][5-a] [b][5].

January 23, 2016

As of January 31, 2016, the “income cap” of the maintenance payor for temporary maintenance was up to and including \$178,000 of the payor’s annual income.

As of January 23, 2016, the “income cap” of the maintenance payor for post-divorce maintenance was up to and including \$175,000 of the payor’s annual income.

October 25, 2016

As of October 25, 2016, the “income cap” of the maintenance payor for temporary maintenance was up to and including \$178,000 of the payor’s annual income.

January 31, 2018

As of January 31, 2018, the “income cap” of the maintenance payor for temporary and post-divorce maintenance is up to and including \$184,000 per year.

February 16, 2018

Appellate Division, Second Department

Award of Costs, Pursuant to 22 NYCRR 130–2.1 Must Reflect Work “Actually Performed” Or Fees “Actually Incurred”

In Matter of Jagnarain v Aponte, --- N.Y.S.3d ----, 2018 WL 736122, 2018 N.Y. Slip Op. 00832 (2d Dept., 2018) nonparty-appellant Amal Oummih was the attorney for the mother in these child custody proceedings, and the nonparty-respondent David Badanes was the attorney for the father. On the eve of the trial scheduled for Monday, August 22, 2016, appellant sought to withdraw as counsel for the mother, because her mother had been gravely ill since July 2016. Instead of moving to withdraw as counsel, the appellant asked her client to discharge her as her attorney. On August 17, 2016, the client complied, and by letter dated August 18, 2016, the appellant informed the Family Court that she had been discharged. On Friday, August 19, 2016, the appellant notified the attorney for the child, who, in turn, notified the respondent. On the day of trial, no consent to change attorney form pursuant to CPLR 321 had been filed, because the retainer agreement for the mother’s new attorney had not been finalized. The respondent moved pursuant to 22 NYCRR 130–2.1 for costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees based upon the appellant’s failure to appear for the trial.

The Family Court, inter alia, determined that the appellant’s failure to appear at the trial was without good cause, granted the respondent’s motion and awarded him the sum of \$2,100.

The Appellate Division modified the order. It noted that pursuant to 22 NYCRR 130–2.1(a) “the court, in its discretion, may impose financial sanctions or, in addition to or in lieu of imposing sanctions, may award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, upon any attorney who, without good cause, fails to appear at a time and place scheduled for an action or proceeding to be heard before a designated court.” Here, Family Court providently exercised its discretion in granting the respondent’s motion and appellant’s failure to properly notify the Family Court and the other parties of her dilemma, and the nature of the harm caused

by her nonappearance, which prolonged the custody litigation, warranted an award of costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees. However, the award of costs, in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, did not reflect work "actually performed" or fees "actually incurred". Accordingly, it reduced the award of costs from the sum of \$2,100 to the sum of \$600.

Proper to Consider as Factor in Awarding Maintenance to Plaintiff Inheritance That Defendant Was Entitled to Receive, Even Though It Was Separate Property.

In *Cullen v Cullen*, --- N.Y.S.3d ----, 2018 WL 635171, 2018 N.Y. Slip Op. 00541 (2d Dept., 2018) the parties were married in August 1982 and plaintiff commenced this action for a divorce and ancillary relief in January 2009 after 26 years of marriage. In September 2012, the parties entered into a stipulation of undisputed facts resolving issues relating to the equitable distribution of certain marital property. During the marriage, the defendant owned and operated Hudson Marine, Inc., a diving services company, while the plaintiff was a full-time mother and homemaker.

The Appellate Division held that Supreme Court providently exercised its discretion in awarding the plaintiff maintenance for a period of eight years, in the sum of \$2,200 per month for the first five years, and in the sum of \$1,000 per month for the last three years. The court properly considered as one factor in awarding maintenance to the plaintiff the inheritance that the defendant was entitled to receive from his aunt's estate, even though the inheritance was the defendant's separate property and not subject to equitable distribution. Additionally, because Hudson constituted a tangible income-producing asset, the court did not err in awarding the plaintiff a distributive share of Hudson in addition to maintenance (see *Keane v. Keane*, 8 N.Y.3d 115, 122, 828 N.Y.S.2d 283, 861 N.E.2d 98).

Supreme Court providently exercised its discretion in equitably distributing the marital assets. The plaintiff was properly awarded \$105,250, representing a 25% share of the value of Hudson as of the date of commencement. Given the court's discretion to establish the valuation date of assets, and the parties' stipulation as to the value of Hudson on the date of commencement, the court did not err in employing the date of commencement as the valuation date for Hudson. It held that the court did not place undue emphasis on the inheritance that he was entitled to receive from his aunt's estate, and was permitted to consider the inheritance as a factor in equitably distributing the marital assets (see Domestic Relations Law § 236 [B][5][d][4], [9]; *Owens v. Owens*, 107 A.D.3d at 1174, 967 N.Y.S.2d 465).

It rejected the defendant's contention that he was entitled to a separate property credit for his contributions to the down payment on the marital residence. His self-serving trial testimony that his aunt gave him a check for \$50,000, that his uncle gave him \$10,000, and that he used these funds toward the down payment, was unsupported by documentary evidence, and insufficient to establish his entitlement to a separate property credit. Additionally, Supreme Court properly found that the defendant failed to present sufficient evidence tracing the source of any funds used to purchase the marital residence to the sale of certain stock, which was purportedly the defendant's separate

property.

Appellate Division, Fourth Department

Childs Out of Court Statements Sufficiently Corroborated for FCA § 1046(A)(Vi) Exception to Hearsay Rule by Childs Age-Inappropriate Knowledge of Sexual Conduct

In Matter of William JB v Dayna LS, --- N.Y.S.3d ----, 2018 WL 668916, 2018 N.Y. Slip Op. 00774 (4th Dept., 2018) the Appellate Division affirmed an order which modified a prior custody order by awarding primary physical custody of the parties' daughter to petitioner, with supervised visitation with respondent. It held, inter alia, that Family Court did not abuse its discretion in determining that the daughter's out-of-court statements describing her alleged sexual abuse by the mother's boyfriend were sufficiently corroborated. Family Court Act § 1046(a)(vi) provides that a child's "previous statements ... 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." Corroboration may be provided by "[a]ny other evidence tending to support the reliability of [the child's] previous statements". Although section 1046 is applicable to child protective proceedings, the Court has routinely applied its provisions as "an exception to the hearsay rule in custody cases involving allegations of abuse and neglect ... where ... the statements are corroborated". It found that corroboration was provided by the daughter's age-inappropriate knowledge of sexual conduct which 'demonstrated specific knowledge of sexual activity. Moreover, the daughter's statements described unique sexual conduct that the boyfriend engaged in with the daughter, and the father submitted evidence that the mother and her boyfriend had admitted that the boyfriend engaged in such conduct with the mother during their sexual relations.

Parent Seeking Downward Modification of Child Support on Ground Physical Disability Interfered with His Ability to Maintain Employment Must "Offer Competent Medical Evidence to Substantiate" Claim

In Matter of Hwang v Tam, --- N.Y.S.3d ----, 2018 WL 668940, 2018 N.Y. Slip Op. 00768 (4th Dept., 2018) the Appellate Division affirmed an order confirming the Support Magistrate's determination that the father willfully violated a prior order to pay child support for the parties' children. It observed that a failure to pay support as ordered itself constitutes 'prima facie evidence of a willful violation and establishes the petitioner's direct case of willful violation, shifting to the respondent the burden of going forward" (Powers, 86 N.Y.2d at 69, 629 N.Y.S.2d 984, 653 N.E.2d 1154). To meet that burden, the respondent must offer some competent, credible evidence of his or inability to make the required payments. If the respondent contends that he or she was unable to meet the support obligation because a physical disability interfered with his or her ability to maintain employment, the respondent must "offer competent medical evidence to substantiate" that claim. That medical evidence must establish that the alleged physical disability affected his or her ability to work. Here, the father failed to offer any medical evidence to substantiate his claim that his disability prevented him from making any of the required payments. The fact that the father was receiving Social Security benefits did not preclude

a finding that he was capable of working where, as here, his claimed inability to work was not supported by the requisite medical evidence.

February 1, 2018

Appellate Division, Second Department

In *Taha v Elzemity*, --- N.Y.S.3d ----, 2018 WL 343624, 2018 N.Y. Slip Op. 00188 (2d Dept., 2018) the parties were married in 2007, and had three children. Shortly before their marriage, they entered into a prenuptial agreement, which provided, inter alia, that, in the event of separation or divorce, each party waived the right to the other's separate property, including property acquired from the proceeds of separate property acquired during the marriage; each party would keep separate bank accounts; and the plaintiff's maintenance obligation would be limited to a lump sum payment of \$20,000. In 2008, the parties moved into the marital residence, which was purchased with funds from the plaintiff's bank account, and the deed and mortgage were placed solely in his name. The plaintiff had been practicing medicine since 1987 and earned approximately \$300,000 annually. The defendant, who had been employed part-time as a sales person when the parties met, did not work outside the home during the marriage but dedicated herself to the care of the household and the parties' children, one with special needs. In October 2013, the plaintiff commenced the action for a divorce . The defendant moved to set aside the prenuptial agreement on the ground, inter alia, that it was unconscionable. The plaintiff cross-moved for summary judgment determining that the prenuptial agreement was valid and enforceable. After a hearing, the Supreme Court found that the prenuptial agreement was not unconscionable. The Appellate Division reversed. It held that an agreement that might not have been unconscionable when entered into may become unconscionable at the time a final judgment would be entered (see Domestic Relations Law § 236[B] [3]). The burden of proof as to unconscionability is on the party seeking to set aside the agreement. The defendant sustained her burden of establishing that the prenuptial agreement was, at the time this action was before the court, unconscionable. Enforcement of the agreement would result in the risk of the defendant's becoming a public charge. The defendant, who was unemployed, largely without assets, and the primary caregiver for the parties' young children, would, under the prenuptial agreement, receive only \$20,000, in full satisfaction of all claims, even though the plaintiff earned approximately \$300,000 annually as a physician Accordingly, the defendant's motion to set aside the prenuptial agreement should have been granted.

In *Matter of Rouster v Murray*, --- N.Y.S.3d ----, 2018 WL 343755, 2018 N.Y. Slip Op. 00151 (2d Dept., 2018) the petitioner was the live-in girlfriend of the appellant's brother. The petitioner and the appellant lived in the same building, on different floors. The petitioner filed a family offense petition against the appellant, alleging that she had physically attacked and verbally threatened her. After a fact-finding hearing, the Family Court determined that the petitioner established by a preponderance of the evidence that the appellant had committed the family offenses of menacing in the third degree and disorderly conduct. The Appellate Division reversed. It observed that pursuant to Family

Court Act § 812(1), the Family Court's jurisdiction in family offense proceedings is limited to certain prescribed criminal acts that occur between, inter alia, 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" (Family Ct Act § 812[1][e]). 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 is the petitioner's live-in boyfriend and the appellant's brother. The parties never resided together and their contact with one another had been purely by happenstance, as they lived in the same building. Accordingly, they do not have an intimate relationship within the meaning of Family Court Act § 812(1)(e), and Family Court lacked subject matter jurisdiction to entertain the family offense petition and to issue the order of protection

Supreme Court

In *RB, v. RJB*, Slip Copy, 2017 WL 6892993 (Table), 2017 N.Y. Slip Op. 51962(U) (Sup. Ct., 2017) Supreme Court held, inter alia, that the value of the food stamps received by plaintiff should be included in her annual income (see *Lattuca v Lattuca*, 129 AD3d 843, 845 [2015]) for purposes of making a pendente lite maintenance award.

January 19, 2018

The Tax Cuts and Jobs Act of 2017

By Joel R. Brandes

The Tax Cuts and Jobs Act of 2017 ("Act") repealed the deduction for alimony and maintenance payments and made other changes to the Internal Revenue Code which will affect the negotiation of separation agreements as well as maintenance and child support awards made after January 1, 2018. The provisions of the Act which effect the tax aspects of maintenance and child support, and are of interest to matrimonial lawyers are discussed in this brief summary of the changes.

Alimony Deduction

The most significant change is that the ("Act") repealed the deduction for alimony

payments for any divorce or separation instrument executed or modified after December 31, 2018. ¹

Under existing law ² alimony and separate maintenance payments made pursuant to a divorce or separation instrument are deductible by the payor spouse and includible in income by the recipient spouse.³

The Tax Cuts and Jobs Act of 2017, ⁴ eliminated the deduction by the payor spouse for alimony and separate maintenance payments. The Internal Revenue Code provisions that specify that alimony and separate maintenance payments were included in income were repealed.

The repeal is effective for any divorce or separation instrument executed after December 31, 2018, or for any divorce or separation instrument executed on or before December 31, 2018, and modified after December 31, 2018, if the modification expressly provides that these amendments apply to the modification.⁵ Alimony payments made pursuant to a divorce or separation instrument made on or after December 31, 2018, are no longer deductible by the payor or includable in the income of the recipient. Payments under existing orders continue to be deductible to the payor and are includable in the income of the recipient.

IRC. § 215, “Alimony, etc., payments” was repealed.⁶ It formerly provided, in part: “ In the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual’s taxable year.”⁷ For purposes of this section, the term “alimony or separate maintenance payment” was defined to mean any alimony or separate maintenance payment (as defined in section 71(b)) which is includible in the gross income of the recipient under section 71.⁸

Some of the conforming amendments are discussed below.

¹ IRC §24

² IRC §§ 61, 71, and 215.

³ IRC §§ 215(a), 61(a)(8) and 71(a).

⁴ Public Law No: 115-97.

⁵ Sec. 11051. Repeal of Deduction for Alimony Payments.

⁶ Former 26 U.S.C.A. § 215

⁷ Former I.R.C. § 215 (a)

⁸ Former I.R.C. § 215 (b)

IRC § 71 9 “Alimony and separate maintenance payments” was repealed. It formerly provided the general rule that gross income includes amounts received as alimony or separate maintenance payments.”¹⁰ It defined “alimony or separate maintenance payments” as any payment in cash if--(A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument, (B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215, (C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and (D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.¹¹ A “divorce or separation instrument” was defined as (A) a decree of divorce or separate maintenance or a written instrument incident to such a decree, (B) a written separation agreement, or (C) a decree (not described in subparagraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse. ¹²

IRC § 6113 “Gross income defined” which contains the general definition of “gross income” was amended by striking paragraph (a) (8) titled “Alimony and separate maintenance payments” and by redesignating paragraphs (9) through (15) as paragraphs (8) through (14), respectively. It had provided: “(a) General definition. -- Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: (8) Alimony and separate maintenance payments;

IRC § 62 14 “Adjusted gross income defined” was amended by striking paragraph (a) (10) which defined “adjusted gross income” in the case of an individual, to mean gross income minus the following deductions: ... (10) Alimony.--The deduction allowed by section 215.”¹⁵

Child Support

Child support payments pursuant to a divorce or separation instrument are not

9 Former 26 U.S.C.A. § 71, I.R.C. § 71.

10 Former I.R.C. § 71(a).

11 Former IRC § 71 (b)(1)

12 Former IRC § 71 (b)(2)

13 Former 26 U.S.C.A. § 61, I.R.C. § 61

14 Former 26 U.S.C.A. § 62, I.R.C. § 62 (a)

15 Former 26 U.S.C.A. § 62, I.R.C. § 62 (a) (10)

treated as alimony.¹⁶ The treatment of child support has not changed under the Act.

Enhancement of child tax credit through 2025 and new family credit

Under 2017 law an individual may claim a tax credit for each qualifying child under the age of 17. The amount of the credit per child is \$1,000. A child who is not a citizen, national, or resident of the United States cannot be a qualifying child.¹⁷

IRC § 24 (h) was added effective January 1, 2018¹⁸ and is titled “Special Rules for Taxable Years 2018 through 2025”.¹⁹ Under the Act the aggregate amount of child credits that may be claimed is phased out for individuals with income over certain threshold amounts. ²⁰ The otherwise allowable child tax credit is reduced by \$50 for each \$1,000 (or fraction thereof) of modified adjusted gross income (“AGI”) over \$75,000 for single individuals or heads of households, \$110,000 for married individuals filing joint returns, and \$55,000 for married individuals filing separate returns. For purposes of this limitation, modified AGI includes certain otherwise excludable income earned by U.S. citizens or residents living abroad or in certain U.S. territories. ²¹

The credit is allowable against both the regular tax and the alternative minimum tax (“AMT”). To the extent the child credit exceeds the taxpayer's tax liability, the taxpayer is eligible for a refundable credit (the “additional child tax credit”) equal to 15 percent of earned income in excess of \$3,000 (the “earned income” formula). ²²

Families with three or more children may determine the additional child tax credit using the “alternative formula,” if this results in a larger credit than determined under the earned income formula. Under the alternative formula, the additional child tax credit equals the amount by which the taxpayer's Social Security taxes exceed the taxpayer's earned income credit (“EIC”). ²³

¹⁶ IRC § 71(c).

¹⁷ Public law No. 115-97. (2017) See Conference Report at <http://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>

¹⁸ Act Sec. 11022 (b).

¹⁹ Act Sec. 11022 (a).

²⁰ Act Sec. 11022 (a). Increase in And Modification of Child Tax Credit, amending IRC § 24 by adding at the end new subsection “(h) SPECIAL RULES FOR TAXABLE YEARS 2018 THROUGH 2025; Applicable in case of a taxable year beginning after December 31, 2017, and before January 1, 2026. Act Sec. 11022 (b) provides that the amendment made by this section shall apply to taxable years beginning after December 31, 2017.

²¹ Public law No. 115-97 (2017). IRC §24(h). See Conference Report at <http://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>

²² Public law No. 115-97 (2017). IRC § 24(h)(6).

²³ Public law No. 115-97 (2017). IRC § 24(h).

Earned income is defined as the sum of wages, salaries, tips, and other taxable employee compensation plus net self-employment earnings. At the taxpayer's election, combat pay may be treated as earned income for these purposes. Unlike the EIC, which also includes the preceding items in its definition of earned income, the additional child tax credit is based only on earned income to the extent it is included in computing taxable income. For example, some ministers' parsonage allowances are considered self-employment income, and thus are considered earned income for purposes of computing the EIC, but the allowances are excluded from gross income for individual income tax purposes, and thus are not considered earned income for purposes of the additional child tax credit since the income is not included in taxable income. 24

Any credit or refund allowed or made to an individual under this provision (including to any resident of a U.S. possession) is not taken into account as income and is not be taken into account as resources for the month of receipt and the following two months for purposes of determining eligibility of the individual or any other individual for benefits or assistance, or the amount or extent of benefits or assistance, under any Federal program or under any State or local program financed in whole or in part with Federal funds. 25

The child tax credit is temporarily increased from \$1000 to \$2,000 per qualifying child.26

The credit is further modified to temporarily provide for a \$500 nonrefundable credit for each qualifying dependent, 27 other than a qualifying children. The provision generally retains the present definition of dependent. 28

The maximum amount refundable increases to and may not exceed \$1,400 per qualifying child.29 Additionally, in order to receive the child tax credit (i.e., both the refundable and non-refundable portion), a taxpayer must include a Social Security number for each qualifying child for whom the credit is claimed on the tax return. For these purposes, a Social Security number must be issued before the due date for the filing of the return for the taxable year. This requirement does not apply to a non-child dependent for whom the \$500 non-refundable credit is claimed.30

24 Public law No. 115-97 (2017). IRC § 24(h).

25 Public law No. 115-97 (2017). IRC § 24(h).

26 Public law No. 115-97 (2017). IRC § 24(h)(2).

27 As dependent is defined in IRC § 152,

28 Public law No. 115-97 (2017). IRC § 24(h)(4).

29 Public law No. 115-97 (2017). IRC § 24(h)(5). The Act uses an indexing convention that rounds the \$1,400 amount to the next lowest multiple of \$100.

30 Public law No. 115-97 (2017). IRC § 24(h)(7). Additionally, a qualifying child who is ineligible to receive the child tax credit because that child did not have a Social Security number as the child's taxpayer identification number may nonetheless qualify for the non-refundable \$500 credit.

The present age limit for a qualifying child is retained. Thus, a qualifying child is an individual who has not attained age 17 during the taxable year. 31

Finally, the adjusted gross income phaseout thresholds are modified. The credit begins to phase out for taxpayers with adjusted gross income in excess of \$400,000 (in the case of married taxpayers filing a joint return) and \$200,000 (for all other taxpayers). These phaseout thresholds are not indexed for inflation. 32

In 2026 the rules for the child tax credit revert to the rules in effect in 2017 with a maximum credit of \$1000 for a qualifying child and lower phaseouts. The provision for enhancement of child tax credit and new family credit is effective for taxable years beginning after December 31, 2017 and expires for taxable years beginning after December 31, 2025. 33

Personal and Dependent Exemptions

The personal exemption for tax year 2017 remains as it was for 2016: \$4,050. However, the exemption is subject to a phase-out that begins with adjusted gross incomes of \$261,500 (\$313,800 for married couples filing jointly). It phases out completely at \$384,000 (\$436,300 for married couples filing jointly.) 34

The Act suspended the personal and dependent exemptions from 2018 through 2025.³⁵ Taxpayers will be able to claim personal and dependent exemptions again in 2026.

Standard Deduction

The standard deduction for married filing jointly is \$12,700 for tax year 2017, up \$100 from the prior year. For single taxpayers and married individuals filing separately, the standard deduction rises to \$6,350 in 2017, up from \$6,300 in 2016, and for heads of households, the standard deduction will be \$9,350 for tax year 2017, up from \$9,300 for tax year 2016. 36

The Standard deduction is increased from 2018 through 2025. The standard deduction amounts are \$12,000 (single person), \$18,000 (head of household) and \$24,000

31 Public law No. 115-97 (2017). IRC §24(h).

32 Public law No. 115-97 (2017). IRC §24(h)(3).

33 Act Sec. 11022 (b). Public law No. 115-97 (2017). IRC §24(h)(7).

34 See <https://www.irs.gov/newsroom/in-2017-some-tax-benefits-increase-slightly-due-to-inflation-adjustments-others-are-unchanged>

35 See Act Sec. 11041. Suspension of Deduction for Personal Exemptions.

36 <https://www.irs.gov/newsroom/in-2017-some-tax-benefits-increase-slightly-due-to-inflation-adjustments-others-are-unchanged>

(married filing jointly).³⁷

Medical Expense Deduction

Medical expenses remain deductible. For 2017 and 2018, medical expenses are deductible to the extent they exceed 7.5% of AGI. In 2019, the threshold will increase to 10% of Adjusted gross income (AGI).³⁸

³⁷ Public law No. 115-97 (2017). See Conference Report at <http://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>

³⁸ Act Sec. 11022 (a). Public law No. 115-97 (2017). See Conference Report at <http://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>

January 16, 2018

Recent Legislation

Tax Cuts and Jobs Act of 2017

The Tax Cuts and Jobs Act of 2017, ⁱ inter alia, repealed the deduction for alimony payments for any divorce or separation instrument executed or modified after December 31, 2018. ⁱⁱ The child tax credit is temporarily increased to \$2,000 per qualifying child and to provide for a temporary \$500 nonrefundable credit for qualifying dependents other than qualifying children. ⁱⁱⁱ The Act eliminated the personal exemptions.^{iv} This discussion focuses on those provisions in the Act of interest to New York matrimonial lawyers.

Under existing law ^v alimony and separate maintenance payments made pursuant to a divorce or separation instrument are deductible by the payor spouse and includible in income by the recipient spouse.^{vi}

Child support payments pursuant to a divorce or separation instrument are not treated as alimony.^{vii}

The Tax Cuts and Jobs Act of 2017, ^{viii} eliminated the deduction by the payor spouse for alimony and separate maintenance payments. The Internal Revenue Code provisions that specify that alimony and separate maintenance payments were included in income were repealed.

The treatment of child support has not changed.

The repeal is effective for any divorce or separation instrument executed after December 31, 2018, or for any divorce or separation instrument executed on or before December 31, 2018, and modified after December 31, 2018, if the modification expressly provides that these amendments apply to the modification.^{ix}

I.R.C. § 215, “Alimony, etc., payments” was repealed.^x It formerly provided, in part: “ In the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual’s taxable year.”^{xi} For purposes of this section, the term “alimony or separate maintenance payment” was defined to mean any alimony or separate maintenance payment (as defined in section 71(b)) which is includible in the gross income of the recipient under section 71.^{xii}

Some of the conforming amendments are discussed below.

IRC §71^{xiii} “Alimony and separate maintenance payments” was repealed. It formerly provided the general rule that gross income includes amounts received as alimony or separate maintenance payments,^{xiv} and, among other things, defined “alimony or separate maintenance payments” and a “divorce or separation instrument.”^{xv}

IRC § 61^{xvi} “Gross income defined” which contains the general definition of “gross income” was amended by striking paragraph (a) (8) titled “Alimony and separate maintenance payments” and by redesignating paragraphs (9) through (15) as paragraphs (8) through (14), respectively. It had provided: “(a) General definition. -- Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: (8) Alimony and separate maintenance payments;

IRC § 62^{xvii} “Adjusted gross income defined” was amended by striking paragraph (a) (10) which defined “adjusted gross income” in the case of an individual, to mean gross income minus the following deductions: ... (10) Alimony.--The deduction allowed by section 215.”^{xviii}

Enhancement of child tax credit and new family credit

Under existing law an individual may claim a tax credit for each qualifying child under the age of 17. The amount of the credit per child is \$1,000. A child who is not a citizen, national, or resident of the United States cannot be a qualifying child.^{xix}

The aggregate amount of child credits that may be claimed is phased out for individuals with income over certain threshold amounts.^{xx} Specifically, the otherwise allowable child tax credit is reduced by \$50 for each \$1,000 (or fraction thereof) of modified adjusted gross income (“AGI”) over \$75,000 for single individuals or heads of households, \$110,000 for married individuals filing joint returns, and \$55,000 for married individuals filing separate returns. For purposes of this limitation, modified AGI includes certain otherwise excludable income earned by U.S. citizens or residents living abroad or in certain U.S. territories.^{xxi}

The credit is allowable against both the regular tax and the alternative minimum tax (“AMT”). To the extent the child credit exceeds the taxpayer's tax liability, the taxpayer is eligible for a refundable credit (the “additional child tax credit”) equal to 15 percent of earned income in excess of \$3,000 (the “earned income” formula).^{xxii}

Families with three or more children may determine the additional child tax credit using the “alternative formula,” if this results in a larger credit than determined under the earned income formula. Under the alternative formula, the additional child tax credit equals the amount by which the taxpayer's Social Security taxes exceed the taxpayer's earned income credit (“EIC”).^{xxiii}

Earned income is defined as the sum of wages, salaries, tips, and other taxable employee compensation plus net self-employment earnings. At the taxpayer's election, combat pay may be treated as earned income for these purposes. Unlike the EIC,

which also includes the preceding items in its definition of earned income, the additional child tax credit is based only on earned income to the extent it is included in computing taxable income. For example, some ministers' parsonage allowances are considered self-employment income, and thus are considered earned income for purposes of computing the EIC, but the allowances are excluded from gross income for individual income tax purposes, and thus are not considered earned income for purposes of the additional child tax credit since the income is not included in taxable income.^{xxiv}

Any credit or refund allowed or made to an individual under this provision (including to any resident of a U.S. possession) is not taken into account as income and is not be taken into account as resources for the month of receipt and the following two months for purposes of determining eligibility of such individual or any other individual for benefits or assistance, or the amount or extent of benefits or assistance, under any Federal program or under any State or local program financed in whole or in part with Federal funds.^{xxv}

The child tax credit is temporarily increased to \$2,000 per qualifying child. The credit is further modified to temporarily provide for a \$500 nonrefundable credit for qualifying dependents other than qualifying children. The provision generally retains the present-law definition of dependent.^{xxvi}

The maximum amount refundable may not exceed \$1,400 per qualifying child.^{xxvii} Additionally, in order to receive the child tax credit (i.e., both the refundable and non-refundable portion), a taxpayer must include a Social Security number for each qualifying child for whom the credit is claimed on the tax return. For these purposes, a Social Security number must be issued before the due date for the filing of the return for the taxable year. This requirement does not apply to a non-child dependent for whom the \$500 non-refundable credit is claimed.^{xxviii}

The present-law age limit for a qualifying child is retained. Thus, a qualifying child is an individual who has not attained age 17 during the taxable year.^{xxix}

Finally, the adjusted gross income phaseout thresholds. Under the conference agreement are modified. The credit begins to phase out for taxpayers with adjusted gross income in excess of \$400,000 (in the case of married taxpayers filing a joint return) and \$200,000 (for all other taxpayers). These phaseout thresholds are not indexed for inflation.^{xxx}

The provision expires for taxable years beginning after December 31, 2025. The provision is effective for taxable years beginning after December 31, 2017.^{xxxi}

Appellate Division, First Department

Attorney Sanctioned for prosecuting a meritless appeal

In *Sonkin v Sonkin*, --- N.Y.S.3d ----, 2018 WL 256523, 2018 N.Y. Slip Op. 00011 (1st Dept., 2017) the Appellate Division affirmed an order which denied plaintiff's motion to invalidate and vacate the parties' divorce judgment on the ground that defendant did not personally sign an updated statement of net worth and the stipulation of settlement that

was eventually incorporated but not merged into the judgment. Plaintiff contended on appeal that there were no documents before the motion court to warrant dismissal of the complaint based on documentary evidence pursuant to CPLR 3211(a)(1). However, the court cited the documentary evidence that was proffered which served as a complete defense to plaintiff's causes of action. The Appellate Division granted defendant's request that it impose sanctions upon plaintiff and his counsel (22 NYCRR 130-1.1[a]). The action below, and the appeal before it, both of which counsel prosecuted, were plainly without merit (22 NYCRR 130-1.1[c][1]). Moreover, the appeal constituted plaintiff's third unsuccessful challenge in the Court to the stipulation of settlement, which the parties entered into in 2012. In its 2016 decision and order, which affirmed, inter alia, an award of counsel fees to defendant, it held that the award was proper based in part on plaintiff's "multiple, unsuccessful attempts to void or rescind the support provisions contained in the stipulation" (Sonkin, 137 A.D.3d at 636, 28 N.Y.S.3d 361). Where a matrimonial litigant engages in a "relentless campaign to prolong th[e] litigation," sanctions in the Appellate Division are appropriate (Heilbut v. Heilbut, 18 A.D.3d 1, 8, 792 N.Y.S.2d 419 [1st Dept. 2005]; 22 NYCRR 130-1.1[c][2]). A sanction was imposed upon plaintiff in the amount of \$5,000, for engaging in frivolous conduct. A sanction was imposed upon plaintiff's attorney, in the amount of \$5,000, for frivolous appellate practice.

Appellate Division, Second Department

Appellate Division holds court must consider child's best interests in determining whether to apply doctrine of judicial estoppel in paternity proceeding

In *Matter of Fahima A v Shah A*, --- N.Y.S.3d ----, 2017 WL 6601554, 2017 N.Y. Slip Op. 09122 (2d Dept., 2017) the mother commenced a proceeding to declare Shah A. the father of the child. The mother's husband, Sayeed A., moved, inter alia, to dismiss the petition, contending that it was barred, among other things, by the doctrine of judicial estoppel. Family Court granted Sayeed's motion without conducting a hearing. The Appellate Division reversed and remitted for a "best interests" hearing. It noted that under the doctrine of judicial estoppel, a party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed (*Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 17, 61 N.E.3d 488). Nevertheless, the "paramount concern" in a paternity proceeding is the child's best interests. The governing statute provides that a petition for genetic testing to determine paternity shall be denied when a court makes a written finding that testing "is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman" (Family Ct Act § 532[a]; see Family Ct Act § 418[a]). "The issue does not arise between two adults; the case turns exclusively on the best interests of the child. Similarly, the child's best interests must be considered when applying the doctrine of judicial estoppel." Family Court dismissed the petition based on evidence demonstrating that the mother had named Sayeed as the child's father in prior court filings in a related matrimonial action in which she obtained support for the child. However, the court failed to consider the child's best interests in making that

determination. Since the petition was dismissed without a hearing, the record was inadequate for the Court to make any informed determination as to the child's best interests.

January 1, 2018

Appellate Division, Third Department

Excess payments made by husband under temporary order may be considered at trial "in appropriately adjusting the equitable distribution award"

In *Rouis v Rouis*, --- N.Y.S.3d ----, 2017 WL 6519456, 2017 N.Y. Slip Op. 08928 (3d Dept., 2017) Plaintiff (wife) and defendant (husband) were married in 1993 and had two children (born in 1997 and 1999). The wife commenced the action for divorce in August 2014. In September 2015, the wife moved for, inter alia, temporary maintenance. Supreme Court granted the wife, among other things, temporary maintenance (\$1,958 per month) and child support (\$2,720 per month) and required the husband to pay for the carrying costs and upkeep of the marital home (\$4,859 per month), private school for the youngest child (\$848 per month), health insurance for the family (\$1,921 per month), interim counsel fees (\$10,000) and the wife's vehicle and fuel costs (\$644 per month).

The Appellate Division held that the awards were excessive and should be reduced. Supreme Court's combined monthly awards amounted to an annual award of \$155,400 plus \$10,000 in interim counsel fees, to be paid from the husband's annual gross income of \$183,300.50 (for purposes of maintenance) as calculated by the court based upon his 2013 tax return. In calculating the temporary maintenance award, Supreme Court applied the statutory formula (see Domestic Relations Law § 236[B][5-a][c][1]), which "created a substantial presumptive entitlement intended to provide consistency and predictability in calculating temporary spousal maintenance awards." The wife was awarded exclusive use and possession of the marital home and resided there with the younger child; the older child also resided there when home from college. The wife also requested, on top of the presumptive maintenance award, that the husband pay \$4,859 per month for the home's carrying costs, including the mortgage, taxes, utilities, insurance and upkeep. The court essentially credited the husband for one half of the carrying costs on the home (\$2,429.50 per month) by reducing the presumptive maintenance award by that amount, resulting in a temporary maintenance award of \$1,958 per month. Supreme Court then ordered the husband to pay the full monthly carrying costs on the home (\$4,859) in which he did not reside. When the wife's vehicle expenses are added (\$644 per month), this resulted in a total combined monthly award of \$7,461, plus tuition (\$848 per month) and child support. The net effect of Supreme Court's order was that the husband was paying the full presumptive maintenance award plus one half of the carrying costs on the home and the wife's vehicle expenses. The Appellate Division recognized that it has been held that "[t]he formula to determine temporary spousal maintenance that is outlined in Domestic Relations Law § 236(B)(5-a)(c) is intended to cover all of the payee spouse's basic living expenses, including housing costs, the costs of food and clothing, and other usual expenses" (*Su v. Su*, 128 A.D.3d at 950, 11 N.Y.S.3d 611). In addition, the court ordered the husband, who no longer had family health coverage from his prior elective office, to obtain and pay the full

amount of “equivalent coverage,” which was estimated to cost \$23,052 per year, or \$1,921 monthly, and apportioned an incorrect pro rata share of unreimbursed medical expenses. The husband was also ordered to pay the entire cost of the younger child’s private school tuition.

The Appellate Division held that while requiring the husband to pay a portion of the housing costs may have been appropriate, Supreme Court should have discussed why the presumptive award of temporary maintenance was “unjust or inappropriate” and the factors it considered. To that end, the court did not explain its reasons for substantially upwardly deviating from the presumptive maintenance award or the basis for requiring the husband to pay the add-on living expenses and half of the housing expenses on top of the guideline amount (see Domestic Relations Law § 236[B][5-a][e][2]; *Su v. Su*, 128 A.D.3d at 949–950, 11 N.Y.S.3d 611; *Khaira v. Khaira*, 93 A.D.3d at 197–200, 938 N.Y.S.2d 513). It found that the combined award was excessive. It reduced the husband’s obligation to pay the carrying costs on the marital home by approximately one half of that excess amount, or \$1,540 per month, to \$3,319 per month. The temporary maintenance award of \$1,958 was not changed.

It found that Supreme Court miscalculated the parties’ pro rata shares of child support and remitted, the matter for immediate recalculation of the husband’s temporary child support obligation.

It noted that the excess payments made by the husband under the court’s temporary order may be considered at trial “in appropriately adjusting the equitable distribution award” (*Giannuzzi v. Kearney*, 127 A.D.3d at 1351, 4 N.Y.S.3d 561).

Sworn Testimony That Marriage Irretrievably Broken Down for A Period Of At Least Six Months Sufficient to Establish Cause of Action for Divorce Under Domestic Relations Law § 170(7)

In *Johnston v Johnston*, --- N.Y.S.3d ----, 2017 WL 6519486, 2017 N.Y. Slip Op. 08923 (3d Dept., 2017) Plaintiff (hereinafter the wife) and defendant (hereinafter the husband) were married in September 1989 and had two children (born in 1991 and 1995). In April 2014, the wife commenced the action.

The Appellate Division held that the husband’s sworn testimony that his marriage to the wife had irretrievably broken down for a period of at least six months was sufficient to establish, as a matter of law, his cause of action for divorce pursuant to Domestic Relations Law § 170(7). Having determined that the husband established irretrievable breakdown pursuant to Domestic Relations Law § 170(7), Supreme Court was under no obligation to grant the wife a judgment of divorce on the ground of adultery or constructive abandonment (see *Hoffer-Adou v. Adou*, 121 A.D.3d at 619, 997 N.Y.S.2d 7)

Where Parties Had Two Children Living in Two Different States Family Court Properly

Retained Jurisdiction Over Petition. To Hold Otherwise Would Compromise Each Child's Statutory Right to Sibling Visitation.

In *Matter of Korisa DD. on behalf of Morgan DD., v Michelle EE.* --- N.Y.S.3d ----, 2017 WL 6519625, 2017 N.Y. Slip Op. 08909 (3d Dept., 2017) after entering into an “Embryo Donation Agreement,” petitioner Korisa DD. gave birth to a son in 2006 (the older child) through in vitro fertilization, utilizing ova donated by respondent Michelle EE. and sperm donated by petitioner Wayne DD., Korisa DD.’s husband. Through the same fertilization process, Michelle EE. gave birth to a son in 2007 (the younger child), who is the genetic sibling of the older child. Petitioners maintain that the two children are aware of the genetic relationship, referring to each other as “bro,” and have developed a close familial relationship. Pursuant to a May 2014 consent order issued in a separate Family Court proceeding, Michelle EE. was permitted to relocate to Kentucky with the younger child. Further, Michelle EE. and her then spouse, respondent Michael FF., agreed that they would have joint custody of the younger child, with Michael FF. having defined parenting time in New York during school breaks and over the summer. Michelle EE. moved to Kentucky with the younger child in June 2014. In July 2015, petitioners commenced a proceeding on behalf of their son seeking sibling visitation pursuant to Family Ct Act § 651(b). Michelle EE. moved to dismiss the petition for lack of subject matter jurisdiction, contending that, under the Uniform Child Custody Jurisdiction Enforcement Act New York is no longer the “home state” of the younger child (Domestic Relations Law § 75-a [7]) because the younger child lived in Kentucky since June 2014. Family Court denied the motion, finding that it had subject matter jurisdiction pursuant to Family Ct Act § 651(b).

The Appellate Division affirmed. It observed that court of this state has jurisdiction to make an initial child custody determination only if, as pertinent here, New York is the child’s home state (see Domestic Relations Law § 76[1][a]). An initial determination “means the first child custody determination concerning a particular child” (Domestic Relations Law § 75-a [8]), which includes a visitation order (see Domestic Relations Law § 75-a [3]). It recognized that the younger child had resided in Kentucky for more than six months, making that state his home state under the UCCJEA (see Domestic Relations Law § 75-a [7]). However, simply focusing on the home state of one child would effectively deprive each state of initial jurisdiction in this matter. The operative distinction here was that the issue of visitation concerned both children, and New York was unquestionably the home state of the older child. Moreover, Family Court retained continuing jurisdiction over the younger child through the consent order providing respondents with joint custody of the younger child, who had significant contacts with New York (see Domestic Relations Law § 76-a [1][a]). Although not determinative, it was important to recognize that the Embryo Donation Agreement included a “Choice of Law and Jurisdiction” provision specifying that the agreement “shall be governed by, construed and enforced in accordance with the laws of the State of New York” (see *Matter of Eldad LL. v. Dannai MM.*, 155 A.D.3d 1336, 65 N.Y.S.3d 284, — [2017]). In this context, Family Court properly retained jurisdiction over the petition. To hold otherwise would compromise each child’s statutory right to sibling visitation. The petition to establish visitation between these two children fell squarely within the embrace of Domestic Relations Law § 71 and Family Ct Act § 651 [b]).

Mother Who Petitioned for Enforcement After the Father Refused to Honor Tennessee Order to Immediately Return Child entitled to “Necessary and Reasonable Expenses Incurred (Domestic Relations Law § 77–K [1] Where Father Failed to Established Award Would Be Inappropriate.

In *Matter of Jessica CC v William DD*, --- N.Y.S.3d ----, 2017 WL 6519622, 2017 N.Y. Slip Op. 08910 (3d Dept., 2017) the mother filed a Tennessee order awarding her custody for registration in New York pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (Domestic Relations Law § 77–d). The father then refused to turn over the child in defiance of the Tennessee order, prompting the mother to petition Family Court for enforcement of the Tennessee order and obtain an ex parte temporary order awarding her sole legal and physical custody of the child pending further proceedings. The child was turned over to the mother prior to an appearance on the pending petitions and, at that appearance, the father withdrew his custody modification petition and conceded that Tennessee was the appropriate forum. The mother requested an award of costs and counsel fees pursuant to Domestic Relations Law § 77–k. Upon Family Court’s direction, the mother submitted paperwork reflecting that she had incurred \$4,262.29 in costs and counsel fees. After considering those papers, as well as the father’s written opposition, Family Court found that the requested amount was appropriate and ordered the father to pay it.

The Appellate Division affirmed. It noted that the mother was obliged to petition for enforcement after the father refused to honor the Tennessee order and its direction that he “immediately return the child to the [m]other” under penalty of contempt. Inasmuch as the mother succeeded in her enforcement efforts, with the father turning over the child to her and acknowledging that Tennessee was the appropriate venue, she was entitled to “necessary and reasonable expenses incurred by or on [her] behalf ..., including costs, communication expenses, attorney’s fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be inappropriate” (Domestic Relations Law § 77–k [1]). The father agreed that Family Court should resolve the issue on papers and failed to thereafter request a hearing. Counsel for the mother submitted an affirmation, with time sheets annexed to it, explaining that she had performed \$3,750 of work but had agreed to cap her bill for the mother at \$2,000. The mother also submitted her own affidavit in which she set forth the travel and lodging expenses incurred as the result of her quest to recover the child in New York. The father responded by nitpicking the amount sought and claiming that any award would be inappropriate given his allegedly virtuous aims. The costs and counsel fees sought were reasonable and in light of the father’s refusal to turn the child over to the mother despite an order directing him to do so from a jurisdiction that he never disputed was a correct one, the father failed to establish that the award would be inappropriate (Domestic Relations Law § 77–k [1]).

Appellate Division, Fourth Department

Where Separation Agreements Unconscionable and Product of Overreaching Court Vacates Financial Provisions of Divorce Judgment

In Tuzzolino v Tuzzolino, --- N.Y.S.3d ----, 2017 WL 6546093, 2017 N.Y. Slip Op. 08991 (4th Dept., 2017) the parties were married in 1978 and entered into a separation agreement on October 30, 2013 and a modification agreement on July 7, 2014. In October 2015, plaintiff husband commenced an action seeking a divorce and to have the agreements set aside. Supreme Court denied his motion. The Appellate Division found that at the time the parties entered into the agreements, defendant wife was represented by counsel but plaintiff was not, which, while not dispositive, is a significant factor for us to consider. Another factor to consider is that the agreements did not make a full disclosure of the finances of the parties. Defendant, who had a master's degree in business administration and was a professor at a SUNY college, would receive two pensions upon retirement, neither of which was valued. The separation agreement did not provide for any maintenance for plaintiff despite the gross disparity in incomes and the length of the marriage and, while the modification agreement provided maintenance for plaintiff, it also required plaintiff to transfer his interest in the marital residence to defendant. In opposition to the motion, defendant averred that the parties "wanted an agreement whereby [plaintiff] would keep his income and retirement assets and I would keep mine." As shown by their statements of net worth, which were prepared after the agreements were executed, plaintiff's assets totaled approximately \$77,000 whereas defendant's assets, which included the marital residence, totaled approximately \$740,000. Based on its consideration of all the factors, the Appellate Division concluded that the agreements were unconscionable and were the product of overreaching by defendant and should be set aside. It reversed the judgment, granted the motion, and remitted the matter to Supreme Court to determine the issues of equitable distribution and maintenance.

Doctrine of Unclean Hands Applied to deny vacatur of divorce judgment

In Sui-Hsu Hsieh v Yen-Tung Teng, --- N.Y.S.3d ----, 2017 WL 6545844, 2017 N.Y. Slip Op. 09008 (4th Dept., 2017), defendant husband was ordered by a 2008 divorce to pay plaintiff wife a distributive award, maintenance, and child support. Shortly thereafter, defendant relocated to Taiwan and failed to comply with the judgment or with subsequent judgments ordering him to pay money to plaintiff. In August 2016 Defendant moved, inter alia, to vacate the judgment of divorce regarding the division of assets and his obligation to pay maintenance and child support. According to defendant, he learned in early 2016 that, during the marriage, plaintiff acquired property in Taiwan that she failed to disclose in her statement of net worth. The Appellate Division held that Supreme Court did not abuse its discretion in denying the motion based on the doctrine of unclean hands. "A trial court may relieve a party from the terms of a judgment of divorce on the grounds of fraud or misrepresentation (see CPLR 5015[a][3]), but the decision to grant such motion rests in the trial court's discretion" (VanZandt v. VanZandt, 88 AD3d 1232, 1233 [3d Dept. 2011]). The doctrine of unclean hands is an equitable defense and is applicable to the equitable relief sought by defendant, i.e., vacatur of the equitable distribution, maintenance, and child support provisions of the judgment of divorce.

December 16, 2017

Court Rules Amendments

22 NYCRR 137.6 (a)(1) Amended

NY Order 17-0021 amended 22 NYCRR 137.6 (a) (1) dealing with the Mandatory Arbitration Procedure to add a provision that where the attorney seeks to commence an action against the client for attorney's fees he must comply with the Fee Arbitration Rules. It modified 22 NYCRR 137.6 to read as follows

(a)(1) Except as set forth in paragraph (2), where the attorney and client cannot agree as to the attorney's fee or where the attorney seeks to commence an action against the client for attorney's fees, the attorney shall forward a written notice to the client, entitled Notice of Client's Right to Arbitrate, by certified mail or by personal service. The notice (i) shall be in a form approved by the board of governors; (ii) shall contain a statement of the client's right to arbitrate; (iii) shall advise that the client has 30 days from receipt of the notice in which to elect to resolve the dispute under this Part; (iv) shall be accompanied by the written instructions and procedures for the arbitral body having jurisdiction over the fee dispute, which explain how to commence a fee arbitration proceeding; and (v) shall be accompanied by a copy of the "request for arbitration" form necessary to commence the arbitration proceeding.

United States Court of Appeals, Second Circuit

Second Circuit defines "Retention" for purposes of the Hague Convention on International Child Abduction and Explains when the Convention Enters into Force

In *Marks v. Hochhauser* 2017 WL 5760345 (2d Cir., 2017) the Second Circuit held that for purposes of the Convention "retention" is a singular and not a continuing act; and that the Convention does not enter into force until a ratifying state accepts an acceding state's accession.

The parties were American citizens who were living in Hong Kong when their three sons were born, one in 2002 and twins in 2005. In July 2005, the parties and the children relocated to Bangkok, Thailand. In August 2015, Marks and Hochhauser were divorced, in Thailand, and the divorce judgment granted Hochhauser sole custody of the Children. On September 18, 2015, Hochhauser and the Children traveled to the United States to visit Hochhauser's ill mother. Before their departure, Hochhauser represented to Marks and the Thai court that she and the Children would stay in New York for three weeks and then

return to Thailand on October 10, 2015. On October 7, 2015, Hochhauser sent Marks an email as follows: "I have made the decision to remain in the United States with the boys. It is clear to me now that there is no workable solution for us to live in Thailand. This decision was based upon trying to build a future for both myself and them, not out of any anger toward you about the past or any desire to exclude you from their lives. The boys need you to continue to be an important part of their lives and I will do as much as I can to facilitate that. Hopefully we can find a way to build a working relationship for their benefit." On January 25, 2016, the Thai Court of Appeals vacated the trial court's judgment in part and held that Marks and Hochhauser "shall exercise joint custody of all of their three minor children."

Marks filed a petition for the return of the Children to Thailand on September 9, 2016, within one year of the date Hochhauser advised Marks that she and the Children would not be returning to Thailand. Hochhauser moved to dismiss the petition, arguing, *inter alia*, that any wrongful retention of the Children took place prior to the Convention's entry into force between the United States and Thailand. The district court granted the motion to dismiss the petition. It first concluded that "retention" is a singular and not a continuing act and that the singular act here occurred on October 7, 2015, when Hochhauser sent her email to Marks advising that she and the Children were not returning to Thailand. It then concluded that the Convention did not enter into force between the United States and Thailand until April 2016, after the United States accepted Thailand's accession to the Convention. The district court held that the retention occurred before the Convention entered into force between the two countries and entered judgment on November 7, 2016, granting the motion to dismiss the petition.

The Second Circuit affirmed. It agreed with the district court that "retention" for these purposes is a singular and not a continuing act. It concluded that the Convention contemplates that "retention" occurs on a fixed date. Here, that date was October 7, 2015, when Hochhauser advised Marks that she would not be returning with the Children to Thailand.

The Second Circuit observed that Article 35 of the Convention provides that it "shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States." Convention, art. 35. Hence, if the removal or retention occurs before the Convention has entered into force between two States, the Convention does not apply.

The Court noted that the Convention does not define "Contracting State," but Articles 37 and 38 provide two separate procedures for countries to accept the Convention. Under Article 37, "[t]he Convention shall be open for signature by the States which were Members of the Hague Conference of Private International Law [the 'CPIL'] at the time of its Fourteenth Session." Convention, art. 37. Once a State signs, the Convention must be "ratified, accepted or approved and the instruments of ratification, acceptance or approval" must be deposited with the Ministry of Foreign Affairs in the Netherlands. Convention, art. 37. Article 38 provides an acceptance procedure for states that were not members of the CPIL at the time of its fourteenth session. In lieu of ratification, these states may "accede" to the Convention. Article 38 explains that: Any other State may accede to the Convention. ... The accession will have effect only as

regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. ... The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance. Convention, art. 38. As Article 38 makes clear, accession requires the acceptance of other states before the Convention “will enter into force,” *i.e.*, the accession has effect only as to Contracting States that “have declared their acceptance of the accession.” *Id.*

At the time the Convention was opened for signature, the United States was a member of the CPIL and Thailand was not. The United States signed the Convention in 1981 and ratified it, thereby becoming a Contracting State, in 1988, and the Convention entered into force in the United States on July 1, 1988. See Contracting State Status Table; *Souratgar*, 720 F.3d at 102 n.5. Thailand acceded to the Convention, pursuant to Article 38, on August 14, 2002, and it entered into force in Thailand on November 1, 2002. *Id.* The United States accepted Thailand’s accession to the Convention on January 26, 2016. See *Acceptances of Accessions: Thailand*, Hague Conference on Private International Law, <https://www.hcch.net/en/instruments/conventions/status-table/acceptances/?mid=670> (last visited Sept. 26, 2017) (“Acceptances of Accessions Table”). The first day of the third calendar month after the United States accepted Thailand’s accession was April 1, 2016. See *id.*; Convention, art. 38.

The Court then held that the Convention does not enter into force until a ratifying state accepts an acceding state’s accession and that Article 35 limits the Convention’s application to removals and retentions taking place after the Convention has entered into force between the two states involved. Therefore, because the Convention did not enter into force between the United States and Thailand until April 1, 2016, after the allegedly wrongful retention of the children in New York on October 7, 2015, the Convention did not apply to petitioner’s claim.

Supreme Court

Supreme Court holds that Court In Matrimonial Action May grant an interim charging lien to outgoing attorney

In *Dayan v Dayan*, --- N.Y.S.3d ----, 2017 WL 6043430, 2017 N.Y. Slip Op. 27399 (Sup. Ct., 2017) Plaintiff’s incoming counsel moved for, inter alia, an order directing former counsel to turn over the file to plaintiff’s new attorney.

Supreme Court, held that in a matrimonial action the right to a charging lien must be held in abeyance in order to satisfy the dictates of *Charnow v. Charnow* (134 AD3d 875, 876, 22 N.Y.S.3d 126 [2d Dept., 2015]) which held that a charging lien is limited “to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interests already held by the client.” *Charnow*

creates the situation where a plaintiff cannot secure her file because the issue of a charging lien is not ripe for adjudication pendente lite since the case has not yet been tried and determined.

With regard to the retaining lien the Court held that it must be established that outgoing counsel has a right to a hearing on the issue of a retaining lien, and the court may set a security interest and an “interim charging lien.” That lien would then be subject to a further hearing at the conclusion of the trial and after decision to determine the amount of a “final charging lien” that would attach to proceeds that is limited “to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interests already held by the client” (Charnow at 876). The Court found that the wife’s claim of indigence was sufficiently controverted so as to require a hearing before a retaining lien could be extinguished and the Court could fix the required security pending completion of the case. The Court had to refer the matter to a hearing to determine plaintiff’s counsels appropriate fee and the posting of adequate security to satisfy the retaining lien.

The Court noted that an attorney of record who is discharged without cause possesses a charging lien pursuant to Judiciary Law § 475. In a matrimonial action a charging lien will be available “to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interest already held by the client. ’ *Moody v. Sorokina*, 50 AD3d 1522, 1523, 856 N.Y.S.2d 755. Where the attorney’s services do not create any proceeds, but consist solely of defending a title or interest already held by the client, there is no lien on that title or interest (*Charnow v. Charnow* 134 AD3d 875, 876, 22 N.Y.S.3d 126, 127–28 [2 Dept.2015]). A charging lien does not attach to an award of alimony or maintenance” (*Turner v. Woolworth*, 221 N.Y. 425, 117 N.E. 814 (1917); *Theroux v. Theroux*, 145 A.D.2d 625, 627, [2d Dept., 1988]) or an award of child support (CPLR 5205[d][3])” (*Haser v. Haser*, 271 A.D.2d 253, 254, [1st Dept., 2000]). It noted that *Mura v. Mura* , 128 AD3d 1344, 1347, 7 N.Y.S.3d 766 (4d Dept., 2014), held that a charging lien could attach to a child support award because “plaintiff did not seek to enforce the 16–year–old support obligation until the parties’ children, who were the intended beneficiaries of the support, were either emancipated or nearly emancipated. In light of the fact that the divorce action was still pending, and no final decision on equitable distribution had been determined, there was no “recovery” for the charging lien to attach to. Supreme Court deemed the application as one for a final charging lien and denied it without prejudice as premature. It held that case law prevents the attorney, pendente lite, from attaching a final charging lien to any fund prior to a determination as to whether a “new fund” has been created by the attorney’s efforts as the matter had not yet proceeded to trial and no judgments had been issued. Thus, any establishment of a charging lien had to be delineated as an interim charging lien subject to a hearing on a final charging lien once the matter was concluded.

The Court referred this issue of fixing the security interest and interim charging lien to a hearing to a Referee to hear and report subject to compliance with 22 NYCRR part 1400 (*Hovanec v. Hovanec*, 79 AD3d 816, 817, 912 N.Y.S.2d 442 [2d Dept., 2010]). It directed that : “If any lien is established by the Court, plaintiff’s former attorney will then be ordered by the Court to turn over the file for posting adequate security under the present statutory and case law requirements or outgoing counsel may be granted an

“interim charging lien.” The interim charging lien would serve to prevent this matter from further delay and give counsel adequate security to extinguish the retaining lien. However, that security interest and the “interim charging lien” would be subject to further adjustment once the case has been properly adjudicated and then a further hearing can be held to determine what role Mr. Buttermann or his firm had in obtaining the result achieved in equitable distribution consistent with the dictates of Charnow. Then and only then would a final charging lien attach.”

December 1, 2017

Court of Appeals

Dismissal of A Neglect Petition Divests Family Court of Jurisdiction to Issue Further Orders or Impose Additional Conditions on A Child's Release

In Matter of Jamie J., 2017 WL 5557887, 2017 NY Slip Op 08161 (2017) the Court of Appeals, in an opinion by Judge Wilson, held that Family Court lacks subject matter jurisdiction to conduct a permanency hearing pursuant to Family Court Act article 10-A once the underlying neglect petition brought under Article 10 has been dismissed for failure to prove neglect. The dismissal of a neglect petition terminates Family Court's jurisdiction.

Jamie J. was born in November 2014. A week later, at the request of the Wayne County Department of Social Services, Family Court directed her temporary removal from Michelle E.C.'s custody pursuant to an ex parte pre-petition order under FCA § 1022. Four days after that, the Department filed its FCA article 10 neglect petition. More than a year later, on the eve of the fact-finding hearing held to determine whether it could carry its burden to prove neglect, the Department moved to amend its petition to conform the pleadings with the proof. Family Court denied that eleventh-hour motion as unfairly prejudicial to Michelle E.C. and to the attorney for Jamie J. After hearing evidence, Family Court found that the Department failed to prove neglect, and therefore dismissed the petition. The Department did not appeal that decision. Family Court did not release Jamie J. into her mother's custody when it dismissed the article 10 neglect petition. Instead, at the Department's insistence and over Michelle E.C.'s objection, it held a second permanency hearing, which had been scheduled as a matter of course during the statutorily required first permanency hearing in the summer of 2015. Family Court and the Department contended that, even though the Department had failed to prove any legal basis to remove Jamie J. from her mother, article 10-A of the FCA gave Family Court continuing jurisdiction over Jamie J. and entitled it to continue her placement in foster care. Family Court held the second permanency hearing on January 19, 2016. There, Michelle E.C. argued, as she did here, that the dismissal of the neglect proceeding ended Family Court's subject matter jurisdiction and should have required her daughter's immediate return. Solely to expedite her appeal of that issue, Michelle E.C. consented to a second permanency hearing order denying her motion to dismiss the proceeding and continuing Jamie J.'s placement in foster care. The Appellate Division, with two Justices dissenting, affirmed.

Judge Wilson observed that the appeal presented a straightforward question of statutory interpretation: does FCA article 10-A provide an independent grant of continuing jurisdiction that survives the dismissal of the underlying article 10 neglect petition? The Court rejected the Departments “hyperliteral reading of section 1088, divorced from all context,” to argue that Family Court's pre-petition placement of Jamie J. under section 1022 triggered a continuing grant of jurisdiction that survived the eventual dismissal of the neglect petition. In other words, even if the Family Court removes a child who has not been neglected or abused, it has jurisdiction to continue that child's placement in foster care until and unless it decides otherwise. The Court held that Section 1088's place in the overall statutory scheme, the legislative history of article 10-A, and the dictates of parents' and children's constitutional rights to remain together compelled the opposite conclusion. Family Court's jurisdiction terminates upon dismissal of the original neglect or abuse petition. Observing that the Court held in *Matter of Tammie Z.*, “if abuse or neglect is not proved, the court must dismiss the petition . . . at which time the child is returned to the parents” (66 NY2d 1, 4-5 [1985]), nothing in the legislative history of article 10-A suggested that its drafters intended to overturn the long-established rule, promulgated by pre-2005 decisions of the Court and of the Appellate Division, that the dismissal of a neglect petition divests Family Court of jurisdiction to issue further orders or impose additional conditions on a child's release. Instead, that history demonstrated that the drafters intended only to correct a technical issue that plagued article 10 and threatened the State's continued access to federal funding under Title IV of the Social Security Act. The order was reversed and the January 26, 2016 permanency order vacated.

Appellate Division, First Department

Appellate Division holds that under circumstances of case, court properly awarded prospective maintenance only. Credit properly denied for Payments towards mortgage and maintenance on marital residence. Such payments were made in satisfaction of defendant's own contractual obligations and did not constitute voluntary payments contemplated under Domestic Relations Law § 236(B) (7) (a)

In *Aristova v. Derkach*, 2017 WL 5575056 (1s Dept., 2017) on December 27, 2004, the parties signed an agreement, effective as of August 1, 2004 (the Termination Agreement), pursuant to which they terminated a preexisting separation agreement but agreed, among other things, that property each had acquired before August 1, 2004 would be separate property.

The Appellate Division held that the court correctly determined equitable distribution in accordance with the terms of the Termination Agreement, upon its finding after trial that defendant failed to prove that the Termination Agreement, which was written, signed, and properly acknowledged, was invalid. While he was not represented by counsel, defendant, an engineer with an MBA, was sufficiently sophisticated to be aware that he might need counsel, particularly given plaintiff's forthright explanation that her purpose in entering into the agreement was to protect her rights to an apartment she had purchased before August 1, 2004, and the fact that she had given him a week to

review the agreement before signing it. Moreover, plaintiff, although an attorney, was not a matrimonial lawyer, and needed the help of online forms in drafting the agreement.

The Appellate Division held that under the circumstances of this case, the court properly awarded prospective maintenance only. During the first two years following commencement of the action, the parties lived together in the marital residence with their children. The trial evidence showed that, during that period, plaintiff voluntarily bore the majority of the family's expenses, including costs associated with the parties' cooperative apartment, and the family's medical and dental insurance costs, as well as groceries and other family expenses. Defendant did not move for pendente lite relief until two months before the scheduled trial date.

The Appellate Division rejected Defendant's contention that he was entitled to a credit against the retroactive child support award because it was unsupported by a showing of any payments he made for child-related expenses. To the extent he relied on his payments towards the mortgage and maintenance on the marital residence, it found that these payments were made in satisfaction of defendant's own contractual obligations and did not constitute the voluntary payments contemplated under Domestic Relations Law § 236(B) (7) (a) (see *Krantz v. Krantz*, 175 A.D.2d 865 [2d Dept 1991], accord *Sergeon v. Surgeon*, 216 A.D.2d 122 [1st Dept 1995]).

Appellate Division, Second Department

Family Court Act § 424–a(a) requires that parties to child support proceedings submit most recently filed income tax returns. Where petitioner mother failed without good cause to submit most recent tax returns Support Magistrate improvidently exercised discretion in failing to adjourn proceeding until mother filed required documents

In *Matter of Feixia Wi-Fisher v Michael*, --- N.Y.S.3d ----, 2017 WL 5473843 (2d Dept., 2017) the Appellate Division held that the Support Magistrate properly imputed income to the father based on his future earning capacity and the funds he received from his wife to pay his expenses, where he had access to his wife's bank accounts which were used to pay the household's expenses.

The Appellate Division observed that Family Court Act § 424–a(a) requires that parties to child support proceedings submit certain required financial documents, including the party's most recently filed state and federal income tax returns. When a petitioner fails without good cause to file the required 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]). Here, the mother failed without good cause to submit her most recent tax returns. Further, her testimony and the financial documents she did submit did not remedy her failure to make complete financial disclosure, since the mother's financial disclosure affidavit contained inconsistencies, her claimed rental income was unsubstantiated, and

her testimony regarding her income and expenses was determined to be incredible. Accordingly, the Support Magistrate improvidently exercised her discretion in failing to adjourn the proceeding until such time as the mother filed the required documents. It remitted the matter for a new determination of the father's child support obligation following the mother's submission of the required financial disclosure.

Error to awarded plaintiff portion of appreciation in value of defendant's dental practice during marriage where she failed to establish the baseline value of the business and the extent of its appreciation

In *Lestz v Lestz*, 2017 WL 5473999 (2d Dept., 2017) the parties married in 1984. At that time, the defendant, who had been a dentist for at least five or six years, had his own dental practice at which the plaintiff was an employee. In 2007, the plaintiff commenced the divorce action. After a nonjury trial, the Supreme Court awarded the plaintiff a portion of the appreciation in value of the defendant's dental practice during the marriage. The Appellate Division reversed. It observed that an increase in the value of separate property is considered 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]). The nontitled spouse has the burden of establishing that any increase in the value of the separate property was due at least in part to his or her direct or indirect contributions or efforts during the marriage. Here, the Supreme Court improperly awarded the plaintiff the sum of \$91,500, representing, in effect, 25% of the appreciation in value during the marriage of the defendant's dental practice, which was his separate property. Although the evidence at trial demonstrated that the plaintiff made limited contributions with respect to the practice, the plaintiff did not offer any proof of the value of the dental practice at the time of the marriage. Accordingly, she failed to satisfy her burden of establishing "the baseline value of the business and the extent of its appreciation" (*Morrow v. Morrow*, 19 A.D.3d at 254, 800 N.Y.S.2d 378), and the court erred in making an award to the plaintiff on this basis (see *Ceravolo v. DeSantis*, 125 A.D.3d 113, 117–118, 1 N.Y.S.3d 468; *Clark v. Clark*, 117 A.D.3d at 669, 985 N.Y.S.2d 276; *Davidman v. Davidman*, 97 A.D.3d 627, 628, 948 N.Y.S.2d 639; *Albanese v. Albanese*, 69 A.D.3d 1005, 1006, 892 N.Y.S.2d 631; *Burgio v. Burgio*, 278 A.D.2d 767, 769, 717 N.Y.S.2d 769).

Appellate Division, Third Department\

Postsecondary education expenses are not subject to collection through income execution

In *Dillon v Dillon*, --- N.Y.S.3d ----, 2017 WL 5489353, 2017 N.Y. Slip Op. 08062 (3d Dept., 2017) the Appellate Division held, inter alia, that Family Court erred in directing that the mother's payments toward the child's college education be made through the Support Collection Unit, as "postsecondary education expenses [are] a separate item in

addition to the basic child support obligation” (Matter of Cohen v. Rosen, 207 A.D.2d 155, 157 [1995], lv denied 86 N.Y.2d 702 [1995]; see Cimons v. Cimons, 53 AD3d 125, 131 [2008]; Tryon v. Tryon, 37 AD3d 455, 457 [2007]), not subject to collection through income execution (see generally CPLR 5241, 5242).

Appellate Division, Fourth Department

A Court Errs In Granting A QDRO More Expansive Than an Underlying Written Separation Agreement Regardless of Whether the Parties or Their Attorneys Approved the QDRO

In *Sanitllo v Santillo*, --- N.Y.S.3d ----, 2017 WL 5505810, 2017 N.Y. Slip Op. 08155 (4th Dept., 2017) the parties divorced in 1994, and the separation agreement incorporated but not merged into their judgment of divorce provided that plaintiff was entitled to a share of defendant’s pension benefits “until her death or remarriage, or [defendant’s] death,” whichever occurred first. Although plaintiff remarried in August 1995, defendant’s attorney executed a qualified domestic relations order (QDRO) that was entered in February 1996. The QDRO did not provide that plaintiff’s entitlement to a share of defendant’s pension would terminate upon her remarriage. In April 2016, defendant filed his retirement documents with the New York State and Local Retirement System and discovered the existence of the QDRO. Shortly thereafter, he moved for, inter alia, an order vacating the QDRO inasmuch as it is inconsistent with the separation agreement. The Appellate Division agreed with defendant that the court erred in denying his motion to vacate the QDRO. A QDRO obtained pursuant to a separation agreement ‘can convey only those rights ... which the parties [agreed to] as a basis for the judgment’ “(Duhamel v. Duhamel [appeal No. 1], 4 AD3d 739, 741 [4th Dept 2004], quoting McCoy v. Feinman, 99 N.Y.2d 295, 304 [2002]). Thus, it is well established that a court errs in granting a QDRO more expansive than an underlying written separation agreement”, regardless whether the parties or their attorneys approved the QDRO without objecting to the inconsistency (see *Page v. Page*, 39 AD3d 1204, 1205 [4th Dept 2007]). Under such circumstances, the court has the authority to vacate or amend the QDRO as appropriate to reflect the provisions of the separation agreement (see *Beiter v. Beiter*, 67 AD3d 1415, 1417 [4th Dept 2009]). It found that the QDRO should never have been entered in the first instance because the clear and unambiguous language of the separation agreement provided that plaintiff’s rights in defendant’s pension benefits had terminated upon her remarriage.

The Appellate Division rejected plaintiff’s contention that defendant was barred by laches from seeking to vacate the QDRO. “The defense of laches requires both delay in bringing an action and a showing of prejudice to the adverse party” (*Beiter*, 67 AD3d at 1416]; see *Matter of Sierra Club v. Village of Painted Post*, 134 AD3d 1475, 1476 [4th Dept 2015]). Even assuming, arguendo, that there was a delay in seeking to vacate the QDRO, it concluded that plaintiff did not demonstrate that she was prejudiced by that delay.

November 16, 2017

Appellate Division, First Department

Appellate Division Holds Supreme Court Has The Authority To Enforce Promissory Notes To A Third Party.

In *Schorr v Schorr*, 2017 WL 4892266 (1st Dept., 2017) the Appellate Division held that in calculating the child support award, the court properly imputed income to defendant by including significant funds he received from his parents to pay his expenses (see Domestic Relations Law § 240[1-b][b][5][iv][d]). Defendant was self-employed and refused to maintain a general ledger or financial records for his business. Trial evidence supported the court's finding that defendant inflated his expenses on his tax returns so as to deflate his reported net income, and otherwise manipulated his income. Further, the defendant, who was the sole executor of his father's estate, admitted to using estate funds directly to pay some of his personal expenses. In view of its inability to quantify these alternate sources of revenue available to the defendant, the court acted within its discretion in imputing income to him based on the discernible measure of parental contributions.

The Appellate Division held that the court providently exercised its discretion in directing the parties to repay to plaintiff's parents from the proceeds of the sale of the marital residence a loan for monies borrowed from her father to purchase the marital residence. It rejected defendant's contention that the court does not have the authority to enforce promissory notes to a third party.

Unequal Distribution Of Marital Property Under DRL § 236(B)(5)(d)(14) Allowed Where Spouse'S Criminal Conduct And Incarceration Impacts Family. Not Necessary for Court To Make Finding Of Marital Waste To Impose Financial Responsibility On A Party For Expenses Arising From His Or Her Criminal Activities.

In *Linda G., v. James G.*, --- N.Y.S.3d ----, 2017 WL 5326824 (1st Dept., 2017) the Appellate Division held that there can be an unequal distribution of the marital home under the "just and proper" standard set forth in Domestic Relations Law § 236(B)(5)(d)(14) where a spouse's criminal conduct and subsequent incarceration impacts the family. The parties were married in 1989. They had two children from the marriage. Shortly after the older son was born, the family purchased and moved into a cooperative apartment on Park Avenue in Manhattan. The husband was a partner in Ernst & Young (E & Y). In October 2007, due to a pending Securities and Exchange Commission insider trading investigation, the husband resigned. At that time, he had been earning \$1.25 million a year. In 2010, the husband was indicted on charges of conspiracy and insider trading. He was found guilty and served a one year and one day sentence in federal prison from May 2010 through January 2011. The SEC investigation and criminal trial depleted the joint assets of the parties. The divorce proceedings started on January 26, 2010. The wife returned to work at JP Morgan in February of 2010, shortly before the husband was imprisoned. In 2013, her base salary was \$300,000 and her bonus was more than \$200,000. The husband began working at Sherwood Partners after his release from incarceration and testified that, as of 2013, his base salary was \$226,000. At the time of the trial, the apartment was valued at \$4.75 million. The husband admitted

that he stopped contributing to the mortgage shortly before he went to prison in May 2010.

Supreme Court took into account the husband's "adulterous and criminal behavior" and awarded the wife 75% of the marital home. The Appellate Division held the husband's adulterous conduct was not sufficiently egregious and shocking to the conscience to justify making an unequal distribution of the marital home. However, it held that the impact of the husband's criminal conduct on the family may be considered in making an unequal distribution. Comparing this case to the facts in *Kohl v. Kohl* (6 Misc.3d 1009[A], 2004 N.Y. Slip Op 51759[U], *24 [Sup Ct., N.Y. County 2004], aff'd 24 AD3d 219 [1st Dept. 2005]) the record supported an unequal distribution. The parties were required to spend down their savings from 2007 through 2010 when the husband was forced to resign due to the SEC investigation. He refused to take a plea bargain and insisted on going to trial, blaming a woman with whom he had an extramarital affair for his insider trading. He was convicted of a felony and lost his license to practice law. The husband's post-incarceration earnings at the time of the trial dropped significantly to less than 20% of his prior income. His income never returned to the level he earned prior to the conviction. As a result of the husband's criminal actions, the wife, who had left a lucrative career to raise their children, was compelled to return to work after being out of the workforce for almost a decade. This meant that the wife could no longer remain at home with the children. During this time, the younger son suffered from psychiatric issues and the older son from significant emotional issues. The husband's insider trading, and ensuing criminal trial, conviction and incarceration caused the family to undergo financial losses and a substantial decrease in the standard of living. These events also significantly disrupted the family's stability and well-being. Based on its review of the record, it found that a 60%/40% equitable division of the value of the marital estate was just and proper when taking into account the hardship that the husband put his family through as a result of his volitional and irresponsible behavior.

The Appellate Division held that Supreme Court's award to the wife of a credit of 50% of marital funds expended in connection with the SEC investigation and criminal proceedings was proper, relying on *Kohl v Kohl*, where, the court found that the husband should be responsible for 65% of the legal fees for civil forfeiture proceedings and the wife responsible for 35% (2004 N.Y. Slip Op 51759[U], *30). It agreed with the wife that she should not be liable for legal fees as she was not a party to the SEC action and also believed the husband's assertions of innocence. To hold the wife responsible for the accumulation of substantial legal fees for which she shared no culpability would be inequitable. It held that it is not necessary for a court to make a finding of marital waste to impose financial responsibility on a party for expenses arising from his or her criminal activities (*Kohl*, 24 AD3d at 220). The portion of the judgment awarding the wife a 50% credit for the legal fees arising from the husband's criminal activity was affirmed.

Appellate Division, Second Department

Order or Judgment Entered By Lower Court On A Remittitur Must Conform Strictly To The Remittitur.

In *Stassa v Stassa*, --- N.Y.S.3d ----, 2017 WL 4930843, 2017 N.Y. Slip Op. 07629 (2d Dept., 2017) the Appellate Division held that trial court, upon remittitur from the Appellate Division, lacks the power to deviate from the mandate of the higher court. An order or judgment entered by the lower court on a remittitur 'must conform strictly to the remittitur. Here, the Supreme Court erred in failing to adhere to the terms of its remittitur.

Appellate Division, Third Department

Third Department Holds Default Is Not Willful Under DRL §244 When It Arises with "A Sincere, Though Mistaken, Belief That Payments Were Not Required, Especially When That Belief Was Based Upon Advice from Counsel"

In *Seale v Seale*, --- N.Y.S.3d ----, 2017 WL 4817287, 2017 N.Y. Slip Op. 07492 (3d Dept., 2017) the Appellate Division held, inter alia, that the wife's request for a money judgment for arrears of payments due pursuant to the judgment of divorce should have been granted. Domestic Relations Law § 244 provides that, upon a party's failure to make any payment for an obligation under a judgment of divorce other than child support, "the court shall make an order directing the entry of judgment for the amount of arrears . . . unless the defaulting party shows good cause for failure to make application for relief . . . prior to the accrual of such arrears" (emphasis added). This provision was intended to shift the burden of seeking relief to the defaulting spouse and to limit a court's discretion in determining whether to grant judgments for arrears. The husband offered various explanations for his failure to make timely payments, but he neither applied for relief prior to his default nor stated any reason for his failure to do so. Supreme Court thus had no discretion to deny the wife's request for a judgment in the full amount of the arrears.

It was undisputed that no arrears remained outstanding. Nevertheless, the wife sought interest for the periods in which the various payments were due but unpaid. Domestic Relations Law § 244 mandates the payment of interest upon arrears "if the default was willful, in that the obligated spouse knowingly, consciously and voluntarily disregarded the obligation under a lawful court order." The Appellate Division held that a default is not willful when it arises from financial disability or from "a sincere, though mistaken, belief that payments were not required, especially when that belief was based upon advice from counsel" (*Parnes v Parnes*, 41 AD3d 934, 937 [2007]; see *Desautels v Desautels*, 80 AD3d 926, 930 [2011]; see also *Allen v Allen*, 83 AD2d 708, 709 [1981]). Here, the husband owned, as his separate property, a number of valuable parcels of real estate, including several business properties. However, he contended that he was in significant financial distress and had no liquid resources other than sales of his separate property with which to satisfy his equitable distribution obligations. The divorce judgment offered some implied support for this assertion by directing the husband to satisfy most of his equitable distribution obligations by selling parcels of his separate property. In addition to evidence specifically detailing the outstanding debts, tax obligations and other financial constraints that resulted in the husband's lack of liquid resources, his submissions established that a June 2014 separate property transaction yielded no funds from which payments could have been made to the wife and that the proceeds of a September 2014 sale, while adequate to permit payment of the other obligations, did not yield sufficient funds to cover the second counsel fee installment

payment. A showing of inability to pay does not preclude a judgment for arrears pursuant to Domestic Relations Law § 244. Nevertheless, for the purpose of determining the interest issue, the Appellate Division found the husband met his burden to demonstrate that his defaults at the time of the property sales were not willful. Both a bench decision issued shortly after the September 2014 transaction and the January 2015 order upon appeal interpreted the provisions of the divorce judgment to find that the second counsel fee installment payment had not yet become due. Although it disagreed with this interpretation, these rulings provided the basis for a sincere belief on the husband's part that he was not then required to make the second installment payment (see *Desautels v Desautels*, 80 AD3d at 930; *Parnes v Parnes*, 41 AD3d at 937). Under these circumstances, it found that the husband met his burden to demonstrate that his delay in making payments was not willful. Thus, the wife was not entitled to interest for the periods of delay.

November 1, 2017

Appellate Division, First Department

Wife Estopped from claiming charitable contributions were marital waste. A party to litigation may not take a position contrary to a position taken in an income tax return

In *Melvin v Melvin*, --- N.Y.S.3d ----, 2017 WL 4781198, 2017 N.Y. Slip Op. 07421 (1st Dept., 2017) the Appellate Division affirmed an order which granted the plaintiff husband's cross motion for an order declaring defendant wife judicially estopped from claiming that charitable contributions reported on the parties' joint income tax returns from 2011 through 2015 constituted marital waste. The wife argued that charitable contributions totaling approximately \$1.5 million, reflected on the parties' joint tax returns from 2011 through 2015, were made without her consent. However, she did not deny that she signed the tax returns under penalty of perjury, that the charity receiving the contributions was a bona fide nonprofit organization, and that the marital estate received a benefit from the contributions in the form of tax deductions. Although the wife claimed that the husband only sent her the signature page of the tax returns, so that she was unaware of their contents, she had unfettered access to the complete returns from the parties' accountant. In any event, by signing the tax returns, she is presumed to have read and understood their contents (see *Vulcan Power Co. v. Munson*, 89 AD3d 494 [1st Dept 2011], lv denied 19 NY3d 807 [2012]; see also *Da Silva v. Musso*, 53 N.Y.2d 543, 550–551 [1981]). “A party to litigation may not take a position contrary to a position taken in an income tax return” (*Mahoney–Buntzman v. Buntzman*, 12 NY3d 415, 422 [2009]). By signing the joint tax return, the wife represented that the charitable contributions were made in both parties' names as a married couple. Thus, she was judicially estopped from now claiming that the donations were, in fact, made without her consent.

Volitional actions which result in unemployment, do not constitute extreme hardship warranting Modification of Child Support

In *Matter of Richard K v Deborah K*, --- N.Y.S.3d ----, 2017 WL 4542490 (Mem), 2017

N.Y. Slip Op. 07173 (1st Dept., 2017) the Appellate Division held that the father, a disbarred attorney who was imprisoned, failed to demonstrate the extreme hardship necessary to obtain modification of the maintenance obligations contained in the parties' stipulation of settlement, which was incorporated but not merged into the parties' divorce judgment (see Domestic Relations Law § 236[B][9][b]). A husband's volitional actions which result in his unemployment, including incarceration preventing any employment, do not constitute such extreme hardship (see *Fabrikant v. Fabrikant*, 62 AD3d 585, 586 [1st Dept 2009]).

Appellate Division, Second Department

Movant may not meet burden on motion by submitting evidence in Reply

In *Dankenbrink v Dankenbrink*, 2017 WL 4658402 (2d Dept., 2017) the Appellate Division, in vacating an order, which vacated a default judgment, held that a movant may not meet his or her burden on a motion by submitting evidence in reply (see *Pinos v. Clinton Café & Deli, Inc.*, 139 AD3d 1034; *Cotter v. Brookhaven Mem. Hosp. Med. Ctr.*, 97 AD3d 524; *Tingling v. C.I.N.H.R., Inc.*, 74 AD3d 954). In any event, the documents submitted were insufficient to demonstrate that the defendant was unable to participate in the action.

There is no express requirement to submit documentation pertaining to the Office of Children and Family Services in a proceeding pursuant to Family Court Act § 661(a)

In *Matter of Francisca M.V.R. v. Jose G.H.G.*, --- N.Y.S.3d ----, 2017 WL 4655898, 2017 N.Y. Slip Op. 07258 (2d Dept., 2017) the mother commenced a proceeding pursuant to Family Court Act article 6 to be appointed guardian of the child for the purpose of obtaining an order declaring that the child was dependent on the Family Court and making specific findings so as to enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (SIJS) pursuant to 8 USC § 1101(a)(27)(J). The Family Court denied the mothers motion for the issuance of an order making the requisite declaration and specific findings so as to enable the child to petition for SIJS without a hearing and dismissed the guardianship petition "for failure to produce required documentation" and "for failure to prosecute." The Appellate Division reversed and remitted for a hearing. It held that there is no express requirement to submit documentation pertaining to the Office of Children and Family Services in a proceeding such as this pursuant to Family Court Act § 661(a) for "[g]uardianship of the person of a minor or infant". Consequently, it was improper for the court to dismiss the petition based on the mother's "failure to produce required documentation." Further, under the circumstances of this case, it was improper for the court to dismiss the petition "for failure to prosecute".

New York State may modify an issuing state's order of child support only when the

issuing state has lost continuing, exclusive jurisdiction

In *Matter of Zagarino v McLean*, --- N.Y.S.3d ----, 2017 WL 4532102, 2017 N.Y. Slip Op. 07131 (2d Dept., 2017) the father commenced a seeking child support for the parties' son. The support Magistrate granted the mothers motion to dismiss the petition on the ground that an order of support was already issued by a court in Missouri, which had continuing, exclusive jurisdiction under the Uniform Interstate Family Support Act (hereinafter UIFSA; Family Ct Act art 5-B). The Appellate Division affirmed. Under the Full Faith and Credit for Child Support Orders Act and UIFSA, the state issuing a child support order retains continuing, exclusive jurisdiction over its child support orders so long as an individual contestant continues to reside in the issuing state (*Matter of Spencer v. Spencer*, 10 NY3d 60, 66; see 28 USC § 1738B[d]; Family Ct Act § 580-205). A state may modify the issuing state's order of child support only when the issuing state has lost continuing, exclusive jurisdiction. (*Matter of Pauls v. Neathery*, 149 AD3d 950, 952, quoting *Matter of Spencer v. Spencer*, 10 NY3d at 66; see 28 USC § 1738B[e]; Family Ct Act § 580-611[a]). The petition was in the nature of a "modification petition," rather than a de novo application. Since the mother and the parties' daughter resided in Missouri, that state retained continuing, exclusive jurisdiction of its child support order, and New York did not have jurisdiction to modify the Missouri order.

Appellate Division, Third Department

Third Department holds it is Error to completely offset presumptive temporary maintenance award by husband's payment of household expenses where husband continued to reside in marital residence.

In *Gavin v Gavin*, 2017 WL 4679950 (3d Dept., 2017) Plaintiff (husband) and defendant (wife) were married in 1995 and had three children, one of whom was unemancipated. The husband commenced the action for a divorce in 2015. The wife moved for pendente lite relief, including temporary maintenance. Both parties continued to reside in the marital residence. Supreme Court ordered the husband to continue paying certain monthly household expenses and to pay the wife an additional \$2,500 per month.

The Appellate Division noted that the Domestic Relations Law was amended in 2010 to establish a formula for calculating temporary maintenance awards (see L 2010, ch 371, § 1). The amendment "create[d] a substantial presumptive entitlement" intended "to provide 'consistency and predictability in calculating temporary spousal maintenance awards' "(*Khaira v. Khaira*, 93 AD3d 194, 197 [2012]) . . . A temporary award may be modified when exigent circumstances are shown, such as when "a party is unable to meet his or her financial obligations or justice otherwise requires" (*Cheney v. Cheney*, 86 AD3d 833, 834-835 [2011]).

The husband earned substantially more money than the wife. After determining that the husband's income exceeded the then statutory cap of \$543,000, Supreme Court determined that the presumptive amount of temporary maintenance payable to the wife was \$160,331, or \$13,361 per month. The court thereafter ordered the husband to

continue to pay the monthly household expenses, totaling \$15,415.2 Further, with respect to that income in excess of \$543,000, the court referenced its ability to award additional temporary maintenance; based on the length of the marriage and the disparity between the parties' incomes, and to provide "additional funds for the [wife] to meet the standard of living enjoyed during the marriage," the court directed the husband to pay an additional \$2,500 each month to the wife.

The wife contended that Supreme Court erred by completely offsetting the presumptive award by the husband's payment of the household expenses. Since the husband continued to reside in the marital residence, the wife maintained that he should be permitted to offset no more than 50% of the household expenses against the presumptive amount of temporary maintenance. In effect, according to the wife, the husband is paying \$10,207.50 each month (i.e., 50% of the carrying charges plus \$2,500), which is less than the presumptive amount provided by the statutory formula.

The Appellate Division held that under the circumstances, justice required a modification to allow the wife to receive the properly calculated presumptive share of maintenance. It was apparent that Supreme Court believed it was appropriate to award temporary maintenance in excess of the statutory cap. Where, as here, the parties continued to reside together in the marital residence during the pendency of a divorce, it found that it is appropriate to credit the payor spouse with one half of the court-ordered carrying charges (see *Su v. Su*, 128 AD3d 949, 950 [2015]; *Francis v. Francis*, 111 AD3d 454, 455 [2013]). Correspondingly, the presumptive amount of temporary maintenance should only be offset by the amount that is credited to the payor spouse. By applying 100% of the carrying charges against the presumptive amount, Supreme Court effectively negated the presumptive amount, a result that was neither intended nor supported by a finding that the presumptive amount was unjust or inappropriate. There was no suggestion that the husband was unable to fulfill the parties' financial obligations as set forth on their respective statements of net worth or to pay the presumptive amount. As such, it found that the wife was entitled to the presumptive award of \$13,361 each month, plus \$2,500 for the amount of the husband's income above the statutory cap, offset by one half of the household expenses, or a credit in the amount of \$7,707.50 each month. Accordingly, in addition to the defined household expenses, the monthly amount payable by the husband to the wife as temporary maintenance should be increased by \$5,654, for a total of \$8,154.

The order was modified by awarding defendant a monthly payment of temporary maintenance totaling \$8,154.

Agreement to deviate from provisions of CSSA which failed to comply with FCA § 413(1)(h) invalid and unenforceable from inception five years earlier, regardless of fact that mother benefitted from it

In *Hardman v Coleman*, --- N.Y.S.3d ---, 2017 WL 4679940, 2017 N.Y. Slip Op. 07373 (3d Dept., 2017) the parties entered into a settlement agreement in 2009 where they agreed, with regard to child support, deviate from application of the Child Support Standards Act (see Family Ct Act § 413). The child support provisions of the agreement exempted the mother, as the noncustodial parent, from paying child support to the father, but obligated her to pay, among other things, one half of the children's health

insurance premiums and uncovered medical expenses. The parties finalized their divorce in January 2012, and their 2009 settlement agreement and subsequent stipulations were incorporated, but not merged, with the judgment of divorce. In 2014, the mother filed a support modification petition, seeking to have the father pay child support in accordance with CSSA guidelines. The Support Magistrate dismissed the mother's modification petition for lack of proof. The mother's subsequent written objections to the Support Magistrate's order (see Family Ct Act § 439[e]) were dismissed by Family Court. The Appellate Division reversed. It agreed with the mother that the child support provisions of the 2009 agreement had to be vacated because the agreement to deviate from the CSSA failed to comply with the requirements of Family Ct Act § 413(1)(h). As relevant here, all child support stipulations seeking to deviate from the CSSA must "include a provision stating that the parties have been 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 child support to be awarded" (Family Ct Act § 413[1][h]). Such provision may not be waived by either party or counsel (see Family Ct Act § 413[1][h]), and the failure to include such recitals in a stipulation agreeing to deviate from the CSSA guidelines will render it "invalid and unenforceable" (Matter of McKenna v. McKenna, 90 AD3d at 1111). Here, the agreement stated that the parties reviewed the provisions of the CSSA, understood them and were aware that, absent their agreement to deviate therefrom, the CSSA would govern the determination of the noncustodial parent's basic child support obligation. The agreement then indicated that the amount of child support to be paid by the mother, as the noncustodial parent, pursuant to the CSSA would be \$79 per week. The mother's basic child support obligation, however, was miscalculated. Although, standing alone, such a miscalculation would be insufficient to invalidate the agreement, here, the parties' stipulation also failed to demonstrate that the parties were apprised that the application of the CSSA "would presumptively result in the correct amount of child support to be awarded." Accordingly, the parties' agreement to deviate from the provisions of the CSSA was invalid and unenforceable from its inception, regardless of the fact that the mother benefitted from the terms of the deviation agreement in the first instance. Therefore, Family Court erred in dismissing the mother's objections. As such, the order was reversed and the matter remitted for a de novo hearing to determine the proper amount that the noncustodial parent must pay in child support pursuant to the provisions of the CSSA.

Grandparents Have Standing to seek visitation where mother made deliberate efforts, without reasonable justification, to preclude them from developing relationship with the children

In *Monroe v Monroe*, --- N.Y.S.3d ----, 2017 WL 4680065, 2017 N.Y. Slip Op. 07358 (3d Dept, 2017) the grandparents commenced a proceeding seeking visitation with their grandchildren. The Appellate Division reversed an order which dismissed the grandparents' petition on the ground that they lacked standing to seek visitation. It observed that when the parents of the subject children are alive, a grandparent may acquire standing to seek visitation of the children by demonstrating that "conditions exist which equity would see fit to intervene" (Domestic Relations Law § 72[1]; see *Matter of E.S. v. P.D.*, 8 NY3d 150, 156 [2007]; *Matter of Wilson v. McGlinchey*, 2 NY3d 375, 380 [2004]). The grandparents must establish a sufficient existing relationship with their grandchildren, or in cases where such a relationship has been frustrated ..., a sufficient

effort to establish one, so that the court perceives it as one deserving the court's intervention. The sufficiency of the grandparents' efforts in this regard must always be measured against what they could reasonably have done under the circumstances. The grandparents acknowledged that they did not have a close relationship with either grandchild; however, they averred that the mother willfully and deliberately denied them any access to the children, without any reasonable cause for doing so, since their respective births. In support of their petition, the grandparents submitted a notarized letter. With regard to the oldest child, the grandparents averred that they were able to hold the child at the hospital on the day she was born. That since such time, they had not been allowed to have contact with the child and acknowledged that they had only seen the child four additional times—one of which was the result of them showing up unannounced to the parents' residence and, on another occasion, to the child's first birthday party. With regard to the youngest child, the grandparents averred that they went to the hospital on the day of the child's birth; however, after only briefly holding the child, the mother informed them that they were not welcome and security was called to escort them out of the hospital. They had not been able to see the child since. Two months later, the grandparents filed the petition seeking visitation. The Appellate Division found the proof adduced in support of the grandparents' petition to be sufficient to confer standing to seek visitation with their grandchildren. Significantly, the circumstances indicated that the mother has made deliberate and immediate efforts to preclude the grandparents from having and/or developing any significant relationship with the children, since the very day they were born, without any stated reasonable justification for doing so. Given the young ages of the children and the brief amount of time that had elapsed between their respective births and the disruption of the grandparents' visitation, equity dictated that the Court not allow the lack of an established relationship be used as a pretext to prevent the grandparents from otherwise exercising their right to seek visitation.

Income Imputed to Father based upon unpaid monthly installments on promissory note to parents

In *Matter of Worfel v Kime*, --- N.Y.S.3d ----, 2017 WL 4679943, 2017 N.Y. Slip Op. 07372 (3d Dept., 2017) the father asserted on appeal that the funds provided by his parents for construction of his new home were improperly considered in assessing his child support obligation. Although there was a promissory note, as of the date of the hearing, the father had not begun to repay the debt in accord with its terms. He also failed to list this debt on either of his financial disclosure affidavits. He father testified that his pay from his parent's hardware store had been decreased. Family Court noted this inconsistency, in that the parents had allegedly made a major loan while decreasing his pay, with knowledge of the ongoing contentious legal proceedings, and upheld the Support Magistrate's determinations upon consideration of the contradictions between the testimony and the documentation. The Appellate Division found no abuse of discretion in Family Court's determination to impute to the father an amount equal to the unpaid monthly payments on the promissory note (see *Family Ct Act § 413[5] [iv] [D]*; *Matter of Abellard v. Aime*, 18 AD3d 653, 653 [2005]; *Matter of Collins v. Collins*, 241 A.D.2d 725, 727 [1997], lv dismissed and denied 91 N.Y.2d 829 [1997]).

Third Department Holds Family Court has discretion to overlook minor failure to comply with requirements of FCA §439(e) regarding filing objections

In *Alberino v Alberino*, --- N.Y.S.3d ----, 2017 WL 4679958, 2017 N.Y. Slip Op. 07370 (3d Dept., 2017) the Support Magistrate modified the prior support order by increasing the father's weekly child support obligation. The order was entered on December 1, 2015 and mailed to the parties on December 3, 2015. The father's attorney attempted to file objections with Family Court at 4:36 p.m. on January 7, 2016, the statutory filing deadline (see Family Ct Act § 439[e]), but was prevented from doing so because the courthouse was closed. Counsel mailed a copy of the objections to the mother and her counsel that day. Counsel also mailed a copy to the court, along with a letter explaining the unsuccessful attempt at filing, and filed the objections with the court in person early the following morning. The mother filed a rebuttal, with no mention of the timing of the objections. Family Court dismissed the objections as untimely. The Appellate Division reversed holding that Family Court abused its discretion when it dismissed the father's objections to the support magistrates order as untimely. Unlike the nonwaivable and jurisdictional time period for filing a notice of appeal, the courts need not require strict adherence" to this filing deadline (*Matter of Ogborn v. Hiltz*, 262 A.D.2d 857, 858 [1999]). Family Court has discretion to overlook a minor failure to comply with the statutory requirements regarding filing objections and address the merits" (*Matter of Ryan v. Ryan*, 110 AD3d 1176, 1178 [2013]) Two attorneys and a law clerk from the firm representing the father submitted affidavits in which they averred that their office called the Family Court Clerk's office earlier in the week and verified that the court would be open until 5:00 p.m. on the filing deadline. They also checked the court's hours of operation on the Unified Court System website, which listed them as 9:00 a.m. to 5:00 p.m.

In termination of parental rights actions, a court may properly look to the ADA's standards for guidance in evaluating whether "diligent efforts" were made

In *Matter of Lacey L*, 153 A.D.3d 1151, 60 N.Y.S.3d 164, 2017 N.Y. Slip Op. 06418 (1st Dept., 2017) the Appellate Division held that Family Court properly determined that agency made reasonable efforts to achieve the permanency goal of returning the child to the mother during the nine-month period following the child's removal. The main issue raised at the permanency hearing was "to what degree the [foster care] agency was required to accommodate the parents' cognitive disabilities when discharging its obligation to pursue the goal of return to parent." While Family Court correctly determined that the ADA was not applicable to this proceeding (see *Matter of La'Asia Lanae S.*, 23 A.D.3d 271, 803 N.Y.S.2d 568 [1st Dept.2005]), the law makes clear, as Family Court recognized and the parties in this case agreed, that "the agencies efforts towards a permanency plan must be tailored to the particular circumstances and individuals in a given case". As the Family Court held in *La'Asia Lanae S.* (191 Misc.2d 28, 42-43, 739 N.Y.S.2d 898 [Fam.Ct., N.Y. County 2002]), in the context of termination of parental rights actions, a court may properly look to the ADA's standards for guidance in evaluating whether "diligent efforts" were made by the agency under Social Services Law § 384-

b(7). The Family Court here acknowledged that it was required to consider the mother's special needs when determining if the agency's efforts were reasonable in this case. After evaluating the agency's efforts in that light, the court found that the agency satisfied its obligation to tailor its efforts to the mother's needs, and that the agency's reunification efforts were reasonable under the circumstances. In precluding litigation of ADA claims during the permanency hearing, but considerate of its purpose to guide the reasonable efforts analysis, the Family Court properly complied with the requirements as set forth by the court in the La'Asia case.

**October 2017 Table of Effective dates of Revisions to DRL §§ 236, 237, 238 and 240
Special Edition**

Table of Effective dates of Revisions to Domestic Relations Law §§ 236, 237, 238 and 240

The Maintenance, Child Support and Counsel Fee provisions of the Domestic Relations Law have been amended numerous times since the statutes were enacted, especially since 1999. Different versions of Domestic Relations Law §§ 236, 237, 238 and 240 apply in matrimonial actions depending upon the date of the commencement of an action. The following table has been created to enable counsel to quickly find the version applicable to actions commenced since 1999 which are available for download on our website at www.nysdivorce.com

Domestic Relations Law § 236 – September 18, 1999 to date

DRL §236, effective September 18, 1999 to September 21, 2003 ³⁹

DRL §236, effective September 22, 2003 to August 31, 2009 ⁴⁰

DRL §236, effective September 1, 2009 to September 13, 2009 ⁴¹

³⁹ L.1999, c. 275, § 2, eff. Sept. 18, 1999. (The chapter, among other things, added the following sentence to DRL § 236 [B][8][a]: “A copy of such order shall be served, by registered mail, on the home office of the insurer specifying the name and mailing address of the spouse or children, provided that failure to so serve the insurer shall not affect the validity of the order.”)

⁴⁰ L.2003, c. 595, § 1, eff. Sept. 22, 2003. (This Chapter, among other things, added the following sentence to DRL § 236[B][3]: “Notwithstanding any other provision of law, an acknowledgment of an agreement made before marriage may be executed before any person authorized to solemnize a marriage pursuant to subdivisions one, two and three of section eleven of this chapter.”)

⁴¹ L.2009, c. 72, § 1, eff. Sept. 1, 2009; L 2010, c. 32, § 1, eff. March 30, 2010, deemed eff. Sept. 1, 2009 (These chapters added to DRL § 236[B] [2] [b] provisions for “automatic orders in matrimonial actions”.)

DRL §236, effective September 14, 2009 to August 12, 2010 ⁴²

DRL §236, effective August 13, 2010 to October 11, 2010 ⁴³

DRL§ 236, effective October 12, 2010 to October 12, 2010 ⁴⁴

⁴² L.2009, c. 229, §§ 1 to 3, eff. Sept. 14, 2009. (This chapter added to DRL § 236[B] [5] [d] and DRL § 236[B] [6] [a] “the loss of health insurance benefits upon dissolution of the marriage” as a factor for the court to consider in awarding maintenance and equitable distribution.)

⁴³ L.2010, c. 371, § 3, eff. Aug. 13, 2010. (This chapter, among other things, enacted DRL § 236 [B][5-a] providing for temporary maintenance guidelines; and added to DRL § 236[B][6] the following six additional maintenance factors: (5) the need of one party to incur education or training expenses; (6) the existence and duration of a pre-marital joint household or a pre-divorce separate household; (7) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law; (11) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity; (12) the inability of one party to obtain meaningful employment due to age or absence from the workforce; (13) the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment).

⁴⁴ L.2010, c. 371, §§ 1, 2, 4, eff. Oct. 12, 2010. (This chapter, among other things, amended DRL §236 [B] by adding a new subdivision 5–a Temporary maintenance awards, which requires the court to make its award in accordance with this subdivision, except where the parties have entered into an agreement pursuant to subdivision 5–a. DRL §236[B] was amended to change the factors, except factor (1), as follows: (2) length of the marriage; (3) the age and health of both parties; (4) the present and future earning capacity of both parties; (5) the need of one party to incur education or training expenses; (6) the existence and duration of a pre-marital joint household or a pre-divorce separate household; (7) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law; (8) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor; (9) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage; (10) the presence of children of the marriage in the respective homes of the parties; (11) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity; (12) the inability of one party to obtain meaningful employment due to age or absence from the workforce; (13) the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment; (14) the tax consequences to each party; (15) the equitable distribution of marital property; (16) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party; (17) the wasteful dissipation of marital property by either spouse; (18) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; (19) the loss of health insurance benefits upon dissolution of the marriage, and the availability and cost of medical insurance for the parties; and (20) any other factor which the court shall expressly find to be just and proper.)

DRL §236, effective October 13, 2010 to October 24, 2015 ⁴⁵

⁴⁵ L.2010, c. 182, §§ 7, 9, eff. Oct. 13, 2015. (This chapter, among other things, added subdivision (2) to DRL §236 [B][9][b], as follows:

(2)(i) The court may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances. Incarceration shall not be a bar to finding a substantial change in circumstances provided such incarceration is not the result of nonpayment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment.

(ii) In addition, unless the parties have specifically opted out of the following provisions in a validly executed agreement or stipulation entered into between the parties, the court may modify an order of child support where:

(A) three years have passed since the order was entered, last modified or adjusted; or

(B) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted. A reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience.

(iii) No modification or annulment shall reduce or annul any arrears of child support which have accrued prior to the date of application to annul or modify any prior order or judgment as to child support. Such modification may increase child support nunc pro tunc as of the date of application based on newly discovered evidence. Any retroactive amount of child support due shall, except as provided for in this subparagraph, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made. Any retroactive amount of child support due shall be support arrears/past due support. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an immediate execution for support enforcement as provided for by this chapter, or in such periodic payments as would have been authorized had such an execution been issued. In such case, the court shall not direct the schedule of repayment of retroactive support.

This chapter, among other things, also added subdivision [d] to DRL §236[B][7], as follows:

d. Any child support order made by the court in any proceeding under the provisions of this section shall include, on its face, a notice printed or typewritten in a size equal to at least eight point bold type informing the parties of their right to seek a modification of the child support order upon a showing of:

(i) a substantial change in circumstances; or

(ii) that three years have passed since the order was entered, last modified or adjusted; or

(iii) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted; however, if the parties have specifically opted out of subparagraph (ii) or (iii) of this paragraph in a validly executed agreement or stipulation, then that basis to seek modification does not apply.)

DRL §236, effective October 25 2015 to January 22, 2016 ⁴⁶

DRL §236, effective January 23, 2016 ⁴⁷

Domestic Relations Law § 237 – July 17, 1992 to date

DRL §237, effective July 17, 1992, to October 11, 2012 ⁴⁸

⁴⁶ L.2015, c. 269, § 3, eff. Oct. 25, 2015. (This chapter, among other things, modified DRL §236 [B][5][d][7] to add the following sentence: “The court shall not consider as marital property subject to distribution the value of a spouse’s enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement. However, in arriving at an equitable division of marital property, the court shall consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse.”)

⁴⁷ L.2015, c. 269, §§ 1, 2, 4, 5, eff. Jan. 23, 2016. (This chapter, among other things, modified the temporary maintenance provisions of DRL §236 [B] [5-a]. It also modified the post-divorce maintenance provisions of DRL §236 [B] [6] [a] to add post-divorce maintenance guidelines and added additional factors for consideration by the court in determining maintenance. The fourteen (14) factors are now:

- (a) the age and health of the parties;
- (b) the present or future earning capacity of the parties, including a history of limited participation in the workforce;
- (c) the need of one party to incur education or training expenses;
- (d) the termination of a child support award before the termination of the maintenance award when the calculation of maintenance was based upon child support being awarded which resulted in a maintenance award lower than it would have been had child support not been awarded;
- (e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;
- (f) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (g) acts by one party against another that have inhibited or continue to inhibit a party’s earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
- (h) the availability and cost of medical insurance for the parties;
- (i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party’s earning capacity;
- (j) the tax consequences to each party;
- (k) the standard of living of the parties established during the marriage;
- (l) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage;
- (m) the equitable distribution of marital property and the income or imputed income on the assets so distributed;
- (n) the contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and
- (o) any other factor which the court shall expressly find to be just and proper.)

⁴⁸ L.1992, c. 422, § 1

DRL §237, effective October 12, 2010 to November 19, 2015 ⁴⁹

DRL §237, effective November 20, 2015 ⁵⁰

Domestic Relations Law §240 – 1998 to present

DRL § 240, effective December 22, 1998 to July 26, 1999⁵¹

DRL§ 240, effective July 27, 1999 to November 8, 1999 ⁵²

DRL§ 240, effective November 9, 1999 to October 1, 2002⁵³

DRL § 240, effective October 2, 2002 to June 17, 2003 ⁵⁴

DRL § 240, effective June 18, 2003 to September 30, 2007 ⁵⁵

DRL § 240, effective October 1, 2007 to September 3, 2008⁵⁶

DRL § 240, effective September 4, 2008 to December 2, 2008 ⁵⁷

⁴⁹ L.2010, c. 329, § 1, eff. Oct. 12, 2010. (This chapter, among other things, modified DRL § 237 (a) and (b) to provide that there shall be rebuttable presumption that counsel fees shall be awarded to the less monied spouse. Both parties and their respective attorneys must file an affidavit with the court detailing the financial agreement between the party and the 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.)

⁵⁰ L.2015, c. 447, § 1, eff. Nov. 20, 2015. (This chapter, among other things, amended DRL § 237 (a) and (b) to provide that an unrepresented litigant shall not be required to file an affidavit detailing fee arrangements when making an application for an award of counsel fees and expenses; provided he or she has submitted an affidavit that he or she is unable to afford counsel with supporting proof, including a statement of net worth, and, if available, W-2 statements and income tax returns for himself or herself.)

51 L.1998, c. 597, §§ 1, 2, eff. Dec. 22, 1998

52 L.1999, c. 378, § 1, eff. July 27, 1999

53 L.1999, c. 606, § 1

54 L.2002, c. 624, § 4, eff. Oct. 2, 2002

55 L.2003, c. 81, § 11, eff. June 18, 2003

56 L.2007, c. 616, § 3, eff. Oct. 1, 2007

57 L.2008, c. 538, § 1, eff. Sept. 4, 2008

DRL§ 240, effective December 3, 2008 to January 22, 2009 58

DRL § 240, effective January 23, 2009 to August 10, 2009 59

DRL§ 240, effective August 11, 2009 to October 8, 2009 60

DRL §240, effective Oct. 9, 2009 to November 14, 2009 ⁶¹

DRL§ 240, effective November 15, 2009 to December 14, 2009 62

DRL§ 240, effective December 15, 2009 to January 30, 2010 63

DRL §240, effective August 11, 2009, to January 30, 2010 ⁶⁴

DRL §240, effective January 31, 2010 to April 13, 2010 ⁶⁵

DRL §240, effective April 14, 2010 to July 29, 2010 ⁶⁶

58 L.2008, c. 532, § 6, eff. Dec. 3, 2008

59 L.2008, c. 595, § 1, eff. January 23, 2009

60 L.2009, c. 295, § 1, eff. Aug. 11, 2009

⁶¹ L.2009, c.215, §2, 4, 6 and 8, eff. Oct. 9, 2009. (This chapter, among other things, amended DRL §240, subd.1, par. A-1 dealing with custody orders.)

62 L.2009, c. 295, § 1, eff. Aug. 11, 2009. (This chapter, among other things, amended Paragraph (a–1) of subdivision 1 of section 240 of the domestic relations law and Family Court Act §651 to provide that prior to the issuance of any permanent or temporary order of custody or visitation, the court shall conduct a review of related decisions in court proceedings initiated pursuant to article ten of the Family Court Act; and (ii) reports of the statewide computerized registry of orders of protection, and reports of the sex offender registry.0

63 L.2009, c. 476, § 2, eff. Dec. 15, 2009. (This chapter, among other things, amended various sections of the Domestic Relations Law, Family Court Act and CPLR to replace the term “Law guardian” with the term “attorney for the child.”)

⁶⁴ L.2009, c.295, §1, eff. August 11, 2009. (This chapter, among other things, repealed DRL§ 240 (1-b) (c) (5) and added a new subparagraph 5 dealing with cash medical support and health insurance benefits. DRL§ 240, subd. 1 (b) was amended by adding a new paragraph 3 dealing with health insurance benefits. DRL§ 240 subd.1 (c) (2) (iii) dealing with health insurance benefits was amended.)

⁶⁵ L.2009, c. 343, § 7, eff. Jan. 31, 2010. (This chapter, among other things, amended DRL §240, (1-b) dealing with “combined parental income.”)

⁶⁶ L.2010, c. 41, § 7, eff. April 14, 2010. (This chapter, among other things, amended DRL §240, (1-c) (c) dealing with custody.)

DRL §240, effective July 30, 2010 to August 12, 2010 ⁶⁷

DRL§ 240, effective August 13, 2010 to August 29, 2010 ⁶⁸

DRL §240, effective August 30, 2010 to November 14, 2011 ⁶⁹

DRL §240, effective November 15, 2011 to March 15, 2013 ⁷⁰

DRL §240, effective March 16, 2013 to September 26, 2013 ⁷¹

DRL §240, effective September 27, 2013 to November 12, 2013 ⁷²

DRL §240, effective November 13, 2013 to December 17, 2013 ⁷³

DRL §240, effective December 18, 2013 to January 11, 2014 ⁷⁴

DRL § 240. Effective January 12, 2014 to January 23, 2016 ⁷⁵

⁶⁷ L.2010, c. 261, § 2, eff. July 30, 2010. (This chapter, among other things, amended DRL §240, (3-a) dealing with service of an order of protection and temporary order of protection.)

⁶⁸ L.2010, c. 341, § 8, eff. Aug. 13, 2010 L.2010, c. 341, § 8, eff. Aug. 13, 2010. (This chapter, among other things, amended DRL§ 240 (3) (e) to add the following sentences: “In any proceeding pursuant to this article, a court shall not deny an order of protection, or dismiss an application for such an order, solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the application or the conclusion of the action. The duration of any temporary order shall not by itself be a factor in determining the length or issuance of any final order. “)

⁶⁹ L.2010, c.446, §2, effective August 30, 2010. (This chapter amended FCA §153-b and DRL§240 to allow individuals to serve court issued permanent or temporary orders of protection as well as other legal documents during the later stages of family offense proceedings using a peace or police officer. It also prohibited the charging of any fee associated with the servicing of these documents.)

⁷⁰ L.2011, c.436, §1, effective November 15, 2011. L. 2010, c.446, §2, eff. Aug. 30, 2011. (This chapter amended DRL §240 (3-a) with regard to service of an order of protection.)

⁷¹ L.2013, c. 1, § 11, eff. March 16, 2013. (This chapter, among other things, amended DRL §240, subd. 3 dealing with orders of protection.)

⁷² L.2013, c. 371, § 1, eff. Sept. 27, 2013. (This chapter, among other things, amended DRL §240, (1-c) (b) dealing with custody.)

⁷³ L.2013, c. 480, § 1, eff. Nov. 13, 2013. (This chapter, among other things, amended DRL §240, subd. 3, d. dealing with orders of protection.)

⁷⁴ L.2013, c. 526, § 8, eff. Dec. 18, 2013. (This chapter, among other things, amended DRL §240, subd.3 a. 7 and 8, dealing with orders of protection.)

⁷⁵ L.2015, c. 567, § 12, eff. June 18, 2016.

DRL §240, effective January 24, 2016 to June 17, 2016 ⁷⁶

DRL§ 240, effective June 18, 2016.⁷⁷

October 16, 2017

Appellate Division, First Department

First Department Holds "Presumption of Legitimacy" applies to a Child Born to a Same-sex Married Couple

In re Maria-Irene D, 2017 WL 4287334 (1st Dept., 2017) the Appellate Division affirmed an order which vacated an adoption. Appellant Marco D. and respondent Han Ming T. (Ming), both British citizens, entered a civil union in the United Kingdom (UK) in 2008, which they converted into a legal marriage in 2015, effective as of the date of their

⁷⁶ L.2015, c. 387, §§ 3, 4, eff. Jan. 24, 2016. (This chapter, among other things, amended DRL § 240 (1-b) (5)(iii) subclauses (G) and (H) to add a new subclause (I) to read as follows: (G) fellowships and stipends, and(H) annuity payments; and(I) alimony or maintenance actually paid or to be paid to a spouse who is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, in which event the order or agreement shall provide for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse; provided, however, that the specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with subparagraph two of paragraph b of subdivision nine of part B of section two hundred thirty-six of this article. In an action or proceeding to modify an order of child support, including an order incorporating without merging an agreement, issued prior to the effective date of this subclause, the provisions of this subclause shall not, by themselves, constitute a substantial change of circumstances pursuant to paragraph b of subdivision nine of part B of section two hundred thirty-six of this article.

DRL § 240 (1-b) (b)(5)(vii) subclause (C) was amended to read as follows: (C) alimony or maintenance actually paid or to be paid to a spouse that who is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, provided in which event the order or agreement provides shall provide for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse; provided, however, that the specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with subparagraph two of paragraph b of subdivision nine of part B of section two hundred thirty-six of this article. In an action or proceeding to modify an order of child support, including an order incorporating without merging an agreement, issued prior to the effective date of this subclause, the provisions of this subclause shall not, by themselves, constitute a substantial change of circumstances pursuant to paragraph b of subdivision nine of part B of section two hundred thirty-six of this article.)

⁷⁷ L.2015, c. 567, § 12, eff. June 18, 2016. (This chapter, added to DRL § 240 (a) the following: "If a proceeding filed pursuant to article ten or ten-A of the family court act is pending at the same time as a proceeding brought in the supreme court involving the custody of, or right to visitation with, any child of a marriage, the court presiding over the proceeding under article ten or ten-A of the family court act may jointly hear the dispositional hearing on the petition under article ten or the permanency hearing under article ten-A of the family court act and, upon referral from the supreme court, the hearing to resolve the matter of custody or visitation in the proceeding pending in the supreme court; provided however, the court must determine custody or visitation in accordance with the terms of this section.)

civil union. In 2013, the couple jointly executed an egg donor and surrogacy agreement with the intention of becoming parents. Both contributed sperm, and the embryo fertilized by Marco's sperm was transferred to the surrogate. The child was born in September 2014. The couple commenced a proceeding in Missouri to terminate the egg donor and surrogate's parental rights to the child. In October 2014, the Missouri court awarded Marco, as the genetic father, "sole and exclusive custody" of the child. Marco, Ming, and the child returned to Florida, where they lived as a family until October 2015, when Ming returned to the UK to seek employment. At some point in or after 2013, Marco entered a relationship with petitioner Carlos A., and they moved to New York with the child after Ming went to the UK. In January 2016, Carlos filed a petition in New York to adopt the child. In the adoption papers, Carlos disclosed that Marco and Ming were married in 2008, but alleged that they had not lived together continuously since 2012 and that Carlos and Marco had been caring for the child since her birth. A home study report stated that Marco and Ming legally separated in 2013 and had no children together. Ming's role in the surrogacy process was not disclosed, nor was the Florida divorce action commenced by Ming in March 2016 in which he sought joint custody of the child.

Family Court granted Ming's motion, and vacated the adoption pursuant to Domestic Relations Law § 114(3), finding that Carlos and Marco had made material misrepresentations to the court that provided sufficient cause to vacate, and that Ming was entitled to notice of the adoption proceeding. The Appellate Division affirmed. It found that Ming and Marco's marriage in the UK was effective as of August 2008. New York courts as a matter of comity will recognize such out-of-state marriages (see e.g. *Matter of Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289, 292 [1980]). The child was born in 2014, as the result of jointly executed surrogacy agreements, at a time when the couple was considered legally married, thus giving rise to the presumption that the child was the legitimate child of both Marco and Ming (see Domestic Relations Law § 24; *Matter of Fay*, 44 N.Y.2d 137 [1978]). After the child was born, Marco, Ming and the child lived together as a family, and the couple took affirmative steps in the UK to establish Ming's parental rights in accordance with UK law. Under these circumstances, the Missouri judgment in 2014 awarding Marco sole and exclusive custody of the child, as opposed to the egg donor and surrogate, was insufficient to rebut the presumption of legitimacy. Marco and Ming were deemed legally married when they embarked on the surrogacy process to have a child together (see *Debra H. v. Janice R.*, 14 NY3d 576 [2010], cert denied 562 U.S. 1136 [2011]). Accordingly, the child was born in wedlock, and Ming was entitled to notice of the adoption proceeding (see Domestic Relations Law § 111[1] [b]). Petitioner's failure to disclose the Florida divorce action, in which the child was named as a child of the marriage and Ming sought joint custody, provided another ground to vacate the adoption (see Domestic Relations Law § 114[3]). The adoption petition required petitioner to give a sworn statement that the child to be adopted was not the subject of any proceeding affecting his or her custody or status. Even though petitioner was aware of the Florida divorce action before finalization of the adoption, he failed to disclose the action to the court, instead averring in a supplemental affidavit that there had been no change in circumstances "whatsoever" since the filing of the adoption petition.

October 1, 2017

Appellate Division, First Department

Family Offense Petition Should Not Be Dismissed “Solely on the Basis That the Acts or Events Alleged Are Not Relatively Contemporaneous with the Date of Petition

In *Monwara G v Abdul G.*, --- N.Y.S.3d ----, 2017 WL 4246833 (1st Dept., 2017) the Appellate Division affirmed an order of Family Court which granted petitioner wife an order of protection. It found that her testimony, although lacking in detail concerning specific dates, supported a finding that the pattern of abusive conduct during the marriage which she testified to had continued within the year preceding the filing of the petition, and her testimony concerning more remote allegations was relevant (see *Matter of Opray v. Fitzharris*, 84 AD3d 1092, 1093 [2d Dept 2011]). It pointed out that a family offense petition should not be dismissed “solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the petition” (Family Ct Act § 812[1]).

Judgment of Divorce Must Contain Provision Addressing Equitable Distribution

In *Serao, v. Bench-Serao*, --- N.Y.S.3d ----, 2017 WL 1450010, 2017 N.Y. Slip Op. 03135 (1st Dept.,2017) the judgment of divorce had to be vacated because it was devoid of any provision addressing the equitable distribution of the parties marital assets or debts.

Appellate Division, Second Department

No Automatic Entitlement to Prejudgment Interest in Matrimonial Litigation. Recoupment of Overpayments of Maintenance Is Generally Against Public Policy

In *O'Donnell v O'Donnell*, --- N.Y.S.3d ----, 2017 WL 4158945, 2017 N.Y. Slip Op. 06540 (2d Dept., 2017) the parties divorce judgment entered on March 26, 2015, incorporated by reference, to survive, their stipulation of settlement dated March 17, 2014, in which the defendant agreed, to “pay the Wife a lump sum of \$1,000,000 on or before September 30, 2014,” to transfer certain real property to her, and to pay her maintenance in the sum of \$4,000 per month for a period of five years. The defendant transferred the real property, but in lieu of paying his maintenance obligation of \$4,000 per month, he paid certain carrying charges on the real property, which totaled more than \$91,000 for the period from April 1, 2014, through October 1, 2015. His maintenance obligation of \$4,000 per month for that period totaled \$72,000. At the time the judgment of divorce was entered on March 26, 2015, the defendant had not paid the \$1,000,000 distributive award. The plaintiff moved, inter alia, to compel the defendant to execute a confession of judgment, or in the alternative, for leave to enter a money judgment against him in the sum of \$1,000,000 plus interest at the statutory rate of 9% per annum (see CPLR 5004). The defendant cross-moved for a money judgment for an alleged overpayment of maintenance of \$19,241.31, representing the difference between the amount he paid in carrying charges and his maintenance obligation for the period from April 1, 2014, through October 1, 2015. The defendant produced a signed confession of judgment executed on March 17, 2014, which rendered academic the motion to compel the defendant to execute a confession of judgment. The confession of judgment made no provision for interest. The defendant stated that he paid the \$1,000,000 in full on June 19, 2015. Supreme Court denied plaintiff’s request for an award of statutory interest on the \$1,000,000, because the stipulation of settlement did not provide for such interest. The court granted the defendant a credit for the alleged overpayment of maintenance of \$19,241.31, on the ground that the plaintiff did not object to the defendant making those payments, therefore “it would be unjust and inequitable to allow the [plaintiff] to retain such additional money.”

The Appellate Division held that plaintiff was not entitled to postjudgment interest, as the \$1,000,000 distributive award was not explicitly set forth in the judgment of divorce, but, rather, was part of the stipulation of settlement that was incorporated by reference, but not merged, in the judgment of divorce. The defendant paid the \$1,000,000 distributive award while the plaintiff’s motion for a money judgment was pending, thus avoiding postjudgment interest. As to prejudgment interest, “[t]here is no automatic entitlement to prejudgment interest, under CPLR 5001, in matrimonial litigation” (*Rubin v. Rubin*, 1 AD3d 220, 221). The general rule in matrimonial actions is that the determination of whether to award prejudgment interest is a discretionary determination with the trial court. As there was no finding of a willful default which would entitle the wife to interest pursuant to Domestic Relations Law § 244, and the amount was not reduced to a judgment, the denial of prejudgment interest was a provident exercise of discretion.

The Appellate Division held that the award of \$19,241.31, representing an alleged overpayment of maintenance, was improper. The recoupment of overpayments of maintenance and/or child support is generally against public policy, since those payments are deemed to have been spent for that purpose. Voluntary payments are generally not credited against amounts currently due (see *McKay v. Groesbeck*, 117 AD3d 810, 811). The voluntary payments were made, at least in part, because the plaintiff was unable to satisfy certain mortgage liens on the real property transferred to her because the defendant did not transfer the \$1,000,000 distributive award to her in a timely manner.

September 16, 2017

Recent Legislation

Laws of 2017, Ch 35 amended the Domestic Relations Law to prohibit marriage of minors under seventeen years of age and amended the process to obtain court approval for marriage of persons at least seventeen years of age but under eighteen years of age.

Domestic Relations Law § 15-a was amended to increase the age of minors who are prohibited from marrying to under seventeen years of age. Previously minors under fourteen years of age were prohibited from marrying.

Domestic Relations Law § 13-b was amended to allow the solemnization of marriage of a party to be married to who is at least seventeen years upon the Court making written affirmative findings required under Domestic Relations Law § 15, subdivision 3. Formerly, the court could allow the solemnization of marriage by minor under sixteen years of age but over fourteen years of age.

Domestic Relations Law §15, subdivisions 1(a), 2 and 3 were amended to require the town or city clerk to require each applicant for a marriage license to present documentary proof of age. In cases where it appears that either party is at least seventeen years of age but under eighteen years of age the process by which the written approval of a justice of the supreme court or a judge of the family court was obtained was amended to provide for, among other things: (i) the appointment of an attorney for the child for each minor party which attorney must have received training in domestic violence including a component on forced marriage; and (ii) prior to the justice of the supreme court or the judge of the family court issuing approval, the justice or judge must (1) provide notification to each minor party of his or her rights, including but not limited to, in relation to termination of the marriage, child and spousal support, domestic violence services and access to public benefits and other services (2) conduct, with respect to each party, including a minor party, a review of related decisions in court proceedings initiated pursuant to article ten of the family court act, and all warrants issued under the family court act, reports of the statewide computerized registry of orders of protection under section two hundred twenty-one-a of the executive law, and reports of the sex offender registry under section one hundred sixty-eight-b of the correction law, and (3) hold an in camera interview, separately with each minor party, and make written affirmative findings specified in subdivision 3, taking into consideration, among other relevant factors, the factors set forth in subdivision 3. The wishes of the parents or legal guardians of the minor intending to be married shall not be the sole basis for consent or approval under this subdivision.

According to the Sponsor's memorandum in support of this legislation parents force their children into marriages, citing reasons such as protecting "family honor," controlling the child's behavior and/or sexuality, and enhancing the family's status. Such reasons are reminiscent of the reasons for allowing girls age fourteen and over but under age sixteen to marry with court approval in 1929. The occurrence of child marriage is not limited to a particular culture or religion, but is widespread in the United States. Child marriage or forced marriage, or both, occur in families across faiths, including Muslim, Christian, Hindu, Buddhist, Sikh, Orthodox Jew, Mormon and Unification Church. Tactics such as threats of ostracism, beatings or death are used to force children to marry against their will. Under the Penal Law, a child under 17 does not have the capacity to consent to sex. It is statutory rape for an adult to have sex with a 16-year old but if he is married to her he can force her to have non-consensual sex as often as he likes. Marriage at any age before 18, undermines girls' health, education and economic opportunities, and increases their likelihood of experiencing violence. As a matter of public policy, no parent or court should be permitted to bind a child under the age of seventeen to a contract where the child lacks the capacity as well as the opportunity to consent. This legislation is intended to strengthen the process as applied to marriage of persons at least seventeen but under eighteen years of age. See 2017 NY Legis Memo 35.

Appellate Division, Second Department

Hearing Required on Motion for Contempt Only If Papers in Opposition Raise Factual Dispute as to Elements of Civil Contempt, or Existence of a Defense

In *Shemtov v Shemtov*, --- N.Y.S.3d ----, 2017 WL 4018453, 2017 N.Y. Slip Op. 06473 (2d Dept., 2017) the Appellate Division affirmed an order which held the defendant in civil contempt for his failure to comply with a prior order directing him to pay, inter alia, pendente lite child support and maintenance, without conducting a hearing on his defense of an inability to pay. It observed that a motion to punish a party for civil contempt is addressed to the sound discretion of the motion court. To prevail on a motion to hold a party in civil contempt, the movant must establish by clear and convincing evidence (1) that a lawful order of the court was in effect, clearly expressing an unequivocal mandate, (2) the appearance, with reasonable certainty, that the order was disobeyed, (3) that the party to be held in contempt had knowledge of the court's order, and (4) prejudice to the right of a party to the litigation (see Judiciary Law § 753[A][3]; *El-Dehdan v. El-Dehdan*, 26 NY3d 19, 29). Once the moving party makes this showing, the burden shifts to the alleged contemnor to refute the movant's showing, or to offer evidence of a defense, such as an inability to comply with the order. A hearing is required only if the papers in opposition raise a factual dispute as to the elements of civil contempt, or the existence of a defense (see *Matter of Fitzgerald*, 144 AD3d at 907; *Matter of Savas v. Bruen*, 139 AD3d 736, 737; *El-Dehdan v. El-Dehdan*, 114 AD3d 4, 17, affd 26 NY3d 19). Here, the papers in opposition did not raise a factual dispute or the existence of a defense.

Family Court

Although Emergency Jurisdiction under DRL. § 76-c Is Generally Temporary it Becomes Permanent Where No Other Custody Proceeding Are Instituted in a Competing Forum and New York Becomes Children's Home State Following Commencement of the Proceeding

In *Matter of J.A. v J.M.G.*, Slip Copy, 2017 WL 4018751 (Table), 2017 N.Y. Slip Op. 51125(U) (Fam.Ct., 2017) on February 6, 2017, fifteen-year-old A.'s paternal grandmother J.A. filed a petition for her custody. The child had been living in Virginia with her mother. On the same day, an ex parte temporary order of custody on behalf of the petitioner was granted. On March 8, 2017, petitioner filed a family offense petition on behalf of A. against her mother, J.G. Petitioner stated in January the respondent allowed child to be physically abused by someone living in her home. The child fled the home and called her [the petitioner] and the police was called. Petitioner states the respondent put the child out of the home and gave her custody of the child. Petitioner requested an order keeping the respondent away from her, her grandchild, their home and to not harass them. An ex parte order of protection ordering the respondent mother to stay away from the child and the grandmother was issued on that day. Family Court, inter alia, denied the mother's motion to dismiss. It found that at the time the petitioner filed her custody and family offense petitions in New York, New York was not the home state of the child as the child had been living in Virginia since 2005 and had only been in New York for less than two months. D.R.L. § 75-a (7). However, the child was physically present in New York and the allegations that she had been abused in Virginia and was at risk of harm if returned there established that New York had temporary emergency jurisdiction. D.R.L. § 76-c (1) ("A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child, a sibling or parent of the child.") Pursuant to D.R.L. § 76-c (2), if there is no previous child custody determination that is entitled to be enforced, and a child custody proceeding has not been commenced in a court of a state having jurisdiction, a custody determination made under temporary emergency jurisdiction remains in effect until the court of a state having jurisdiction has taken steps to assure the protection of the child. Moreover, if a child custody proceeding has not been or is not commenced in a state having jurisdiction, a child custody determination made under this section becomes a final determination and this state becomes the home state of the child. Here, there were allegations that the child was abused in her mother's home and that she was at risk of further abuse if she returns. No proceeding which could protect the child had been commenced in Virginia, which was the child's home state when she left. There was no previous child custody determination that was entitled to be enforced. Thus, in the absence of any proceeding in another state that would have jurisdiction, under D.R.L. § 76-c (2), New York, which originally exercised emergency jurisdiction, had now become the home state of the child. Under D.R.L. § 76-c (2), the New York court retains jurisdiction, and the motion to dismiss the petitions on that ground was denied. § 76-c (2); See *Rodriguez v. Rodriguez*, 118 AD3d 1011 (2d Dept.2014) (reversing family court's determination that Florida was proper venue where there was a prima facie showing that child would be in imminent risk of harm if returned to father in Florida); *Santiago v. Riley*, 79 AD3d 1045 (2d Dept.2010) (reversing family court's dismissal of family offense proceeding where children were present in New York and, although there was also a proceeding commenced in Delaware, family court failed to determine whether it should continue to exercise emergency jurisdiction because it was necessary to protect the child); see also *Tin Tin v. Thar Kyi*, 92 AD3d 1293, 1294 (4th Dept.2012) ("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....").

September 1, 2017

Appellate Division, Second Department

Religious Upbringing Clause in Custody Agreement Cannot Be Enforced Extent it is not in Best Interests of Children or Violates Parent's Legitimate Due Process Right to Express Oneself and Live Freely.

In *Weisberger v Weisberger*, --- N.Y.S.3d ----, 2017 WL 3496090, 2017 N.Y. Slip Op. 06212 (2d Dept., 2017) in their stipulation of settlement dated November 3, 2008, which was incorporated but not merged into their 2009 judgment of divorce, the parties agreed to joint legal custody of the children with the mother having primary residential custody and the father having specified visitation. The stipulation contained the following religious upbringing clause: "Parties agree to give the children a Hasidic upbringing in all details, in home or outside of home, compatible with that of their families'. Father shall decide which school the children attend. Mother to insure that the children arrive in school in a timely manner and have all their needs provided."The stipulation of settlement further provided that each party "shall be free from interference, authority and control, direct or indirect, by the other."

In November 2012, at which time the children were nine, seven, and five years old, respectively, the father moved to modify the stipulation of settlement so as to, inter alia, award him sole legal and residential custody of the children; award the mother only supervised therapeutic visitation; and to enforce the religious upbringing clause so as to require the mother to direct the children to practice full religious observance in accordance with the Jewish Hasidic practices of ultra Orthodoxy at all times and require her to practice full religious observance in accordance with the Hasidic practices of ultra Orthodoxy during any period in which she has physical custody of the children and at any appearance at the children's schools. In support of the motion, the father alleged that the mother had radically changed her lifestyle in a way that conflicted with the parties' religious upbringing clause. The father alleged that since the parties had entered into the stipulation of settlement the mother had, among other things, come out publicly as a lesbian, disparaged the basic tenets of Hasidic Judaism in front of the children, allowed the children to wear non-Hasidic clothes, permitted them to violate the Sabbath and kosher dietary laws, and referred to them by names that were not traditionally used in the Hasidic community. The father further alleged that the mother had dressed immodestly, dyed her hair, and permitted a transgender man to reside in her home with the children.

Supreme Court determined that there had been a change of circumstances caused by the mother's transition from an ultra Orthodox Hasidic lifestyle to a "more progressive, albeit Jewish, secular world." The court noted that the mother's conduct was in conflict with the parties' agreement, which "forbade living a secular way of life in front of the children or while at their schools." The court posited that had there been no agreement it might have considered the parties' arguments differently; however, "given the existence of the Agreement's very clear directives, [the] Court was obligated to consider the religious upbringing of the children as a paramount factor in any custody determination". Supreme Court awarded him sole legal and residential custody of the children, as well as final decision-making authority over medical and dental issues, and issues of mental health, with supervised therapeutic visitation to the mother. The court stayed the provision of the order limiting the mother's visitation to supervised therapeutic visits, conditioned upon, inter alia, her compliance with the religious upbringing clause. Supreme Court enforced the religious upbringing clause so as to require the mother to direct the children to practice full religious observance in accordance with the Hasidic practices of ultra Orthodoxy at all times. The court ordered that during any period of visitation or during any appearance at the childrens' schools "the [mother] must practice full religious observance in accordance with the Hasidic practices of ultra Orthodoxy."

The Appellate Division modified the order. It observed that to the extent the mother's sexual orientation was raised at the hearing, courts must remain neutral toward such matters, such that the focus remains on the continued best interests and welfare of the children. The Appellate Division found that a change of circumstances had occurred, such that a modification of the stipulation of settlement was necessary. However, Supreme Court's determination to modify the stipulation of settlement so as to, inter alia, award the father sole legal and residential custody of the children, lacked a sound and substantial basis in the record. In pertinent part, the court gave undue weight to the parties' religious upbringing clause, finding it to be a "paramount factor" in its custody determination. It held that when presented as an issue, religion may be considered as one of the factors in determining the best interest of a child, although it alone may not be the determinative factor. Clauses in custody agreements that provide for a specific religious upbringing for the children will only be enforced so long as the agreement is in the best interests of the children. It found that the mother had been the children's primary caretaker since birth, and their emotional and intellectual development was closely tied to their relationship with her. The mother took care of the children's physical and emotional needs both during and after the marriage, while the father consistently failed to fully exercise his visitation rights or fulfill his most basic financial obligations to the children after the parties' separation. Aside from objecting to her decision to expose the children to views to which he personally objected, the father expressed no doubts whatsoever about the mother's ability to care and provide for the children. The weight of the evidence established that awarding the father full legal and residential custody of the children with limited visitation to the mother would be harmful to the children's relationship with her.

Furthermore, the Supreme Court improperly directed that enforcement of the parties' stipulation of settlement which required the mother to practice full religious observance in accordance with the Hasidic practices of ultra Orthodoxy during any period in which she has physical custody of the children and at any appearance at the children's schools. The plain language of the parties' agreement was "to give the children a Hasidic upbringing". The parties' agreement did not require the mother to practice any type of religion, to dress in any particular way, or to hide her views or identity from the children. Nor may the courts compel any person to adopt any particular religious lifestyle. At a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise" (Lee v. Weisman, 505 U.S. at 587). Thus, it held that a religious upbringing clause should not, and cannot, be enforced to the extent that it violates a parent's legitimate due process right to express oneself and live freely (see Lawrence v. Texas, 539 U.S. 558, 574. The parties themselves agreed in the stipulation of settlement that they "shall [each] be free from interference, authority and control, direct or indirect, by the other" (emphasis added). The weight of the evidence did not support the conclusion that it was in the children's best interests to have their mother categorically conceal the true nature of her feelings and beliefs from them at all times and in all respects, or to otherwise force her to adhere to practices and beliefs that she no longer shares. There was no indication or allegation that the mother's feelings and beliefs were not sincerely held, or that they were adopted for the purpose of subverting the religious upbringing clause, and there had been no showing that they are inherently harmful to the children's well-being.

The evidence at the hearing established that the children spent their entire lives in the Hasidic community, they attend Hasidic schools, and their extended families are Hasidic. The weight of the evidence demonstrated that it was in the children's best interests to continue to permit the father to exercise final decision-making authority over the children's education and to continue to permit him to require the children to practice full religious observance in accordance with the Hasidic practices of ultra Orthodoxy while they are in his custody, or in the custody of a school that requires adherence to such practices. It directed the mother to make all reasonable efforts to ensure that the children's appearance and conduct comply with the Hasidic religious requirements of the father and of the children's schools while the children are in the physical custody of their father or their respective schools.

Where Wife Violated Automatic Orders by Ceasing to Pay Premiums for Husbands Whole Life Insurance Policy, Motion to Hold Wife in Civil and Criminal Contempt Properly Denied Based upon Husbands Admitted Use of His Whole Life Insurance Policy as a "Savings Plan"

In *Savel v Savel*, --- N.Y.S.3d ----, 2017 WL 3611679, 2017 N.Y. Slip Op. 06309 (2d Dept., 2017) the plaintiff served a summons with notice accompanied by the “automatic orders” of Domestic Relations Law § 236(B)(2)(b), which require, inter alia, that both parties maintain existing life insurance policies in full force and effect. The plaintiff moved to hold the defendant in civil and criminal contempt, alleging that she violated the automatic orders by ceasing to pay the premiums for his whole life insurance policy. He further sought an order directing the defendant to maintain the policy during the pendency of the action. In opposition, the defendant conceded that she ceased paying the premiums for the plaintiff’s whole life insurance policy, but argued that she did not violate the automatic orders and that, even if she did, the plaintiff was not prejudiced thereby. The parties had \$12 million in term life insurance benefitting their children, in addition to each of their whole life insurance policies. The defendant argued that the whole life insurance policies were intended as savings vehicles that should not be subject to the automatic orders, and she should not have to contribute her post-commencement earnings to a savings vehicle for the plaintiff. The Supreme Court denied the plaintiff’s motion to hold the defendant in contempt and to direct her to maintain the subject policy during the pendency of the action, determining that, under the circumstances of this case, the plaintiff’s whole life insurance policy was a savings vehicle and not life insurance subject to the automatic orders. The Appellate Division held that “under the particular circumstances of this case, including the \$12 million in term life insurance on the parties, an additional \$7.6 million in whole life insurance on the defendant, and the plaintiff’s admitted use of his whole life insurance policy as a “savings plan,” the Supreme Court providently exercised its discretion in declining to hold the defendant in contempt”, and properly denied the plaintiff’s motion to hold the defendant in contempt and to direct her to maintain the subject policy during the pendency of the action.

Appellate Division, Third Department

Seven Month Hiatus Between Plaintiff's Receipt, Retention, and Lack of Specific Objection to Defendants' Bills, Including Partial Payment Thereon, Implied an Account Stated

In *Costopoulos v DeCoursey*, 151 A.D.3d 1452 (3d Dept., 2017) the Appellate Division affirmed an order of Supreme Court that awarded defendants summary judgment on the theory that defendants had established an account stated with plaintiff. "An attorney can recover fees on an account stated with proof that a bill was issued to a client and held by the client without objection for an unreasonable period of time". The defendants need not establish the reasonableness of the fee since the client's act of holding the statement without objection will be construed as acquiescence as to its correctness. In support of their motion, defendants submitted the retainer agreement, copies of the monthly unpaid invoices sent to plaintiff, and copies of email correspondence between defendant Nicole Helmer Simon and plaintiff. These documents demonstrated plaintiff's receipt of the invoices, partial payment thereon and lack of specific objections to the invoices. These "submissions satisfied [defendants'] prima facie burden to show that accounts were submitted and retained without objection, thus shifting the burden to [plaintiff] to demonstrate the existence of triable issues of fact. In opposition, plaintiff submitted her affidavit and copies of emails between her and Simon. Review of the proof offered by plaintiff showed that, in March 2015, plaintiff expressed questions about general billing policies set forth in the retainer agreement, including the time charged to her for sending and receiving emails. After an exchange of emails between plaintiff and Simon, these concerns were resolved by a credit on plaintiff's next monthly bill. Thereafter, defendants sent plaintiff monthly bills that were received and retained by plaintiff, and upon which plaintiff made periodic payments, with the last payment made on September 21, 2015. During the period between March 2015 and October 20, 2015, plaintiff received and retained seven monthly bills that detailed the hourly rate, hours expended and the services rendered. During this period, plaintiff failed to articulate any questions directed at specific instances where she found the bills to be in error, and this lack of specific objection establishes the correctness and reasonableness of the fees. The emails upon which plaintiff relied to establish her objections to the amount due revealed that plaintiff "failed to rebut the inference that [she] agreed to the account by tendering evidentiary proof of circumstances tending to show a contrary inference" and "were insufficient to raise a triable issue of fact as to the existence of an account stated" (*Schlenker v. Cascino*, 124 A.D.3d at 1153, 2 N.Y.S.3d 292). The emails and, plaintiff's own affidavit revealed only generalized objections relating to the escalating expenses due to delays in the litigation outside the control of defendants. The long hiatus between plaintiff's receipt, retention, and the lack of specific objection to defendants' bills, including her partial payment thereon, implied an account stated since, when no timely objection is raised after an account is presented, silence is deemed acquiescence and warrants enforcement of the implied agreement to pay. As is relevant here, the retainer agreement provided that, "[u]pon receipt of our bill, you are expected to review the bill and promptly bring to our attention any objections you may have to the bill."

Appellate Division, Fourth Department

Court Erred in Issuing Orders of Protection That Did Not Expire until the Children's 18th Birthdays Where Respondent Was a Parent Substitute Who Was Responsible for the Children's Care

In Matter of Nevaeh T., 151 A.D.3d 1766, 56 N.Y.S.3d 757, 2017 N.Y. Slip Op. 04725 (4th Dept., 2017) Petitioner commenced neglect proceedings against Wilbert J., III (respondent) and respondent mother. The mother admitted that she neglected the children, and orders were issued granting her an adjournment in contemplation of dismissal. The petitions against respondent proceeded to a hearing, after which Family Court issued an order finding that respondent was a parent substitute who was responsible for the children's care and finding that he neglected the children. After a dispositional hearing, the court issued orders of protection in favor of the children until their 18th birthdays.

The Appellate Division held that the court properly found that he was a person legally responsible for the care of the children. The testimony at the hearing established that respondent was at the mother's residence on at least a regular basis, if not actually living there. However, it agreed with respondent that the court erred in issuing orders of protection that did not expire until the children's 18th birthdays. Pursuant to Family Court Act § 1056(1), the court may issue an order of protection in an article 10 proceeding, but such order of protection shall expire no later than the expiration date of "such other order made under this part, except as provided in subdivision four of this section." Subdivision (4) allows a court to issue an order of protection until a child's 18th birthday, but only against a person "who was a member of the child's household or a person legally responsible ..., and who is no longer a member of such household at the time of the disposition and who is not related by blood or marriage to the child or a member of the child's household." Here, respondent was found to be a person legally responsible for the children and, at the time of the dispositional hearing, he no longer lived with the mother. He was also not related by blood or marriage to the children, but he was related to a member of their household. Petitioner's caseworker testified at the dispositional hearing that respondent was the father of the mother's recently-born child, who lived in the mother's home. Subdivision (4) was therefore inapplicable on its face. Inasmuch as the only other dispositional orders issued with respect to the children at the time the court issued the orders of protection had expiration dates of March 26, 2015, it modified the orders of protection issued in these proceedings to expire on that same date.

August 16, 2017

Appellate Division, Second Department

Where Court Appointed Forensic Evaluator Directed to Submit an Updated Report on Remittur Supreme Court Should Have Permitted Plaintiff to Cross-examine the Forensic Evaluator with Respect to the Updated Report

In *EV v. RV*, --- N.Y.S.3d ----, 2017 WL 3272238, 2017 N.Y. Slip Op. 05994 (2d Dept., 2017) upon remittitur from the Appellate Division in this custody modification proceeding, the court-appointed forensic evaluator performed a new evaluation and submitted an updated forensic mental health report. The plaintiff then moved, inter alia, for leave to cross-examine the forensic evaluator regarding the updated report. Supreme Court denied the motion, and granted defendant's cross motion to modify the prior orders of custody and visitation so as to award him sole legal and physical custody of the child. The Appellate Division noted that the matter had been remitted to the Supreme Court for the limited purpose of receiving the updated forensic mental health evaluation and an in camera examination of the child (see *E.V. v. R.V.*, 130 AD3d at 921). However, in receiving the updated report pursuant to this Court's order, the Supreme Court should have permitted the plaintiff to cross-examine the forensic evaluator with respect to the updated report (see 22 NYCRR 202.16[g][2]; *Ekstra v. Ekstra*, 49 AD3d 594, 595). It remitted the matter to the Supreme Court for the sole purpose of permitting cross-examination of the forensic evaluator with respect to the updated report. It held the appeal in abeyance and directed that the Supreme Court shall issue a report setting forth its findings derived from the cross-examination and setting forth whether the testimony received would have changed its determination set forth in the order appealed from.

Where Party Has Paid Other Party's Share of Marital Debt, Such as Mortgage, Taxes, and Insurance on the Marital Residence, Reimbursement Is Required.

In *Morales v Carvajal*, --- N.Y.S.3d ----, 2017 WL 3273299, 2017 N.Y. Slip Op. 059459 (2d Dept., 2017) the Appellate Division held that plaintiff was entitled to receive a credit against the proceeds of the sale of the marital residence for the money that he paid to reduce the balance of the mortgage during the pendency of the action.. The plaintiff 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.

The Court also held that credit card debt incurred prior to the commencement of a matrimonial action constitutes marital debt and should be equally shared by the parties.

Appellate Division, Third Department

No appeal of right from order denying an ex parte motion to issue order to show cause

In *Matter of St. Lawrence County Support Collection o/b/o Bowman v Bowman*, 55 N.Y.S.3d 674 (Mem), 2017 N.Y. Slip Op. 05641 (3d Dept., 2017) the Appellate Division held that an appeal from an order denying an ex parte motion to issue an order to show cause must be dismissed as such order is not appealable as of right (see CPLR 5701[a][2])

Where Custody of Child under Supervision of DSS Is Transferred to the Custody of a Parent or Relative in Another State, the Provisions of the ICPC Apply Even Where There Is a Pending Family Ct Act Article 6 Petition for Custody

In *Matter of Dawn N., v Schenectady County Department of Social Services*, --- N.Y.S.3d ---, 2017 WL 2870414, 2017 N.Y. Slip Op. 05482 (3d Dept., 2017) Petitioner (grandmother) was the maternal grandmother of the child (born in 2010) and a resident of North Carolina. In May 2014, respondent Schenectady County Department of Social Services (DSS) effectuated an emergency removal of the child and commenced a neglect proceeding against the mother. The grandmother commenced a Family Ct Act article 6 proceeding against DSS and the mother seeking custody of the child. The mother was sentenced to a term of imprisonment. In response to the grandmother's custody petition, DSS asked that its North Carolina counterpart perform a home study to determine whether, under the Interstate Compact on the Placement of Children (see Social Services Law § 374-a [hereinafter ICPC]), the grandmother was a suitable resource for the child. After completion of the home study the North Carolina authorities advised DSS that it did not recommend placement of the subject child with the grandmother. Family Court conducted a fact-finding hearing. The mother appeared and voiced her support for the grandmother's petition—prompting Family Court to dispense with an extraordinary circumstances inquiry. At the conclusion of that hearing, Family Court dismissed the grandmother's petition, finding that it was not in the child's best interests to award custody to the grandmother.

The Appellate Division affirmed for reasons other than those expressed by Family Court. Although Family Court acknowledged in its written decision that North Carolina had not recommended placement of the child with the grandmother, the court did not address whether, as a threshold matter, the ICPC applied where, as here, a relative was seeking custody of the child pursuant to a petition brought under Family Ct Act article 6 or whether custody of the child could be awarded to the grandmother in the absence of approval from North Carolina authorities. As the ICPC applied to this proceeding, and in light of the statutory prohibition against placing a child in another jurisdiction if that jurisdiction determines that such placement would not be in the child's best interests (Social Services Law § 374-a [1] [art III] [d]), Family Court properly dismissed the grandmother's petition for custody. The Appellate Division observed that the ICPC provides, in relevant part, that “[n]o sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein” (Social Services Law § 374-a [1] [art III] [a]). To that end, the statute expressly provides that “[t]he 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” (Social Services Law § 374-a [1] [art III][d]).

The Appellate Division rejected the grandmothers argument that the ICPC did not apply at all because custody of the subject child is being sought in the context of a Family Ct Act article 6 proceeding (rather than in conjunction with the related Family Ct Act article 10 neglect proceeding against the mother). At the time that the grandmother's custody petition was filed, DSS had custody of the child in the context of the then-pending Family Ct Act article 10 proceeding. To that end, where the custody of a child who is under the supervision of [DSS] is transferred to the custody of a parent or relative in another state, the provisions of the ICPC apply (Matter of Alexis M. v. Jenelle F., 91 AD3d 648, 650–651 [2012])—even where, as here, there is a pending Family Ct Act article 6 petition for custody (see Matter of Faison v. Capozello, 50 AD3d 797, 797–798 [2008]; but see Matter of Louis N. [Dawn O.], 98 AD3d 918, 919 [2012]; Matter of Marcy RR., 2 AD3d 1199, 1200–1201 [2003]). Permitting a court to award custody of a child (who is in the care and custody of a social services agency) to an out-of-state relative in the context of a Family Ct Act article 6 proceeding (while there is a related Family Ct Act article 10 proceeding in play) not only subverts the goals of the ICPC, but allows a court to effectively circumvent the procedures and requirements set forth therein—a result that is contrary to the expressed purpose of the statute. It agreed with DSS that the provisions of the ICPC applied and, absent approval from authorities in North Carolina, Family Court could not grant the grandmother's petition for custody.

August 1, 2017

Appellate Division, Second Department

Parties May Chart Their Own Litigation Course by Agreement Which Courts Are Bound to Enforce.

Waiver of Physician-patient Privilege in Contesting Custody Requires Showing That Resolution of Custody Issue Requires Revelation of Protected Material

In *Bruzzese v Bruzzese*, --- N.Y.S.3d ----, 2017 WL 2961475, 2017 N.Y. Slip Op. 05579 (2d Dept., 2017) the plaintiff commenced an action for a divorce, and the defendant counterclaimed for a divorce. Prior to trial, the parties stipulated to a divorce on the ground of an irretrievable breakdown of the marital relationship pursuant to Domestic Relations Law § 170(7). After a nonjury trial, the Supreme Court, inter alia, awarded the defendant a divorce on the ground of cruel and inhuman treatment. The Appellate Division held that Supreme Court erred in awarding the defendant a divorce on the ground of cruel and inhuman treatment. "Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce" (*Matter of New York, Lackawanna & W. R.R. Co.*, 98 N.Y. 447, 453). There was no showing of cause sufficient to invalidate the parties' stipulation to a divorce on the ground of an irretrievable breakdown of the marital relationship. Accordingly, the court should have awarded the defendant a divorce on this ground.

The Appellate Division found, inter alia, that the Supreme Court, relying on the physician-patient privilege, improperly precluded testimony of two witnesses who were doctors, regarding the defendant's mental health. It noted that in a matrimonial action, a party waives the physician-patient privilege concerning his or her mental or physical condition by actively contesting custody. However, there "first must be a showing beyond mere conclusory statements that resolution of the custody issue requires revelation of the protected material" (*McDonald v. McDonald*, 196 A.D.2d 7, 13; see *Baecher v. Baecher*, 58 A.D.2d 821). Since the defendant actively contested custody, and the plaintiff made the requisite showing that resolution of the custody issue required revelation of the protected material, the court should not have precluded the testimony of the doctors regarding the defendant's mental health.

Authors note: In *McDonald v. McDonald*, 196 A.D.2d 7, 13 (2d Dept., 1994) the Second Department adopted the requirement of *Perry v Fiumano*, 61 AD2d 512, 519 that before the court may find that there has been a waiver of the physician-patient privilege "[t]here first must be a showing beyond 'mere conclusory statements' that resolution of the custody issue requires revelation of the protected material" (*Perry v Fiumano*, 61 AD2d 512, 519).

Proper to Award Spouse Credit for Half of Mortgage Payments Made after Commencement. Both Parties Are Responsible for Mainlining Marital Residence after Commencement.

In *Brinkmann v Brinkmann*, --- N.Y.S.3d ----, 2017 WL 3045864, 2017 N.Y. Slip Op. 05702 (2d Dept., 2017) the plaintiff and the defendant were married in 1975. In August 2011, the plaintiff commenced the action for a divorce. The Appellate Division held that the court did not err in granting the plaintiff a credit for one-half of the payments that he made towards the mortgage on the marital residence following the commencement of the action. Generally, it is the responsibility of both parties to maintain the marital residence during the pendency of a matrimonial action. Here, the defendant voluntarily moved out of the marital residence in 2010, and the plaintiff had been solely responsible for the mortgage payments on the residence since that time.

The Appellate Division dismissed the appeal from so much of the judgment as awarded the defendant counsel fees in the sum of \$5,000. It is the obligation of the appellant to assemble a proper record on appeal. Here, the defendant failed to include any of the papers submitted to the Supreme Court in connection with her application for counsel fees in the record on appeal. Since the record was inadequate for this Court to review the issues raised by the defendant as to this award, it dismissed the appeal from this portion of the judgment.

Where Stipulation Fails to Identify Who Submits QDRO it Is Generally the Responsibility of the Party Seeking Approval of QDRO

In *Scheriff v Scheriff*, --- N.Y.S.3d ----, 2017 WL 3044528, 2017 N.Y. Slip Op. 05760 (2d Dept., 2017) the parties stipulation provided that the defendant was entitled to 50% of the marital portion of the plaintiff's pension and that the parties were to cooperate with each other in obtaining a Qualified Domestic Relations Order (QDRO) to divide the pension, that they would equally share the cost of preparing the QDRO, and that the defendant's share would be determined pursuant to the formula set forth in *Majauskas v. Majauskas* (61 N.Y.2d 481). The defendant moved, inter alia, "for a set-off against plaintiff's entitlement to his equity share of the former marital home in an amount equal to all monies owed for QDRO arrears. Supreme Court denied the motion and directed the defendant to prepare and submit "an appropriate Domestic Relations Order." The Appellate Division affirmed. It observed that under the defendant was entitled to her equitable share of the plaintiff's pension and that payment of her share was to be effectuated through the submission of a QDRO. Although the stipulation failed to identify the party who would be responsible for submitting the QDRO, "it is generally the responsibility of the party seeking approval of the QDRO to submit it to the court with notice of settlement" (*Kraus v. Kraus*, 131 AD3d at 101). Thus, the defendant should have prepared and submitted a proposed QDRO to the Supreme Court with a copy to the defendant's employer. In the absence of a QDRO, there were no "QDRO arrears."

Appellate Division, Third Department

Where Children's Wishes Are Product of Influence AFC Justified in Advocating for a Position Contrary to Those Wishes

In *Matter of Cunningham v Talbot*, --- N.Y.S.3d ----, 2017 WL 2977187, 2017 N.Y. Slip Op. 05637 2017 WL 2977187 (3d Dept., 2017) the Appellate Division held that as the evidence supported a finding that the children's wishes were both a product of the father's influence and "likely to result in a substantial risk of imminent, serious harm to [them]," the attorney for the children was justified in advocating for a position contrary to those wishes where the attorney for the children properly informed Supreme Court that the children had expressed a desire not to visit the mother (see 22 NYCRR 7.2[d][3]).

Appellate Division Vacates Provision of Judgment for Visitation with Parties Dog. Judgement must Conform Strictly to Courts Decision

In *Minervini v Minervini*, 2017 WL 3045586 (2d Dept., 2017) after the parties submitted stipulations of agreed-upon facts and requests for relief in lieu of trial, the court issued a decision and order resolving the issue of equitable distribution and directed that, in accordance with the parties' agreement, all pensions and retirement accounts would be divided "in accordance with the *Majauskas* rule" (see *Majauskas v. Majauskas*, 61 N.Y.2d 481). The court subsequently issued a judgment of divorce, which, did not include a provision awarding the defendant his proportionate share of the plaintiff's pension and retirement accounts pursuant to the formula established in *Majauskas v. Majauskas* (61 N.Y.2d 481). In addition, the judgment awarded the plaintiff visitation with the parties' dog. The Appellate Division observed that a judgment or order must conform strictly to the court's decision. Where there is an inconsistency between a judgment or order and the decision upon which it is based, the decision controls. It found that the defendant correctly contended that the judgment of divorce had to be modified to conform to the Supreme Court's decision. The decision and order did not contain a provision awarding the plaintiff visitation with the parties' dog, and that provision of the judgment had to be deleted. The judgment failed to include a provision awarding the defendant his proportionate share of the plaintiff's pension and retirement accounts, and a provision doing so had to be added.

July 16, 2017

Appellate Division, Second Department

Father Properly Precluded from Offering Evidence as to Financial Ability for Failure to Accompany the Affidavit with Documentation Required by Family Court Act § 424-a

In the Matter of Suffolk County Department of Social Services, ex rel Calliendo v Block, --- N.Y.S.3d ----, 2017 WL 2855673, 2017 N.Y. Slip Op. 05445 (2d Dept., 2017) the Appellate Division held that Family Court did not err in denying the father's objections to the Support Magistrate's order granting the petition for child support. It observed that where a respondent in a child support proceeding fails, without good cause, to comply with the compulsory financial disclosure mandated by Family Court Act § 424-a, "the court on its own motion or on application shall grant the relief demanded in the petition or shall order that, for purposes of the support proceeding, the respondent shall be precluded from offering evidence as to respondent's financial ability to pay support" (Family Ct Act § 424-a[b]). While the father submitted a sworn financial affidavit, he failed to accompany the affidavit with any of the documentation required by Family Court Act § 424-a. Since the father failed, without good cause, to comply with the compulsory financial disclosure mandated by Family Court Act § 424-a, the Family Court did not err in precluding him from offering evidence as to his financial ability to pay and providently exercised its discretion in determining the amount of support based on the needs of the child, which were established by the petitioner as the customary grant for one child on public assistance..

Where No Party Moved for a Change in Custody Court May Not Modify Existing Custody Order in Non-emergency Situation Absent Notice and Opportunity to Present Evidence

In *Noel v Melle*, --- N.Y.S.3d ----, 2017 WL 2800796, 2017 N.Y. Slip Op. 05226 (2d Dept., 2017) the mother was awarded sole custody of the child, with visitation to the father. The father filed a violation petition alleging that the mother had violated the order by relocating with the child and by denying him visitation. After three court appearances, the matter was scheduled for a hearing. On that date, the Supreme Court denied a request by the mother to appear by telephone, and, without the father having made an application for custody of the child or the benefit of an evidentiary hearing, awarded the father custody of the child. The court also issued a warrant for the mother's arrest. The Appellate Division reversed and remitted the matter to the Supreme Court for further proceedings on the father's violation petition. It cautioned the Supreme Court to be mindful that determining the best interest of a child is a weighty responsibility, and that it ordinarily should not make such a determination without conducting an evidentiary hearing. It held that in order to modify a consent order granting sole custody to a parent, there must be a showing of a change in circumstances such that modification is required to protect the best interests of the child'. Custody determinations should generally be made only after a full and plenary hearing and inquiry. Reversal or modification of an existing custody order should not be a weapon wielded as a means of punishing a recalcitrant or contemptuous parent. Moreover, where no party has moved for a change in custody, a court may not modify an existing custody order in a non-emergency situation absent notice to the parties, and without affording the custodial parent an opportunity to present evidence and to call and cross-examine witnesses. Supreme Court improperly modified the consent order by changing custody from the mother to the father without the father having sought that relief in the petition, and without any apparent consideration of the child's best interests (see *S.L. v. J.R.*, 27 NY3d at 563). The court's award of custody to the father under the circumstances of this case also was improper in light of the father's statements during the proceedings that he did not have a steady place to live with the child and that he did not wish to make an application for custody.

Appellate Division, Third Department

Court must Conduct Family Ct Act § 1089(d) Age-appropriate Consultation Before Modifying Permanency Plan

In *Matter of Dawn M*, --- N.Y.S.3d ----, 2017 WL 2801050, 2017 N.Y. Slip Op. (3d Dept., 2017) the Appellate Division held that Family Court erred in failing to conduct the age-appropriate consultation with the children as mandated by Family Ct Act § 1089(d), before modifying the permanency plan from return to parent to termination of parental rights and freeing the children for adoption. There was nothing in the record indicating that Family Court fulfilled its obligation to conduct such consultation. While a personal consultation is not required, “the court is required to find some age-appropriate means of ascertaining their wishes” (*Matter of Julian P. [Melissa P.-Zachary L.]*, 106 AD3d 1383, 1385 [2013]; see *Matter of Dakota F. [Angela F.]*, 92 AD3d 1097, 1098 [2012]). The mere participation at the hearing and the giving of a closing statement, without more, by the attorney who represented Dawn, Summer and Samantha did not satisfy the age-appropriate consultation requirement of Family Ct Act § 1089(d). The closing statement by the attorney for the three younger children was devoid of any statement indicating the preferences of Dawn, Summer or Samantha. Nor did the attorney for the three younger children point to any other evidence in the record that reflected their wishes. The Legislature has made it explicitly clear that a permanency hearing “shall” include an age-appropriate consultation (Family Ct Act § 1089[d]; see 22 NYCRR 205.17 [d]). In light of this statutory command, the children’s wishes, although not dispositive (see *Matter of Alexis SS. [Chezy SS.]*, 125 AD3d 1141, 1143 n. 2 [2015]), carry significance and cannot be lightly overlooked. Given that the record did not disclose the wishes of Dawn, Summer or Samantha, the matter was remitted so that Family Court could conduct the age-appropriate consultation under Family Ct Act § 1089(d) with respect to these children.

July 1, 2017

Appellate Division, Third Department

Enforcement of a Charging Lien Properly Pursued by Way of Motion Within Action to Which it Pertains

In *Sprole v Sprole*, --- N.Y.S.3d ----, 2017 WL 2674271 (Mem), 2017 N.Y. Slip Op. 05135 (3d Dept., 2017) the Appellate Division rejected the wife’s argument that Supreme Court erred in denying her cross motion for dismissal on the basis that her former attorney Gingold, who represented her during the action in 2010, inter alia, improperly commenced the action by motion. A charging lien is a creature of statute and provides an attorney compensation for his or her unpaid services, where applicable, by way of an “equitable ownership interest in a client’s cause of action”. The amount of the charging lien may be determined prior to the outcome of the underlying action. Enforcement of a charging lien is properly pursued by way of motion within the action to which it pertains.

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Mandatory Arbitration Provisions of 22 NYCRR Part 137 Do Not Apply to Application for Charging Lien for More than \$50,000

In *Sprole v Sprole*, --- N.Y.S.3d ----, 2017 WL 2674291, 2017 N.Y. Slip Op. 05131 (3d Dept., 2017) after a judgment of divorce was granted in September 2015, Richard B. Alderman, who represented defendant (wife) in the divorce action from September 2011 until his discharge on June 10, 2015, moved to secure a charging lien. The court, granted the request for a charging lien in the sum of \$52,173.43, directed that the award was enforceable against the wife's equitable distribution award and ordered that a \$2,200 check that plaintiff had issued to the wife as her share of credit card points be reissued by plaintiff to Alderman. The Appellate Division rejected the wife's argument that she discharged Alderman for cause. When discharged "for cause," an "attorney has no right to compensation or to a retaining lien" (*Teichner v. W & J Holsteins*, 64 N.Y.2d 977, 979 [1985]). A 'for cause' termination must be based on more than a client's general dissatisfaction with the attorney's performance and typically involves a significant breach of legal duty such that the client can establish that the attorney's conduct constituted a failure to properly represent the client's interests. (*Doviak v. Lowe's Home Ctrs., Inc.*, 134 AD3d 1324, 1326 [2015]).

Alderman appeared as counsel on the wife's behalf and, as such, he was entitled to assert a retaining lien on the file after his discharge (see *D'Ambrosio v. Racanelli*, 129 AD3d 900, 901 [2015]). Having moved within this action to secure a charging lien pursuant to Judiciary Law § 475, Alderman was not bound by the arbitration notice provisions of 22 NYCRR 137.6(b). The fee dispute program set forth in 22 NYCRR part 137 does not apply to disputes for more than \$50,000 (see 22 NYCRR 137.1 [b][2]).

Appellate Division, Second Department

Court Erred in Dismissing Support Petition Based on a Nonparty's Refusal to Disclose Financial Information Voluntarily

In *Matter of Deshotel v Mandile*, --- N.Y.S.3d ----, 2017 WL 2604482, 2017 N.Y. Slip Op. 04972 (4th Dept., 2017) the Appellate Division affirmed an order which imputed income to the mother finding that the record supported the determination that the mother "has access to, and receives, financial support from" her paramour, with whom she resided. The Appellate Division held that the Support Magistrate erred in dismissing the mother's cross petition for a downward modification of child support. The sole justification for that dismissal was the mother's failure to provide financial disclosure from her paramour, a nonparty, who had filed an affidavit stating that he refused to provide financial disclosure to the court. While certain penalties or sanctions may be appropriate for the individual conduct of the mother it was apparent that the actions of a nonparty weighed heavily in the decision to invoke the 'ultimate penalty' (*Fox v. Fox*, 9 AD3d 549, 550). Under the circumstances of this case, it concluded that the court erred in dismissing the cross petition based on a nonparty's refusal to disclose financial information voluntarily. It modified the order by reinstating the mother's cross petition for a downward modification of child support, and remitted the matter to Family Court for a new hearing on the cross petition.

Child in a Custody Matter Does Not Have “Full-party” Status and Cannot Appeal from Denial of Mothers Modification Petition Where She Does Not Appeal.

In *Matter of Lawrence v Lawrence*, --- N.Y.S.3d ----, 2017 WL 2604311 (Mem), 2017 N.Y. Slip Op. 05023 (4th Dept., 2017) the Appellate Division dismissed the appeal taken by the Attorney for the Child representing the parties' oldest child from an order dismissing the mother's petition seeking modification of a custody order. Inasmuch as the mother had not taken an appeal from that order, the child, while dissatisfied with the order, cannot force the mother to litigate a petition that she has since abandoned. It held that a child in a custody matter does not have "full-party status" (*Matter of McDermott v. Bale*, 94 AD3d 1542, 1543), and it declined to permit the child's desires to chart the course of litigation.

Family Court

Placement in a Juvenile Delinquency Matter Does Not Satisfy Dependency Requirement for a Sijs Finding

In *Matter of K.S.*,--- N.Y.S.3d ----, 2017 WL 2727027, 2017 N.Y. Slip Op. 27212 (Fam Ct, 2017) Family Court held that a placement in a juvenile delinquency matter does not satisfy the dependency requirement necessary for a SIJS finding as set forth in 8 U.S.C. § 1101(a)(27)(j) and 8 CFR § 204.11. It found no Appellate authority in this State to support a finding that a juvenile delinquency proceeding constitutes a dependency upon the Family Court for special findings in a SIJS matter. Respondent's request for a SIJS finding was denied.

June 16, 2017

Testimonial Evidence is not sufficient to overcome marital property presumption

In *Schacter v Schacter*, --- N.Y.S.3d ----, 2017 WL 2366242, 2017 N.Y. Slip Op. 04372 (1st Dept., 2017) the Appellate Division held that Plaintiff's brief testimony that a piano was gifted to him during the marriage did not suffice to overcome the marital property presumption; thus, the court properly deemed the piano marital property to be sold and the net proceeds divided equally between the parties (see DRL § 236[B][1][c]; *Bernard v. Bernard*, 126 AD3d 658, 659 [2d Dept 2015])

Appellate Division, Second Department

Net Value of Each Asset must Be Determined Before Distribution

In *Rudish v Rudish*, --- N.Y.S.3d ----, 2017 WL 2346529, 2017 N.Y. Slip Op. 04307 (2d Dept., 2017) the Appellate Division reiterated the rule that “A determination must be made as to the net value of each asset before determining the distribution thereof” (*D’Amato v. D’Amato*, 96 A.D.2d 849, 850; see *Van Dood v. Van Dood*, 142 AD3d 661, 662). Here, the defendant failed to establish his entitlement to equitable distribution of the parties’ sailboat and the contents of the marital home, as he failed to offer any evidence as to the value of these items. The Supreme Court properly declined to award the defendant a credit for the vehicle purchased by him prior to the marriage since he failed to establish its value.

Appellate Division, Third Department

Where Counsel Believes Client May Give False Testimony, Counsel Should Attempt to Dissuade the Client from Testifying And, Failing That, Present the Client’s Testimony in a Narrative Fashion

In *Matter of Yanique S v Frederick T*, --- N.Y.S.3d ----, 2017 WL 2467068, 2017 N.Y. Slip Op. 04515 (3d Dept., 2017) a family offense proceeding, the Appellate Division observed that an attorney's duty to zealously represent a client is circumscribed by an 'equally solemn duty to comply with the law and standards of professional conduct ... to prevent and disclose frauds upon the court' " (People v. DePallo, 96 N.Y.2d 437, 441 [2001]). To that end, the Rules of Professional Conduct expressly prohibit an attorney from, among other things, "mak[ing] a false statement of fact or law to a tribunal" "offer[ing] or us[ing] evidence that [he or she] knows to be false", "suppress[ing] any evidence that [he or she] or the client has a legal obligation to reveal or produce", "knowingly us[ing] perjured testimony or false evidence" or otherwise "knowingly engag[ing] in other illegal conduct". Where counsel knows that his or her client or a witness called by counsel has either "offered material [false] evidence" or is engaging, has engaged or intends to engage "in criminal or fraudulent conduct related to the proceeding" appropriate remedial efforts—including making a disclosure to the tribunal (see People v. DePallo, 96 N.Y.2d at 441; Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.4[a][3]; [b]). Absent such knowledge, however, counsel may only do precisely what respondent's counsel did here—inform the court, without elaboration, that he or she has an ethical dilemma, attempt to dissuade the client from testifying and, failing that, present the client's testimony in a narrative fashion. As the Second Department recently reiterated, an attorney confronted with counsel's situation here "must contend with competing considerations—duties of zealous advocacy, confidentiality and loyalty to the client on the one hand, and a responsibility to the courts and our truth-seeking system of justice on the other. Requiring counsel to put on the record his or her reasons [underlying the stated ethical dilemma] and the advice offered to the [client] related to his or her testimony would not strike the appropriate balance between these competing considerations but rather, would present too great a risk that ... counsel would be forced to reveal client confidences" (People v. Wesley, 134 AD3d at 965. Contrary to respondent's claim, the foregoing procedure did not deprive him of the effective assistance of counsel, and, given that counsel otherwise cross-examined petitioner, made appropriate objections, advanced a plausible defense and presented a cogent closing statement, it rejected respondent's assertion that he was denied meaningful representation.

Appellate Division, Fourth Department

Attorney for the Child Violated Ethical Duty When He Advocated for Result That Was Contrary to Child's Expressed Wishes

In *Matter of Kleinbach v Cullerton*, --- N.Y.S.3d ----, 2017 WL 2491351, 2017 N.Y. Slip Op. 04641 (4th Dept., 2017) the Appellate Division, inter alia, agreed with the father that the initial Attorney for the Child (AFC) violated his ethical duty to determine the subject child's position and advocate zealously in support of the child's wishes, because that AFC advocated for a result that was contrary to the child's expressed wishes in the absence of any justification for doing so. It held that there are only two circumstances in which an AFC is authorized to substitute his or her own judgment for that of the child: "[w]hen the [AFC] 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. (*Matter of Swinson v. Dobson*, 101 AD3d 1686, 1687 quoting 22 NYCRR 7.2[d][3]), neither of which was present here. In addition, although an AFC should not have a particular position or decision in mind at the outset of the case before the gathering of evidence" (*Matter of Carballeira v. Shumway*, 273 A.D.2d 753, 756; see *Matter of Brown v. Simon*, 123 AD3d 1120, 1123), the initial AFC indicated during his first court appearance, before he spoke with the child or gathered evidence regarding the petitions, that he would be substituting his judgment for that of the child.

June 1, 2017

Chief Administrative Judge Adopts New Rules for Matrimonial Actions

By Administrative Order A/O/100/17, 22 NYCRR §202.50 (b) was amended to add a new section 202.50 (b)(3).

The new section requires that every Uncontested and Contested Judgment of Divorce contain certain decretal paragraphs, including one concerning the venue where post judgment applications for modification or enforcement in Supreme Court should be brought. 22 NYCRR §202.50 (b)(3), which is effective August 1, 2017, provides as follows:

202.50. Proposed Judgments in Matrimonial Actions; Forms

* * *

(b) Approved Forms.

* * *

(3) Additional Requirement with Respect to Uncontested and Contested Judgments of Divorce. In addition to satisfying the requirements of paragraphs (1) and (2) of this subdivision, every judgment of divorce, whether uncontested or contested, shall include language substantially in accordance with the following decretal paragraphs which shall supersede any inconsistent decretal paragraphs currently required for such forms:

ORDERED AND ADJUDGED that the Settlement Agreement entered into between the parties on the ___ day of ____, [] an original OR [] a transcript of which is on file with this Court and incorporated herein by reference, shall survive and shall not be merged into this judgment, * and the parties are hereby directed to comply with all legally enforceable terms and conditions of said agreement as if such terms and conditions were set forth in their entirety herein; and it is further

* In contested actions, this paragraph may read either [shall survive and shall not be merged into this judgment] or [shall not survive and shall be merged into this judgment].

ORDERED AND ADJUDGED, that the Supreme Court shall retain jurisdiction to hear any applications to enforce the provisions of said Settlement Agreement or to enforce or modify the provisions of this judgment, provided the court retains jurisdiction of the matter concurrently with the Family Court for the purpose of specifically enforcing, such of the provisions of that (separation agreement) (stipulation agreement) as are capable of specific enforcement, to the extent permitted by law, and of modifying such judgment with respect to maintenance, support, custody or visitation to the extent permitted by law, or both; and it is further

ORDERED AND ADJUDGED, that any applications brought in Supreme Court to enforce the provisions of said Settlement Agreement or to enforce or modify the provisions of this judgment shall be brought in a County wherein one of the parties resides; provided that if there are minor children

of the marriage, such applications shall be brought in a county wherein one of the parties or the child or children reside, except. in the discretion of the judge, for good cause. Good cause applications shall be made by motion or order to show cause. Where the address of either party and any child or

children is unknown and not a matter of public record, or is subject to an existing confidentiality order pursuant to DRL § 254 or FCA § 154-b, such applications may be brought in the county where the judgment was entered; and it is further

By Administrative Order A/O/99/17, 22 NYCRR §202 was amended to add a new section 202.16-b.

The new section addresses the submission of written applications in contested matrimonial actions.

The new rules contain limitations which are applicable to the submission of papers on pendente lite applications for alimony, maintenance, counsel fees, child support, exclusive occupancy, custody and visitation unless the requirements are waived by the judge for good cause shown. Among other things, all orders to show cause and motions must be in Times New Roman, font 12 and double spaced. The supporting affidavit or affidavit in opposition or attorney affirmation in support or opposition or memorandum of law may not exceed twenty (20) pages. Any expert affidavit may not exceed eight (8) additional pages. Reply affidavits or affirmations may not exceed ten (10) pages. Surreply affidavits can only be submitted with prior court permission. 22 NYCRR 202.16 - b, which is effective July 1, 2017, provides as follows:

§202.16-b Submission of Written Applications in Contested Matrimonial Actions.

(1) **Applicability.** This section shall be applicable to all contested matrimonial actions and proceedings in Supreme Court authorized by subdivision (2) of Part B of section 236 of the Domestic Relations Law.

(2) Unless otherwise expressly provided by any provision of the CPLR or other statute, and in addition to the requirements of 22 NYCRR §202.16 (k) where applicable, the following rules and limitations are required for the submission of papers on pendente lite applications for alimony, maintenance, counsel fees, child support, exclusive occupancy, custody and visitation unless said requirements are waived by the judge for good cause shown:

(i) Applications that are deemed an emergency must comply with 22 NYCRR §202.7 and provide for notice, where applicable, in accordance with same. These emergency applications shall receive a preference by the clerk for processing and the court for signature. Designating an application as an emergency without good cause may be punishable by the issuance of sanctions pursuant to Part 130 of the Rules of the Chief Administrative Judge. Any application designated as an emergency without good cause shall be processed and considered in the ordinary course of local court procedures.

(ii) Where practicable, all orders to show cause, motions or crossmotions for relief should be made in one order to show cause or motion or cross-motion.

(iii) All orders to show cause and motions or cross motions shall be submitted on one-sided copy except as otherwise provided in 22 NYCRR §202.5(at or electronically where authorized, with one-inch margins on

eight and one half by eleven (8.5 x 11) inch paper with all additional exhibits tabbed. They shall be in Times New Roman font 12 and double spaced. They must be of sufficient quality ink to allow for the reading and proper scanning of the documents. Self-represented litigants may submit handwritten applications provided that the handwriting is legible and otherwise in conformity with these rules.

(iv) The supporting affidavit or affidavit in opposition or attorney affirmation in support or opposition or memorandum of law shall not exceed twenty (20) pages. Any expert affidavit required shall not exceed eight (8) additional pages. Any attorney affirmation in support or opposition or memorandum of law shall contain only discussion and argument on issues of law except for facts known only to the attorney. Any reply affidavits or affirmations to the extent permitted shall not exceed ten (10) pages. Surreply affidavits can only be submitted with prior court permission.

(v) Except for affidavits of net worth (pursuant to 22 NYCRR §202.16 (b)), retainer agreements (pursuant to Rule 1400.3 of the Joint Rules of the Appellate Division), maintenance guidelines worksheets and/or child support worksheets, or counsel fee billing statements or affirmations or affidavits related to counsel fees (pursuant to Domestic Relations Law §237 and 22 NYCRR §202.16(k))' all of which may include attachments thereto, all exhibits annexed to any motion, cross motion, order to show cause, opposition or reply may not be greater than three (3) inches thick without prior permission of the court. All exhibits must contain exhibit tabs.

(vi) If the application or responsive papers exceed the page or size limitation provided in this section, counsel or the self-represented litigant must certify in good faith the need to exceed such limitation, and the court may reject or require revision of the application if the court deems the reasons insufficient.

(3) Nothing contained herein shall prevent a judge or justice of the court or of a judicial district within which the court sits from establishing local part rules to the contrary or in addition to these rules.

By Administrative Order A/O 102/17, the Uncontested Divorce Packet Forms were modified to reflect the increases as of March 1, 2017 in the Self Support Reserve to \$16,281 and in the Poverty Level Income for a single person to \$12,060. (see https://childsupport.ny.gov/dcse/child_support_standards.html).

May 16, 2017

Appellate Division, Second Department

Conditional Order of Preclusion Becomes Absolute upon Failure to Comply with It, Unless Reasonable Excuse for Failure to Comply Existence of a Potentially Meritorious Cause of Action or Defense Shown.

In *Luo v Yang*, --- N.Y.S.3d ----, 2017 WL 1657478, 2017 N.Y. Slip Op. 03504 (2d Dept., 2017) the Appellate Division affirmed a protective order pursuant to CPLR 3103(a) preventing the defendant from seeking to obtain any information about the plaintiff, whether financial or otherwise, and quashed any subpoenas issued prior to the order appealed from on behalf of the defendant seeking any financial or other information of the plaintiff on the ground he was precluded from offering any evidence at trial in this action following his husband's failure to respond to the plaintiff wife's discovery. It pointed out that a conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order". Here, the so-ordered stipulation entered into by the parties in this action functioned as a conditional order of preclusion, which became absolute upon the defendant's failure to comply with it, unless the defendant demonstrated a reasonable excuse for failure to comply with its terms and the existence of a potentially meritorious cause of action or defense. The defendant, who offered bare allegations of neglect by his prior counsel, failed to demonstrate a reasonable excuse for his failure to comply with the so-ordered stipulation.

Physician Permitted to Lay Foundation under CPLR 4518(a) for Entries That He Did Not Personally Enter

In *Spence-Burke v Burke*, --- N.Y.S.3d ----, 2017 WL 1484047, 2017 N.Y. Slip Op. 03210 (2d Dept., 2017) the Appellate Division held, inter alia, that a child's excessive absences from school may be relevant to the best interests analysis. At trial, the plaintiff sought to admit uncertified medical records from the child's pediatrician's office. Of these records, several entries were written by Innis O'Rourke, a physician who testified at trial, and the remaining entries were written by nontestifying physicians who worked in the same medical practice as Dr. O'Rourke. The Supreme Court precluded the entries written by the nontestifying physicians on the basis that Dr. O'Rourke was permitted to lay a foundation under CPLR 4518(a) only for the entries that he had written. This was error, as a physician is permitted to lay a foundation under CPLR 4518(a) even for entries that he did not personally enter into a patient's medical records.

Once Child Turns 21 Court "Is Divested of Subject Matter Jurisdiction over Guardianship Petition

In *Matter of Jose D. H.-P. v. Maria M.N. DE P.* 148 A.D.3d 1020, 49 N.Y.S.3d 730, 2017 N.Y. Slip Op. 02038 (2d Dept., 2017) the Appellate Division dismissed the appeals as academic. It held that where a child who consented to the appointment of a guardian after his or her 18th birthday turns 21, the term of appointment of the guardian "expires on the child's twenty-first birthday" (SCPA 1707[2]). Consequently, once the child turns 21, the court "is divested of subject matter jurisdiction, and cannot exercise such jurisdiction by virtue of an order nunc pro tunc" Thus, the guardianship petition could not be granted since the child was now 21. Furthermore, since guardianship status, which the Family Court can only grant to individuals under 21, is a condition precedent to a declaration allowing a child to seek SIJS, the petitioner's motion for the issuance of an order declaring that the child is dependent on the Family Court and making the requisite specific findings so as to enable him to petition for SIJS was rendered academic.

Appellate Division, Third Department

Support Magistrate Has Authority to Require Respondent to Participate in Rehabilitative Services

In Matter of Cortland County Department of Social Services v. Perry, --- N.Y.S.3d ----, 2017 WL 1712813, 2017 N.Y. Slip Op. 03581 (3d Dept., 2017) the Appellate Division held that the Support Magistrate had authority to impose sanctions, such as participation in rehabilitative services as was ordered here, for respondent's willful violation of the support order. Family Ct Act § 439(a) sets forth in detail the powers of support magistrates and provides, in pertinent part, that "support magistrates shall be empowered to hear, determine and grant any relief within the powers of the court in any proceeding under this article." Under Family Ct Act § 454(3)(b), which is encompassed by the foregoing provision, courts have the authority, upon the willful violation of a support order, to require a respondent's participation in rehabilitative programs such as "work preparation and skills programs." Family Ct Act § 439(a) only requires the confirmation by Family Court of a sanction where a support magistrate recommends the commitment of a respondent, who has willfully violated a support order, to a period of incarceration. The Support Magistrate clearly acted within her authority in imposing a sanction that required respondent to participate in rehabilitative services and it was not necessary for the matter to be referred to Family Court for this purpose.

Appellate Division, Fourth Department

Parent Has a Continuing Obligation to Support Child in Foster Care

In Matter of Smith v Jefferson County Dept of Social Services, -- N.Y.S.3d ----, 2017 WL 1528548, 2017 N.Y. Slip Op. 03318 (4th Dept., 2017) the Appellate Division held that when a child is placed in foster care, the child's parent has a continuing obligation to provide financial support (see Social Services Law § 398[6] [d]; Family Ct Act §§ 415, 422). That obligation is governed by the guidelines delineated in the CSSA, which apply even in residential or foster care reimbursement contexts.

May 1, 2017

Appellate Division, First Department

First Department Affirms Award of Costs of Higher Education, Including College, for 7 Year Old Child Because it Appeared to Be an Inevitable Expense for this Child

In Klauer v Abeliovich, --- N.Y.S.3d ----, 2017 WL 1450277, 2017 N.Y. Slip Op. 03110 (1st Dept., 2017) the parties were married in December 2008 and there was one child of the marriage, born in 2010.

The Appellate Division held that Supreme Court correctly rejected the Referee's recommendation as to basic child support when it determined that in setting the basic child support obligation the parties' combined income above the \$141,000 statutory cap should be taken into consideration (Domestic Relations Law § 240[1-b][f]). In deciding to utilize the parties' combined income up to \$800,000 in setting support, the court examined whether the capped support "adequately reflects a support level that meets the needs and continuation of the child[s] lifestyle" and concluded that it did not (Beroza v. Hendler, 109 AD3d 498, 500–501 [2d Dept 2013]).

The Appellate Division held that Supreme Court, under the circumstances, providently exercised its discretion in ordering that the husband pay 20% of the child's educational expenses, including college, until the child attains age 21 (see *Cimons v. Cimons*, 53 AD3d 125, 131 [2d Dept 2008]). The court took into consideration several factors, including the high educational achievements of both parties and their professions. Plaintiff, a financial analyst, has a B.A. from Georgetown and an MBA from Columbia Business School; she also holds series 3 and 7 licenses. Defendant, an associate professor of medicine at Columbia University Medical School, has a B.A. from Massachusetts Institute of Technology and a M.D./Ph.D. from Harvard. During the marriage the parties agreed the child would be privately educated and their enrollment of the child in a private nursery school when he was only nine months old reflects their agreement. There was no indication that defendant could not afford to pay his share of private school tuition, and his argument that the child was too young for the court to have addressed higher education issues does not warrant modification of Supreme Court's order. There was no reason to delay resolution of the issue of higher education, including college, because it appeared to be an inevitable expense for this child, given the parties' apparent commitment to an enriched education, the parties' means and their high level of educational achievements. It affirmed the award because it was not an improvident exercise of the court's discretion.

The Appellate Division held that absent an agreement to the contrary, or without engaging in a proper analysis under the paragraph "(f)" factors of the Domestic Relations Law, the court should not have ordered defendant to pay for summer and/or extracurricular activities (Domestic Relations Law § 240[1-b][f]; *Michael J.D.*, 138 AD3d at 154). Unlike health care and child care expenses, these "add-on" expenses are not separately enumerated under the CSSA and it is usually anticipated that they will be paid from the basic child support award ordered by the court. Furthermore, without explaining why, Supreme Court allocated these add-ons in the same manner it allocated educational expenses (i.e. 20% to defendant as opposed to 10.5%). Because the court made its determination before the Court's decision in *Michael J.D.*, where it clarified how these add-ons should be analyzed and separately justified under paragraph (f), it remitted to Supreme Court the issue of how summer and/or any other extracurricular activities not specifically agreed to by the parties will be allocated between them, if at all.

The Appellate Division modified to eliminate the award of the separate property credit to plaintiff in the amount of \$350,000 and otherwise affirm Supreme Court's denial of any further separate property credit to plaintiff in the amount of \$932,000 for payments toward the principal and/or renovation costs of their Fifth Avenue coop. It held that Plaintiff was not entitled to a separate property credit for the \$350,000 downpayment or the additional sum of \$932,000 the parties applied towards the purchase price of the Fifth Avenue coop. The conveyance of separate funds under these circumstances resulted in the separate assets becoming presumptively marital and partial use of separate funds to acquire a marital asset does not mandate that plaintiff be credited for any separate funds she committed (see *Fields*, 15 NY3d at 167).

The Appellate Division held that the court correctly determined that plaintiff's bonus, although paid after the action was commenced, was compensation for her past performance, not tied to future performance (see *DeJesus v. DeJesus*, 90 N.Y.2d 643, 652 [1997]). As a general rule, bonuses paid as compensation for past services are marital property and subject to equitable distribution (see *Ropiecki v. Ropiecki*, 94 AD3d 734, 736 [2d Dept 2012]). The court properly prorated the bonus to reflect that although it was paid for the 2011 calendar year, the parties separated in May 2011, meaning only 40% of the total amount could be considered marital.

The Appellate Division held that while it was a provident exercise of the court's discretion to permit plaintiff to make payments to defendant of his distributive share of the marital assets in installments, post-decision interest is mandatory on the distributive award pursuant to CPLR 5002, and should be awarded (see *Moyal v. Moyal*, 85 AD3d 614, 615 [1st Dept 2011]).

Judgment of Divorce Vacated Where No Provision for Equitable Distribution

In *Serao, v. Bench–Serao*, --- N.Y.S.3d ----, 2017 WL 1450010, 2017 N.Y. Slip Op. 03135 (1st Dept.,2017) the Appellate Division found that Defendant established prima facie that the judgment of divorce had to be vacated because it was devoid of any provision addressing the equitable distribution of the parties’ marital assets or debts (see Domestic Relations Law § 236[B][5] [a]; *Wong v. Wong*, 300 A.D.2d 473 [2d Dept 2002]) and that the judgment was correctly vacated to the extent necessary to determine equitable distribution.

Husband Awarded 1% of the Wife’s Monthly Pension Benefits Where Parties Separated 37 Years Given That the Value of Wife’s Pension Was Due Almost Entirely to Her Sole Efforts.

In *Campbell v Campbell*, --- N.Y.S.3d ----, 2017 WL 1377813, 2017 N.Y. Slip Op. 02956 (1st Dept., 2017) the parties, who were married on August 24, 1973, lived together as husband and wife for only 52 months, before husband vacated the marital residence in 1978. The parties’ son remained with wife. For the next 37 years, the parties lived separate and apart, with neither seeking a formal separation. In 2011, wife retired from her job at Lincoln Hospital, where she began working in 1973, the same year as the marriage. She collected \$4,241.95 per month in pension benefits, and, apart from her social security benefits, she had no other source of income. In 2013, wife commenced an action for divorce. The Wife’s pension was the parties’ primary marital asset. The Appellate Division held that the trial court erred in awarding husband 50% of wife’s pension accumulated during the time they lived together between the date of the parties’ marriage on August 24, 1973, and the date of their separation on or about January 1, 1978. The wife’s pension benefits from the date of marriage to commencement of the divorce action constituted marital property, subject to equitable distribution. Equitable distribution does not mean equal (see *Arvantides v. Arvantides*, 64 N.Y.2d 1033, 1034 [1985]), and “an unequal distribution is appropriate when a party has not contributed to the marital asset in question” (*Del Villar v. Del Villar*, 73 AD3d 651, 652 [1st Dept 2010]). The court found that the wife testified credibly that after the husband moved out of the marital residence on or about January 1, 1978, she and their son received no further economic or non-economic support from him, to which she would have surely been entitled. Given that the value of wife’s pension was due almost entirely to her sole efforts, the Appellate Division awarded the husband as his distributive share 1% of the wife’s monthly pension benefits.

Appellate Division, Second Department

Counsel Fees Denied Where Counsel Failed to Submit Detailed Billing Records

In *Massina v Massina*, --- N.Y.S.3d ----, 2017 WL 1394158, 2017 N.Y. Slip Op. 02978 (2d Dept.,2017) a post-judgment enforcement proceeding the Appellate Division held that Supreme Court erred in granting plaintiff an award of counsel fees, as there was no documentation submitted of the value of services performed by her attorney. The plaintiff sought an award of counsel fees of \$5,000, and the court failed to explain how it determined that the “reasonable” fees incurred by the plaintiff amounted to \$3,500, in light of the fact that the plaintiff’s counsel failed to submit detailed billing records showing the legal services performed, and the time expended on each service (see *Marshall v. Marshall*, 1 AD3d at 324; *Reynolds v. Reynolds*, 300 A.D.2d at 646).

April 16, 2017

Appellate Division, First Department

First Department Holds That Invoices Standing Alone May Not Be Regarded as Evidence of Title or Ownership of Property.

In *Anonymous v. Anonymous*,--- N.Y.S.3d ----, 2017 WL 1234201, 2017 N.Y. Slip Op. 02613 (1st Dept., 2017) the parties prenuptial agreement did not specifically address how the parties should divide their art collection upon dissolution of the marriage. It provided that any property owned on the date of execution of the prenuptial agreement, April 21, 1992, or "hereafter...acquired" by one party remains that party's separate property. It provided that "[n]o contribution of either party to the care, maintenance, improvement, custody or repair of... [the other's party]...shall in any way alter or convert any of such property...to marital property. The prenuptial agreement further provided that "any property acquired after the date of the marriage that is jointly held in the names of both parties" shall, upon dissolution of the marriage — which occurred on March 25, 2014 — be divided equally between the parties. Under the heading, Non-Marital Property, the agreement provided: "No property hereafter acquired by the parties or by either of them...shall constitute marital property...unless (a) pursuant to a subscribed and acknowledged written agreement, the parties expressly designate said property as marital property...or (b) title to said property is jointly held in the names of both parties." During the marriage, the parties agreed to acquire certain art as a joint collection, including pieces acquired through Art Advisory Services, Luhring Augustine, and The Kitchen. The husband moved, inter alia, for a declaratory judgment that, "consistent with the Prenuptial Agreement, the title to the art purchased during the marriage determines whether it is marital or separate property, regardless of the source of funds used to acquire it or the alleged intent behind the purchase." He argued that title should be determined based solely on the invoice or bill of sale. The motion court relied on the invoices as proof of whether the art was jointly or individually held in granting his motion. The Appellate Division held to the contrary, that invoices, standing alone, may not be regarded as evidence of title or ownership of the art. An invoice is defined as "[a] list of goods sent or services provided, with a statement of the sum due for these" (Oxford Living Dictionaries [<https://en.oxforddictionaries.com/definition/invoice>]). "An invoice...is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, or cost of the goods, or price of the things invoiced, and it is as appropriate to a bailment as a sale. Hence, standing alone, it is never regarded as "evidence of title" (*Sturm v. Boker*, 150 US 312, 328 [1893]). An invoice cannot be said to be dispositive of ownership. The purpose of the invoice is not to identify the

titled owner. The unreliability of an invoice as sole proof of title was evidenced by various invoices in the record. The Appellate Division concluded that title to personalty cannot be determined by relying solely upon an invoice. In determining title to the artwork in question, all the facts and circumstances of the acquisition and indicia of ownership must also be considered. Accordingly, the order was reversed, on the law, the declaration vacated, and the matter remanded for further proceedings, including discovery and an evidentiary hearing to determine the ownership of the disputed art.

Separation Agreement Violated Rule That When Children's Rights Are Involved the Contract Yields to the Welfare of the Children

In *Keller-Goldman v Goldman*, --- N.Y.S.3d ----, 2017 WL 1272107, 2017 N.Y. Slip Op. 02723 (1st Dept., 2017) the parties settlement agreement provided that "During the period in which a Child is attending a college and residing away from the residences of the parties and [the father] is contributing towards the room and board expenses of that Child, [the father] shall be entitled to a credit against his child support obligations in an amount equal to the amount [the father] is paying for that Child's room and board." The father paid approximately \$12,000 for the latter expense and sought a credit towards his total monthly child support obligation of \$2,500 for the parties 3 children, in the amount of approximately \$1,200. The Appellate Division held that as a matter of public policy, the agreement could not be enforced as written. Ooke parties cannot contract away the duty of child support. Despite the fact that a separation agreement is entitled to the solemnity and obligation of a contract,. The duty of a parent to support his or her child shall not be eliminated or diminished by the terms of a separation agreement when children's rights are

involved the contract yields to the welfare of the children, nor can it be abrogated by contract”
(Matter of Thomas B. v. Lydia D., 69 AD3d 24, 30 [1st Dept 2009]. It found that the agreement here violated this rule. The credit sought by the father took away that portion of child support intended for the welfare of the other two children. Taken to its logical end, the agreement threatened to completely deprive the other children of any support whatsoever, if monthly room and board costs for one child were to exceed \$2,500. The Court also found that the reasonable expectation of the parties when they executed the agreement, based on its plain language, was that the father would support each child individually until that child was emancipated. This could be deduced from the fact that the agreement reduced the total support amount after the emancipation of the first, and then the second, child. Insofar as the credit provision was the one that immediately followed, it was reasonable for the mother to interpret that provision as making clear that attendance at college or a gap year program was effectively a “temporary emancipation,” where no support payment was necessary for the child because the child was not a financial burden on the mother. At the same time, the credit provision prevented the mother from realizing a windfall by collecting child support for a child who, temporarily, is not a household expense. Reading the agreement this way, the two provisions could be understood as being in harmony with each other, which is a goal when construing any contract (see Gessin Elec. Contrs. Inc. v. 95 Wall Assoc., LLC, 74 AD3d 516, 518 [1st Dept 2010]). The Court was unaware of any rule of construction limiting the ability to harmonize two or more separate contraction clauses to instances where they explicitly cross-reference each other. To interpret the credit provision as negating the child support promised for each child in the preceding provision would be an untenable construction, and an absurd result. (Two Justices dissented)

Appellate Division, Second Department

A Party for Whom a Guardian Ad Litem Has Been Appointed, May Only Appear in an Action by That Guardian Ad Litem

In Yerushalmi v Yerushalmi, --- N.Y.S.3d ----, 2017 WL 1239382, 2017 N.Y. Slip Op. 02691 (2d

Dept., 2017) an action for a divorce, the defendant suffered a stroke in September 2015, prior to the completion of continued hearing on his motion to terminate his temporary maintenance obligation. When the defendant appeared pro se for the continuation of the hearing Supreme Court determined that he was no longer competent, and a guardian ad litem was appointed on the defendant's behalf. Three days later, the defendant retained attorney Anthony A. Capetola to represent him in the action. Supreme Court denied plaintiff's motion to disqualify Capetola from representing the defendant. The Appellate Division held that Supreme Court erred in denying the motion to disqualify Capetola from representing the defendant in this action. A party who has been deemed by the court to be incapable of defending his or her rights, and for whom a guardian ad litem has been appointed, may only appear in an action by that guardian ad litem (see CPLR 321(a), 1201; Caruso v. Caputo, 143 A.D.2d 795, 796). Since a guardian ad litem had already been appointed on behalf of the defendant, the defendant lacked authority to select and retain Capetola as his attorney.

A Financial Obligation Incurred by One Party During the Marriage in Pursuit of His or Her Separate Interests Should Remain That Party's Separate Liability

In *Marin v Marin*, --- N.Y.S.3d ----, 2017 WL 1157567, 2017 N.Y. Slip Op. 02415 (2d Dept., 2017) the parties were married in July 1989, and had two children together, born in 1992 and 1996. After the

birth of their first child in 1992, the plaintiff stopped working outside the home and was the primary caregiver of the children. The defendant, a doctor of osteopathy with his own medical practice, was the sole source of financial support for the family since that time. In June 2008, the plaintiff commenced this action for a divorce. The Appellate Division, inter alia, rejected the plaintiff's contention that since some of the proceeds from certain loans were used to finance the defendant's medical practice, which was not treated as marital property, the Supreme Court should have allocated this debt to the defendant as his separate responsibility, rather than allocating it equally between the parties. It observed that Supreme Court is given broad discretion in allocating the assets and debts of the parties to a marriage, and may consider the entirety of the marital estate in apportioning responsibility for debts. 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" (Corless v. Corless, 18 AD3d at 494). Here, the funds at issue were used to benefit the defendant's medical practice, which was the sole means of financial support for the entire family. Therefore, under the circumstances, it could not be said that this debt was incurred for the defendant's sole benefit. As such, contrary to the plaintiff's contentions, the court's decision to distribute this debt equally among the parties was not an improvident exercise of discretion.

Appellate Division, Third Department

Where a Child Lacks a Home State at the Time a Neglect Proceeding Is Commenced, an Alternate Basis for Subject Matter Jurisdiction under Uccjea Exists under Domestic Relations Law § 76[1][b]

In Matter of Milani X, --- N.Y.S.3d ----, 2017 WL 1253198, 2017 N.Y. Slip Op. 02714 (3d Dept., 2017) the Respondent, a resident of New York gave birth to a daughter at a hospital in Pennsylvania in May 2016. Allegations emerged that respondent had used drugs during the pregnancy and that the child was experiencing withdrawal following her birth, prompting petitioner to commence a neglect proceeding while the child was still hospitalized. Respondents motion to dismiss the proceeding which was based upon, among other things, the ground that Family Court lacked subject matter jurisdiction to adjudicate a child who had never lived in New York to be neglected, was denied.

The Appellate Division affirmed. It held that Family Court is granted "original jurisdiction over [neglect] proceedings" (Family Ct Act § 1013[a]; see N.Y. Const, art VI, § 13[b]), and its

subject matter jurisdiction does not depend upon the situs of the neglect. However, it does depend upon satisfying the standards put in place by the Uniform Child Custody Jurisdiction and Enforcement Act. Several bases exist for the exercise of subject matter jurisdiction in a new neglect proceeding, the first being that New York is “the home state of the child on the date of the commencement of the proceeding” (Domestic Relations Law § 76[1][a]). The home state of a child less than six months old, such as the child here, is “the state in which the child lived from birth with” a parent or person acting as a parent (Domestic Relations Law § 75-a [7]). Here, the child was born in a Pennsylvania hospital and was still hospitalized when the proceeding was commenced. The fact that the child was hospitalized in another state had little relevance in determining where she lived, as “persons removing to hospitals or other institutions for treatment” do not “gain or lose a residence simply because they are away from home” (Matter of Seitelman v. Lavine, 36 N.Y.2d 165, 171 [1975]). Moreover, inasmuch as the hospital had only treated the child for a few weeks and was not “awarded legal custody [of her] by a court,” the hospital could not be considered a person acting as a parent within the meaning of Domestic Relations Law § 75-a (7) (Domestic Relations Law § 75-a [13]). Having been born into the sort of “temporary absence” that plays no role in identifying her home state (Domestic Relations Law § 75-a [7]), and not having had the opportunity to live with respondent, her father or another person

acting as a parent, the child had no home state under UCCJEA. The Court observed that where a child lacks a home state at the time a neglect proceeding is commenced, an alternate basis for subject matter jurisdiction under UCCJEA exists where “(i) the child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and (ii) substantial evidence is available in this state concerning the child’s care, protection, training, and personal relationships” (Domestic Relations Law § 76[1][b]). Respondent and the child’s father had significant connections to New York. While the child was hospitalized in Pennsylvania after her birth, child protective officials in New York became involved with her, and evidence regarding her parents’ ability to care for her and her relationship with other relatives was in New York. New York therefore had the types of contacts with the child and her family that permitted the exercise of jurisdiction in this proceeding and, as a result, Family Court properly denied respondent’s motion to dismiss.

April 1, 2017

2017 Child Support Standards Chart Released

The 2017 combined parental income amount (“statutory cap”) is \$143,000. The 2017 self-support reserve is \$16,281 and the poverty income guidelines amount for a single person is \$12,060.

See https://www.childsupport.ny.gov/child_support_standards.html

The child support standards chart, released March 17, 2017 is available at <https://www.childsupport.ny.gov/dcse/pdfs/CSSA.pdf>

Since January 31, 2016 the income cap of the maintenance payor for temporary and final (post-divorce) maintenance increased from \$175,000 to \$178,000 per year. By Administrative Order A/O 12/16, Revised Instructions and Forms for Use in Matrimonial Actions in Supreme Court were adopted effective January 31, 2016. The revised forms reflect the increase in the annual income cap of the maintenance payor for temporary and final (post-divorce) maintenance from \$175,000 to \$178,000 per year based on CPI increases as required by the 2015 Maintenance Guidelines Law (L. 2015, ch. 269), and clarify instructions regarding use of the UD-Packet forms. See <http://www.nycourts.gov/divorce/legislationandcourtrules.shtml> (last accessed April 1, 2017)

Appellate Division, First Department

Family Ct Act § 437–a Not Dispositive Where Father Employed During Pendency Social Security Disability Benefits Application

In Matter of Anthony S v Monique TB, --- N.Y.S.3d ----, 2017 WL 1137109, 2017 N.Y. Slip Op. 02365 (1st Dept., 2017) the Appellate Division held that Family Court improvidently exercised its discretion in not imputing to the father as income the \$500 per month he was earning from his part-time employment in 2012 solely on the basis of Family Ct Act § 437-a, which bars the Family Court from requiring a recipient of social security disability benefits to engage in certain employment related activities. That statute was not dispositive in this case where the father had been employed during the pendency of his social security disability benefits application and did not show that he was unable to continue to be employed in any capacity after he began receiving benefits. The matter was remanded for a new determination as to the amount of child support, including a new determination as to whether the \$500 per month should be imputed to the father.

Appellate Division, Second Department

Hearing Not Always Required on Contempt Application

In Matter of Chichra v Chichra, --- N.Y.S.3d ----, 2017 WL 986570, 2017 N.Y. Slip Op. 01851 (2d Dept., 2017) the Appellate Division held that a hearing is not mandated in every instance where a finding of contempt is sought. It need only be conducted if a factual dispute exists which cannot be resolved on the papers alone.

Overpayments of Child Support May Not Be Recouped Against Child Support Obligation, but May Be Used to Offset Share of Add-on Expenses

In Matter of McGovern v McGovern, --- N.Y.S.3d ----, 2017 WL 986497, 2017 N.Y. Slip Op. 01862 (2d Dept., 2017) the Appellate Division observed, in affirming an order which denied the father recoupment of overpayments of child support, that there is strong public policy in this state, which the Child Support Standards Act did not alter, against restitution or recoupment of the overpayment of child support. The reason for this policy is that 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. Thus, recoupment of child support payments is only appropriate under "limited circumstances" which were not present here. However, while child support overpayments may not be recovered by reducing future support payments, public policy does not forbid offsetting add-on expenses against an overpayment.. Thus, although the overpayments may not be applied to the father's child support obligation, he may use the overpayments to offset his share of the add-on expenses, such as the educational expenses.

Paternal Stepgrandfather Has No Standing to Seek Visitation Within the Meaning of Domestic Relations Law § 72

In Matter of B.S. v. B.T. , --- N.Y.S.3d ----, 2017 WL 1068091, 2017 N.Y. Slip Op. 02044 (2d Dept., 2017) the paternal grandmother and paternal stepgrandfather of the child commenced a proceeding for visitation with the child. After a hearing, the Supreme Court granted the petition and set forth a visitation schedule. The Appellate Division held, inter alia, that since the paternal stepgrandfather was not the biological grandfather of the child or the legal grandfather by virtue of adoption, he was not the child's grandparent within the meaning of Domestic Relations Law § 72 and, therefore, he had no standing to seek visitation, and, the petition for visitation should have been dismissed insofar as asserted by him.

Appellate Division, Third Department

Where Petition Dismissed Sua Sponte Court Is Required to Accept Allegations as True

In *Matter of Burdick v Boehm*, --- N.Y.S.3d ----, 2017 WL 1082848, 2017 N.Y. Slip Op. 02107 (3d Dept., 2017) the Appellate Division observed that on a motion to dismiss pursuant to CPLR 3211(a), the facts as alleged in the petition are accepted as true (see *Matter of Leon v. Martinez*, 84 N.Y.2d 83, 87–88 [1994]). It held that here, where the petition was dismissed without a motion, sua sponte, the Family Court was bound to credit the father’s allegations in his petition.

Appellate Division Construes Dum Custa Provision in Agreement (cohabitation with an unrelated adult male pursuant to New York State Domestic Relations Law § 248) Not to Require Holding Self out as Another Man’s Wife

In *Perez v Perez-Brache*, --- N.Y.S.3d ----, 2017 WL 1116108, 2017 N.Y. Slip Op. 02258 (4th Dept., 2017) the parties’ support and property settlement agreement, which was incorporated but not merged into the judgment of divorce, provided that defendant’s “maintenance obligation shall be sooner terminated upon [defendant]’s death, or [plaintiff]’s death. ADDITIONALLY, after the fourth (4th) year of such payments, [defendant]’s maintenance obligation shall also terminate upon either [plaintiff]’s remarriage, or [plaintiff]’s cohabitation with an unrelated adult male pursuant to New York State Domestic Relations Law [§] 248.” The Appellate Division held that the court erred in determining that, pursuant to the terms of the agreement, defendant was required to establish that plaintiff held herself out as another man’s wife. “It is well settled that the parties to a matrimonial agreement may condition a husband’s obligation to support his wife solely on her refraining from living with another man without the necessity of the husband also proving that she habitually holds herself out as the other man’s wife as Domestic Relations § 248 requires’. Here, “the fact that the agreement refers only to the cohabitation prong of Domestic Relations Law § 248 compelled it to conclude that the parties did not intend to include the second prong of plaintiff holding herself out as another man’s wife” (id. at 1298). The reference to Domestic Relations Law § 248 in the parties’ agreement was “solely for the purpose of defining cohabitation, i.e., “habitually living with another person” (§ 248).

March 16, 2017

Appellate Division, Second Department

Oral Stipulation Which Did Not Include Statement Precise Amount of Presumptive Child Support under Cssa Held Valid Where it Stated That Parties Entered into Agreement “After Having Been Advised of the Calculations Pursuant to the [Cssa]”

In Bitic v Bitic, --- N.Y.S.3d ----, 2017 WL 776986, 2017 N.Y. Slip Op. 01529 (2d Dept., 2017) the Appellate Division held that Supreme Court properly found that the child support provisions of the parties' stipulation were valid and enforceable. It was undisputed that the oral stipulation otherwise complied with the requirements of Domestic Relations Law § 240(1-b)(h), except that it did not include an on-the-record statement of the precise amount of the presumptive child support under the CSSA. Instead, it recited that the parties were entering into the agreement "after having been advised of the calculations pursuant to the [CSSA]," and each party had received a copy of the CSSA and was "fully aware" of the amount the court would award if applying the CSSA based upon the parties' respective incomes. The agreement to deviate from the CSSA was made in exchange for concessions in the distribution of certain marital assets. The plaintiff stated on the record that she understood the terms of the stipulation, which were clear to her, and she had discussed them with her attorney. In addition, the parties' respective federal income tax returns and statements of net worth were incorporated into the record for the purpose of demonstrating "calculations of income for purposes of CSSA." It held that while the better practice would have been to state for the record the number reflected by those calculations, the statutory requirement was satisfied here, and the record demonstrated that the plaintiff's agreement to the child support provisions of the stipulation was made knowingly.

Custody Awarded to Grandmother Based upon Extraordinary Circumstances Where Prolonged Separation of Six Years

In Matter of Williams v Frank, --- N.Y.S.3d ----, 2017 WL 902408, 2017 N.Y. Slip Op. 01702 (2d Dept., 2017) the child, who was born in 2003, was in the exclusive care of the maternal grandmother since he was approximately 10 months old. In March 2004, the maternal grandmother was granted custody upon the default of the mother and the father. The mother had been arrested for shoplifting in 2004, and was deported in 2005 based on her illegal status. The mother returned to the United States legally in March 2011, and filed a petition to modify the order dated December 9, 2004, so as to her award her sole custody of the child. Family Court, inter alia, awarded sole legal and residential custody to the maternal grandmother. The Appellate Division affirmed. It found that Family Court properly determined that the maternal grandmother sustained her burden of demonstrating extraordinary circumstances based upon the mother's prolonged separation from the subject child, and the maternal grandmother having provided for the child's financial, educational, emotional, and medical needs, with no contribution from the mother.

Improper to Rely Entirely on Therapists Recommendation in Making Visitation Determination

In *Matter of Jennifer JH v Artrio, JR*, --- N.Y.S.3d ----, 2017 WL 902463, 2017 N.Y. Slip Op. 01694 (2d Dept., 2017) the Appellate Division reversed an order which denied the mothers petition for visitation without a hearing, relying on the recommendation of the child's therapist, who indicated that there should be no visitation between the mother and the child at that time. It held that a hearing was necessary to determine whether the totality of the circumstances warranted a modification of the visitation order and whether such a change was in the best interests of the child (citing *Matter of Athena H.M. v. Samuel M.*, 143 AD3d 561; see also *S.L. v. J.R.*, 27 NY3d 558, 564). Moreover, it was improper for the Family Court to rely exclusively on the therapist's recommendation in making the visitation determination.

Appellate Division, Third Department

Charging Lien May Be Pursued by Former Attorney by Motion in Action to Which Lien Pertains

In *Sprole v Sprole*, --- N.Y.S.3d ----, 2017 WL 923057, 2017 N.Y. Slip Op. 01747 (3d Dept., 2017) the Appellate Division held that a valid charging lien is an "equitable ownership interest in [a] client's cause of action" (*Cranbourne & Parke, LLP v. AB Recur Finans*, 18 AD3d 222, 223 [2005]) and can properly be pursued by way of motion within the action to which the alleged lien pertains (see Judiciary Law § 475; *Haser v. Haser*, 271 A.D.2d 253, 255 [2000]; *Butler, Fitzgerald & Potter v. Gelmin*, 235 A.D.2d 218, 219 [1997]; *Miller v. Kassatly*, 216 A.D.2d 260, 261 [1995]).

Family Court

Family Court Holds Medical Records Exception to Hearsay Rules Includes Statements by the Patient about Who Caused the Injuries and Statements Made by a Third Party to a Patient's Treatment Providers

In Matter of Raheem D., Slip Copy, 2017 WL 952700 (Table), 2017 N.Y. Slip Op. 50298(U) (Fam Ct., 2017) a juvenile delinquency proceeding, Family Court observed that under the medical records exception to the hearsay rule statements made by a patient that are germane to medical treatment are considered to be exceptions to the hearsay rule and therefore admissible for their truth. See People v. Ortega, 15 NY3d 610 (2010); Williams v. Alexander, 309 N.Y. 283 (1955). Traditionally, this exception did not include statements by the patient about who caused the injuries, as that was not viewed as relevant to the treatment of the physical injury. It noted that in recent years, New York State courts have broadened this exception considerably to include not only statements about the injuries themselves, but also statements identifying the perpetrator and the context of how the injury occurred. See, e.g., Ortega, 15 NY3d at 617; People v. Duhs, 16 NY3d 405 (2011) (holding the same and also that admission of such statements in a criminal case did not violate the 6th Amendment right to cross-examination). It held that, a patient's statements about who caused the injury and under what circumstances may be admissible in these types of cases.

Family Court also held that the medical records exception to the hearsay rule was broad enough to cover statements made by a third party to a patient's treatment providers. It observed that in *Matter of A.M.*, 44 Misc.3d 514 (Bronx Co. Family Court 2014) the Court reviewed and agreed with the holdings in *Matter of Dolan*, 35 Misc.3d 781 (Nassau Co. Sup.Ct. 2012), and *Feinstein v. Goebel*, 144 Misc.2d 462 (Sup.Ct. Queens Co.1989), admitting into evidence statements in medical records made by someone other than the patient. In *Dolan*, a civil proceeding about whether ongoing treatment was necessary for a patient, the trial court admitted statements reflected in medical records made by (1) the patient's son, (2) an outpatient program representative, and (3) the patient's caseworker outside of the hospital. In analyzing the issue, the court cited Justice Smith's concurrence in *Ortega*: "when a patient has a mental health problem, it may often be true that almost any statement about his or her history will be within the hearsay exception." *Dolan*, 35 Misc.3d at 783. It then held that these third party statements were "relevant to [the patient's] treatment, and could be used to develop a discharge plan that would ensure his safety." *Id.* at 784. In *Feinstein*, the court ruled in a civil action that statements made by a patient's son were admissible under the exception, holding that the son was under a duty to relate truthful information in order to insure the appropriate treatment for his parent. That court found that "[t]he trustworthiness of the son's statements to the house doctor are [sic] unquestionable," following the logic of *Williams v. Alexander's* holding that statements which are "helpful to an understanding of the medical or surgical aspects of [the hospitalization]" should be admitted. 144 Misc.2d at 465-66; see also 20-22 *Prince LLC v. Tsue Kwai Yen*, 32 Misc.3d 1224(A) (Sup.Ct. N.Y. Co.2011) (third party declarations admissible as germane to medical treatment). Family Court found that the statements made by the complainant's mother to the treatment providers, contained within the child's medical records, were relevant and germane to the child's treatment and admissible under the medical records exception to the hearsay rule.

March 1, 2017

Appellate Division, First Department

Family Court Is Permitted to Issue a New Order of Protection If the Respondents Conduct Is in Violation of a Valid Order of Protection.

In *Matter of Lisa T v King ET*, 2017 WL 758243 (1st Dept., 2017) the Family Court found, on the record after a hearing, that respondent had willfully violated the temporary order of protection with his April 3, 2014 emails containing statements clearly intended to harass petitioner. As a result of this determination, the Family Court conducted a dispositional hearing on respondent's violation of the temporary order of protection, and thereafter issued a new order of protection. The Appellate Division held that the Family Court adhered to the prescribed procedure and did not exceed its jurisdiction by issuing this final order of protection. It observed that Family Court Act § 846-a, "Powers on failure to obey order," is "punitive [in] nature"; it prescribes the procedure and penalties for failing to obey a temporary order of protection. The court is permitted to issue a new order of protection if the respondent is "brought before the court for failure to obey [a] ... temporary order of protection issued pursuant to this act ... and if, after hearing, the court is satisfied by competent proof that the respondent has willfully failed to obey ... such order." Under Family Court Act § 846-a the new order of protection must be in accordance with Family Court Act § 842, which permits a court to issue such an order upon a finding "on the record that the conduct alleged in the petition is in violation of a valid order of protection." The majority rejected the contention of the dissent that Family Court Act § 846-a must be read to provide that a "final" order of protection can only be issued upon the Family Court's determination that: (1) the respondent willfully violated a final order of protection that itself was issued upon a finding that a family offense was committed; or (2) the respondent's violation of a temporary order of protection constituted a family offense; or (3) the respondent's violation of a final order of protection constituted a family offense. There is no support in the statute or in the case law for this proposition. The dissent's argument would require this Court to read language into the statute that is, simply, not there. Family Court Act § 846-a does not require a finding of the commission of a family offense.

Appellate Division, Second Department

Where Sufficient Economic Data Available, Temporary Child Support That Deviates from the Guidelines Amount May Constitute an Improvident Exercise of Discretion, Absent an Adequate Reason for the Deviation

In *Kashman v Kashman*, --- N.Y.S.3d ----, 2017 WL 690969, 2017 N.Y. Slip Op. 01343 (2d Dept.,2017) the Appellate Division observed that in determining an award of pendente lite child support, courts may, in their discretion, apply the Child Support Standards Act (hereinafter CSSA) standards and guidelines, but they are not required to do so. However, under some circumstances, particularly where sufficient economic data is available, an award of temporary child support that deviates from the level that would result if the provisions of the CSSA were applied may constitute an improvident exercise of discretion, absent the existence of an adequate reason for the deviation. (*Davydova v. Sasonov*, 109 AD3d at 957). As the court failed to provide any explanation as to how it determined the amount of the award of pendente lite child support the matter was remitted to the Supreme Court for a calculation of the defendant's pendente lite child support obligation and a new determination of that branch of the plaintiff's motion which was for pendente lite child support. Should the court determine not to apply the CSSA in calculating the new award, the determination shall include an explanation as to why the court declined to do so and the basis for the new award.

Appellate Division, Third Department

Third Department Holds That Where Neither Party Submitted Proof of Value of Home it Was Not Error to Credit Husband's Testimony as to its Value. Given Husband's Testimony That He Had "No Idea" What Vehicle Was Worth, Not an Abuse of Discretion to Determine it Had No Value.

In *Barnhart v Barnhart*, --- N.Y.S.3d ----, 2017 WL 803885, 2017 N.Y. Slip Op. 01611 (3d Dept., 2017) Plaintiff (husband) and defendant (the wife) were married in 2002. In 2014, the husband brought this action for divorce. A trial was held in May 2015. Neither party complied with 22 NYCRR 202.16(h), which required them to submit statements of proposed distribution. Neither party made opening or closing statements at trial and neither party submitted expert evidence or evidence in the form of financial documentation or title documentation related to any asset at issue. The parties were the only witnesses at the trial. Supreme Court granted the wife \$250 a week in maintenance for an approximately 11-year period and determined equitable distribution. The court ordered the husband to "take all necessary steps to place" a specified amount of his retirement account in the wife's name, which, according to the court's valuations, led to an overall equal division of the marital property.

The Appellate Division found that when examined at trial about the value of the marital home, the husband testified that the home was worth "\$50,000[,] we decided on that." Neither party submitted any other proof that would allow for a more precise valuation of the home or any proof that would indicate, contrary to the husband's testimony, that the \$50,000 valuation of the home was even contested. Accordingly, it could not say that the court abused its discretion by, in the absence of any opposing proof, crediting the husband's testimony as to the value of the home.

The Appellate Division held that Supreme Court did not err in attributing no value to a 2012 Chevy Suburban vehicle that the court awarded to the wife, subject to any debt against it. The proof established that the vehicle was marital property, and the husband put forward no documentary evidence establishing that the vehicle was titled to him. Moreover, he conceded both that the vehicle was within the wife's possession and that she was paying the lien on it. Thus, the husband "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" (*Alper v. Alper*, 77 AD3d 694, 696 [2010]; see *Iwahara v. Iwahara*, 226 A.D.2d 346, 347 [1996]). Particularly given the husband's testimony that he had "no idea" what the vehicle was worth, Supreme Court did not abuse its discretion in determining that it had no value for the purpose of equitable distribution.

The Appellate Division held that the court also erred when it determined that the husband had two retirement accounts that were marital property and that were, at the time of the commencement of the proceeding, collectively valued at \$160,000. The only proof regarding these accounts was the husband's admissions that he, at one point, had two retirement accounts, each worth \$80,000, and his further acknowledgment that the wife was entitled to half his retirement savings. The husband specified, however, that the parties, "when [they] were together during the marriage," removed assets from the second of the accounts so that only \$8,000 remained. As there was no contradictory proof in the record that would support the factual conclusion that the aforementioned account was valued at more than \$8,000 at the time of the commencement of the action or at any point thereafter, the proof only supported the conclusion that the husband's two accounts collectively represented \$88,000 worth of marital assets subject to equitable distribution. It modified the judgment accordingly.

Supreme Court

Supreme Court Awards Custody of Child Born of Husbands Sexual Relationship with Couples Friend to Husband, Wife and Friend.

In *Dawn M v Michael M*, --- N.Y.S.3d ----, 2017 WL 923725, 2017 N.Y. Slip Op. 27073 (Sup. Ct., 2017) the plaintiff, Dawn M., who was "the non-biological, non-adoptive parent, " was awarded "tri-custody" of defendant Michael M.'s ten-year-old biological son J.M. whose mother was Audria. Dawn M. and Michael M. were married on July 9, 1994. Audria moved in with plaintiff and defendant, and the three began to engage in sexual relations. Audria, plaintiff and defendant began to consider themselves a "family" and decided to have a child together. They decided they would try to conceive a child naturally by defendant and Audria engaging in sexual relations with him. It was agreed, before a child was conceived, that plaintiff, Audria and defendant would all raise the child together as parents. Audria became pregnant and J.M. was born on January 25, 2007. For more than eighteen months after J.M.'s birth, defendant, plaintiff and Audria continued to live together. Audria and plaintiff shared duties as J.M.'s mother including taking turns getting up during the night to feed J.M. and taking him to doctor visits, In October of 2008, Audria and plaintiff moved out of the marital residence with J.M. The divorce action was commenced by plaintiff against defendant in 2011. Prior to this divorce, a custody case was commenced by defendant against Audria. Defendant and Audria settled their custody proceeding by agreeing to joint custody; residential custody with Audria and liberal visitation accorded to defendant. The plaintiff still resided with Audria and J.M., and saw J.M. on a daily basis. She testified that she brought the action to assure continued visitation and to secure custody rights for J.M. because she feared that without court-ordered visitation and shared custody, her ability to remain in J.M.'s life would be solely dependent upon obtaining the consent of either Audria or the defendant.

Supreme Court observed that pursuant to DRL § 70, a parent may apply to the court for custody based solely upon what is for the best interest of the child, and what will promote his welfare and happiness. The Court of Appeals in *Brooke S.B.* stressed that its decision only addressed the ability of a person who was not a biological or adoptive parent to establish standing as a parent to petition for custody and visitation, and that the ultimate determination of whether to grant those rights rests in the sound discretion of trial courts in determining the best interests of the child (28 N.Y.3d at 28, 39 N.Y.S.3d 89, 61 N.E.3d 488). The evidence established that the plaintiff acted as a defacto joint custodial parent with defendant and Audria and shared in making all major decisions in J.M.'s life. The Court found that based on the evidence adduced the best interests of J.M. would be served by granting plaintiff's application for shared legal custody with defendant. Such joint legal custody would actually be a tri-custodial arrangement as Audria and defendant already shared joint legal custody. As it appeared from Audria's testimony that she whole-heartedly supported such an arrangement, this Court found no issue with regards to Audria's rights in granting this relief.

In a footnote the Court pointed out that Defendant contended that *Alison D. v. Virginia M.* (77 N.Y.2d 651 [1991]), required the court to deny plaintiff's requested relief for custody and visitation based on her lack of standing, and that prior to the Court of Appeals' decision in *Brooke S.B. v. Elizabeth A.C.C.* (28 N.Y.3d 1 [2016]), the court denied defendant's motion for summary judgment based upon the Marriage Equality Act and the Court's analysis of Vermont Law in *Debra H. v. Janice R.* (14 N.Y.3d 576 [2010]), and found plaintiff had standing as a parent. It also stated that under *Brooke S.B. v. Elizabeth A.C.C.* (28 N.Y.3d 1, 39 N.Y.S.3d 89, 61 N.E.3d 488), relying heavily on the dissent written by Chief Judge Judith Kaye in *Allison D.* (77 N.Y.2d 651, 657[1991]), the law states "where a partner shows by clear & convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive parent has standing to seek visitation and custody under DRL 70." This case represents the logical next step.

February 16, 2017

Appellate Division, Fourth Department

Assinging Day Care Responsibilities to Relative Not a Ground to Deprive Parent of Custody

In *Matter of Hendrickson v Hendrickson*, --- N.Y.S.3d ----, 2017 WL 539237 (4th Dept., 2017) the Appellate Division held, inter alia, that "a more fit parent will not be deprived of custody simply because the parent assigns day-care responsibilities to a relative owing to work obligations" (*Matter of Chyreck v. Swift*, 144 AD3d 1517, 1518).

Appellate Division Holds It is Error to Refuse to Allow Parties to enter Settlement Agreement During Trial.

In *Keegan v Keegan*, --- N.Y.S.3d ----, 2017 WL 460544, 2017 N.Y. Slip Op. 00869 2017 WL 460544 (4th Dept., 2017) the Appellate Division found that the judgment of divorce failed to conform with the mandatory provisions of the Domestic Relations Law and was deficient as it pertained to the issues of custody, visitation, child support, and equitable distribution. It modified the judgment by vacating every decretal paragraph therein, except for the decretal paragraph granting the divorce, the decretal paragraph allowing the parties to resume the use of their premarriage surnames and the decretal paragraph regarding service and granted a new trial on the issues before a different justice.

The Appellate Division found that the court erred in refusing to allow the parties to enter into a settlement agreement. In the midst of trial, the parties' attorneys indicated that an agreement had been reached granting custody to defendant and regular visitation to plaintiff. The court stated that it was "very unhappy" with the length of the trial and immediately terminated all discussions concerning the parties' agreement. The trial continued and, after the close of proof that same day, the court granted custody to plaintiff without regular visitation to defendant. Under the unusual circumstances of this case, i.e., where the parties evinced their agreement in open court to the material terms of a settlement agreement, there were no indicia of fraud or manifest injustice, and the court prevented the parties from ratifying their agreement but instead made a ruling directly contrary to the terms of that agreement, the court erred in granting primary physical custody to plaintiff. That error was compounded when the court entered a visitation schedule that erroneously denied meaningful visitation to defendant.

The Appellate Division held that the Supreme Court also erred in failing to award child support retroactive to [August 23, 2013], the date of the application therefor.” Moreover, the final judgment contained no provision at all for child support and the judgment was deficient because the court did not “determine the respective rights of the parties in their separate or marital property, and ...provide for the disposition thereof in the final judgment”

February 1, 2017

Appellate Division, First Department

Family Court Act § 1046(a)(vi) is explicitly limited to child protective proceedings under articles 10 and 10-A, and has no application to family offense proceedings

In *Matter of Dhanmatie G v Zarmin B*, 2017 WL 82279 (1st Dept., 2017) the Appellate Division affirmed an order which dismissed without prejudice petitioner’s family offense petition finding that Petitioner’s allegations that respondent paternal uncle inappropriately touched one or more of the children were supported only by the inadmissible hearsay statements of the children (Family Court Act § 834). Family Court Act § 1046(a)(vi), which allows such testimony, is explicitly limited to child protective proceedings under articles 10 and 10-A, and has no application to family offense proceedings under article 8. The application of that provision in child custody proceedings under article 6 has been confined to situations in which the custody proceeding is founded upon abuse or neglect, rendering the issues “inextricably interwoven” (*Matter of Khan-Soleil v. Rashad*, 108 AD3d 544, 546 [2d Dept 2013]). Moreover, the mere repetition of the statements does not constitute corroboration (*id.* at 878; see also *Matter of Nicole V.*, 71 N.Y.2d 112, 124 [1987]).

Appellate Division, Second Department

No Change of Custody Where Child’s Bond to the Alienating Parent, and Her Alienation from the Father, Was So Strong But Child Support Suspended

In Matter of Sullivan v Plotnick, --- N.Y.S.3d ----, 2016 WL 7445000, 2016 N.Y. Slip Op. 08873 (2d Dept., 2016) Family Court, inter alia, found that the mother had alienated the children, and vacated the fathers support obligation to the extent of directing him to pay 50% of his child support obligation to the mother, and to pay the remaining 50% of his child support obligation to the mother's attorney to hold in an escrow account, pending the mother's active participation in restoring the parental access rights of the father. Subsequently, after a violation hearing, the Family Court confirmed the report of the Judicial Hearing Officer finding that the mother wilfully violated the order by failing to affirmatively act to restore the parental access rights of the father and interfering with the children's relationship with the father, and made an order terminating the father's support obligation, directing that funds received by the mother's attorney as partial payment of the father's support obligation be refunded to the father, denying the father's petition to modify the custody orders, and vacated the prior orders directing parental access for the father.

The Appellate Division found that while one parent's alienation of a child from the other parent is an act inconsistent with the best interests of the child here, the child's bond to the alienating parent, and her alienation from the father, was so strong, with, among other factors, both parents contributing to the deterioration of that relationship, that a change of custody would be harmful to her. There was, thus, no basis to disturb the Family Court's determination, made after a hearing and an in camera interview with the child, that a change of custody would not be in the child's best interests (see *Matter of Lew v. Sobel*, 46 AD3d 893, 895).

The Court also held that the evidence adduced at the hearings justified a suspension of the father's obligation to make future child support payments. There was evidence that the mother deliberately frustrated the court-ordered therapeutic visitation in many ways, including unnecessarily canceling a number of sessions, discussing the court proceedings and the therapeutic visits with the children and telling the son that it was up to him as to whether he participated in the therapeutic visits, and referring negatively to the father in the presence of the children. These deliberate efforts by the mother influenced the children to view visitation with the father negatively and contributed to the failure of therapeutic visitation. The mother further failed to make an effort to have a therapist address the children's negative feelings toward their father and made no effort to assist the children in restoring their relationship with the father. Thus, the evidence supported the finding that the mother, by her example, her actions, and her inaction, manipulated the children's loyalty, encouraged the estrangement of the father and children, and deliberately frustrated visitation. Under these circumstances, it was appropriate to suspend the father's current child support obligations.

When Determining an Appropriate Amount of Child Support, a Court Should Consider a Child's Actual Needs and the Amount Required for Him or Her to Live an Appropriate Lifestyle.

In *Matter of Peddycoart v McKay*, --- N.Y.S.3d ----, 2016 WL 7479458, 2016 N.Y. Slip Op. 08974 (2d Dept., 2016) the Appellate Division reduced the amount of child support awarded by the Family Court. It held that Family Court must articulate an explanation of the basis for its calculation of child support based on parental income in excess of the statutory cap. This articulation should reflect a careful consideration of the stated basis for its exercise of discretion, the parties' circumstances, and its reasoning why there should or should not be a departure from the prescribed percentage. In addition a court "must relate that record articulation" to the factors set forth in Family Court Act § 413(1)(f). The Support Magistrate's reasons for applying the statutory percentage to the combined parental income in excess of \$141,000 must be sufficiently related to the statutory factors. Furthermore, when determining an appropriate amount of child support, a court should consider a child's actual needs and the amount required for him or her to live an appropriate lifestyle. Here, the Support Magistrate's conclusory determination that the child was in need of the full measure of child support—i.e., application of the statutory percentage to the combined parental income in excess of the statutory cap—was belied by the record.

Once the Child Turns 21, the Court Is Divested of Subject Matter Jurisdiction And Cannot Exercise Such Jurisdiction to Grant Special Immigrant Juvenile Status

In the Matter of Lourdes B.V.I., v Jose R.D.L.C.Q.144 A.D.3d 909, 42 N.Y.S.3d 41, 2016 N.Y. Slip Op. 07648 (2d Dept., 2016) the Appellate Division dismissed, as academic, the appeal from the an order denying the application for an order declaring that the child iwas dependent on the Family Court and making specific findings so as to enable him to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101 (a) (27) (J). During the pendency of the appeal the child turned 21. The Appellate Division held that where, as here, a child who consented to the appointment of a guardian after his or her 18th birthday turns 21, the term of appointment of the guardian “expires on [the child’s] twenty-first birthday, or after such other shorter period as the court establishes upon good cause shown” (SCPA 1707 [2]). Consequently, once the child turns 21, the court “is divested of subject matter jurisdiction, [and] cannot exercise such jurisdiction by virtue of an order nunc pro tunc” (Matter of Maria C.R. v Rafael G., 142 AD3d 165, 170 [2016]; see Davis v State of New York, 22 AD2d 733 [1964]). Thus, the guardianship petition could not be granted at this juncture.

Appellate Division, Third Department

Party Bound by Representations in Statement of Proposed Disposition

In Sprole v Sprole, --- N.Y.S.3d ----, 2016 WL 7469547, 2016 N.Y. Slip Op. 08911 (3d Dept.,2016) the Appellate Division held that inasmuch as the wife represented to Supreme Court in her statement of proposed disposition that the parties credit card debt was a marital liability, she could not now be heard to complain that the court erred in treating it as such (Robinson v. Robinson, 133 AD3d at 1190).

Third Department Holds Court May, in its Discretion, Impose Sanctions upon a Party That Fails to Comply with a Scheduling Order Specifying That the Parties Provide a Witness List

In *Matter of Jesse E. v Lucia F.*, --- N.Y.S.3d ----, 2016 WL 7469542, 2016 N.Y. Slip Op. 08912 (3d Dept., 2016) the Appellate Division, in affirming a custody award to the father, held that Family Court did not abuse its discretion in precluding certain witnesses from testifying as to the mother's supervision of the child, the mother's progress in treatment and recovery and the mother's fiancé's compliance with probation and the work that he had done on his relationship with the mother. Family Court may, in its discretion, impose sanctions upon a party that fails to comply with a disclosure order (see CPLR 3126; *Matter of Landrigen v. Landrigen*, 173 A.D.2d 1011, 1012 [1991]). "The general rule is that a court should only impose a sanction commensurate with the particular disobedience it is designed to punish, and to go no further" (*Matter of Landrigen v. Landrigen*, 173 A.D.2d at 1012; see *Matter of Arcidino v. McCarthy*, 16 AD3d 1132, 1132 [2005]). The mother failed to comply with a scheduling order specifying that the parties were required to provide a witness list one week before the trial date. The court allowed the mother to testify to the aforementioned topics, but foreclosed testimony from the witnesses who were not disclosed to the other parties. The court did not abuse its discretion in imposing this commensurate remedy. The child's right to have issues fully explored would have been impeded if the mother presented witnesses without providing the father and the attorney for the child the court-ordered notice that would have permitted them to prepare for examination of such witnesses, and the mother was allowed to—and did—testify to the underlying issues. Curiously, the court state that in any event, given that Family Court explicitly credited the mother's testimony on the important topic of her recovery and ongoing sobriety, any error would be harmless.

Third Department Holds That Failure to Effectuate Proper Service of a Motion Deprives the Court of Jurisdiction to Entertain the Motion

In *Matter of Gariel v Morse*, --- N.Y.S.3d ----, 2016 WL 7469484 (Mem), 2016 N.Y. Slip Op. 08921 (3d Dept., 2016) the Appellate Division held that the father's letter to the court had to be treated as a motion for voluntary discontinuance pursuant to CPLR 3217(b) (see Family Ct Act § 165[a]) and, as such, it had to comply with the applicable service requirements. Inasmuch as the father's failure to effectuate proper service "deprive[d] the court of jurisdiction to entertain the motion"(Lee v. I-Sheng Li, 129 AD3d 923, 923 [2015]; see *Matter of Lydia DD.*, 94 AD3d at 1386; *Bianco v. LiGreci*, 298 A.D.2d 482, 482 [2002]; *Adames v. New York City Tr. Auth.*, 126 A.D.2d 462, 462 [1987]; *Burstin v. Public Serv. Mut. Ins. Co.*, 98 A.D.2d 928, 929 [1983]), it found that Family Court erred in dismissing the petition.

Violation of a Visitation Order May Not Be Willful If it Is Due to the Child's Resistance to Visitation

In *Matter of James XX v Tracey YY*, --- N.Y.S.3d ----, 2017 WL 52838, 2017 N.Y. Slip Op. 00052 (3d Dept., 2017) the Appellate Division, inter alia, affirmed an order which dismissed the father's violation petition which alleged that the mother had failed to honor the visitation schedule. It observed that the father, as a proponent of a violation petition, was obligated to show the existence of a lawful court order in effect with a clear and unequivocal mandate, that the mother had actual knowledge of the conditions of the order, and that the mother's "actions or failure to act defeated, impaired, impeded or prejudiced" the father's rights, and that the alleged violation was willful (*Matter of Prefario v. Gladhill*, 140 AD3d 1235, 1236 [2016]). The father testified concerning an incident that occurred when he was unable to exercise his visitation rights. The record showed that the father arrived at the mother's residence to pick up the children, but the children refused to go with him. The mother claimed that the children told her that they did not want to see the father. A witness for the father testified to another instance of missed visitation. When the children did not arrive at the agreed meeting place, the witness called the mother, who told her that the children would not be coming. The Appellate Division held that a violation of a visitation schedule embodied in a court order may not be willful if it is due to the child's resistance to visitation (*Matter of Prefario v. Gladhill*, 140 AD3d at 1237). Family Court found that the relationship between the father and the children was often "toxic and volatile" and that, at times, there was a total breakdown of the relationship between the father and the children. The mother's testimony, and the record of the children's text messages to and from the father, provided ample evidence that the children often vehemently resisted visiting the father. Family Court found that the children simply would not attend visitation with the father unless it was convenient for them. Accordingly, Family Court correctly found that, although there were violations of the modified order, they were not willful on the part of the mother, but, rather, due to the children's resistance to visitation.

January 2, 2017
Appellate Division, First Department

Appellate Division Affirms Equitable Distribution Award Reduced Because of Husband's Egregious Misconduct

In *Pierre v Pierre*, --- N.Y.S.3d ----, 2016 WL 7394496 (Mem), 2016 N.Y. Slip Op. 08596 (1st Dept, 2016) the Appellate Division affirmed a judgment which reduced the defendant's equitable distribution award based upon his misconduct. It observed that defendant stabbed plaintiff wife two times with a steak knife, slammed her head against the toilet and put it into the bowl, causing her to enter a coma, require months of hospitalization and five surgeries, and rendering her disabled. He pleaded guilty to attempted assault in the first degree. The Appellate Division held that marital fault can only be considered under Domestic Relations Law § 236(B)(5)(d)(14), 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" (*Howard S. v. Lillian S.*, 62 AD3d 187, 190–191 [1st Dept 2009], *affd* 14 NY3d 431 [2010]). To be deemed egregious, the conduct must callously imperil the value society places on human life and " 'the integrity of the human body' " (*Havell v. Islam*, 301 A.D.2d 339, 345 [1st Dept 2002]). It held that this conduct was so egregious as to warrant a reduction in the equitable distribution award to defendant husband.

First Department Holds Party seeking to declare child of "ceremonial marriage" illegitimate required to rebut the presumption of legitimacy by clear and convincing evidence.

In *Commissioner of Social Services ex rel N.Q. v B.C.*, --- N.Y.S.3d ----, 2016 WL 7393608, 2016 N.Y. Slip Op. 08613 (1st Dept, 2016) the Appellate Division held that Family Court did not abuse its discretion in finding that respondent father and the child's mother entered into a "ceremonial marriage", thereby giving rise to the presumption that the child was a legitimate child of the marriage who was entitled to support under Family Court Act § 417. It observed that there is an established legal presumption that every person is born legitimate," a presumption which "operates ... in any case in which legitimacy is in issue" (*Matter of Fay*, 44 N.Y.2d 137, 141–142 [1978]). It is " 'one of the strongest and most persuasive [presumptions] known to the law' " (*id.* at 142, quoting *Matter of Findlay*, 253 N.Y. 1, 7 [1930]). In *Findlay*, the Court of Appeals made clear that the presumption may be rebutted, but only if "common sense and reason are outraged by a holding that it abides". The presumption of legitimacy has since been codified in the Family Court Act, which provides, "A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of [support proceedings] regardless of the validity of such marriage" (Family Court Act § 417). A ceremonial marriage need not take any particular form, provided that the parties solemnly declare in the presence of a clergyman or magistrate, and at least one witness, that they intend to be married (Domestic Relations Law § 12). *Findlay* notwithstanding, the statute's use of the word "deemed" appears to make a child's legitimacy un rebuttable when the parents have entered into a ceremonial marriage. However, New York courts have continued to treat the presumption as a rebuttable one. To rebut the presumption, the challenger must disprove legitimacy by clear and convincing evidence (*Barbara S.*, 24 AD3d at 452; *Ghaznavi*, 163 A.D.2d at 195). The court's determination after a hearing that respondent and N.Q. entered into a ceremonial marriage was supported by the evidence and the court's credibility determinations. Therefore, it affirmed the court's factual determination that a ceremonial marriage took place. It rejected Respondent's contention that petitioner was required to prove

the ceremonial marriage by clear and convincing evidence. It was respondent's burden to rebut the presumption of legitimacy by clear and convincing evidence. He failed to carry that burden. The Court rejected respondent's argument that the ceremony did not comply with the requirements of Islam (because there was no written marriage contract). The child's legitimacy did not depend on the validity of the marriage (Family Court Act § 417). As long as respondent and N.Q. entered into a ceremonial marriage, the child is presumed to be legitimate and, therefore, entitled to support.

Appellate Division, Second Department

Second Department Holds that Party Seeking Counsel Fees Must Demonstrate, Prima Facie, attorney substantially complied with 22 NYCRR 1400.2 and 1400.3

In *Piza v Baez-Piza*, --- N.Y.S.3d ----, 2016 WL 7224738, 2016 N.Y. Slip Op. 08384 (2d Dept., 2016) following a trial, the defendant sought additional attorney's fees, and, the Supreme Court, inter alia, awarded the defendant the sum of \$7,500 in attorney's fees for legal services provided following the earlier award of \$3,500 in attorney's fees. The Appellate Division held that Supreme Court erred in awarding the defendant total attorney's fees in excess of the \$7,500 retainer that she paid to her attorney, as she did not demonstrate, prima facie, that her attorney substantially complied with 22 NYCRR 1400.2 and 1400.3 (see *Vitale v. Vitale*, 112 AD3d 614, 615). It modified the judgment to provide that the additional award of attorney's fees for legal services provided following the prior award of \$3,500 be limited to the sum of \$4,000 (see *Mulcahy v. Mulcahy*, 285 A.D.2d 587, 588–589).

Appellate Division Considers Factor [6] “the existence and duration of a pre-marital joint household in awarding Maintenance

In *Kaprov v Stalinsky*, --- N.Y.S.3d ----, 2016 WL 7380951, 2016 N.Y. Slip Op. 08509 (2d Dept., 2016) the husband argued, inter alia, that as the Supreme Court had already ordered him to pay, pursuant to a pendente lite order, \$3,000 per month in temporary maintenance retroactive to November 12, 2010, the date on which the wife filed her complaint seeking a divorce, the Court, in awarding maintenance for seven years from the date of judgment this effectively granted the wife an 11-year maintenance award, which is excessive in duration given that the marriage lasted only 12 years and the parties had no children together. The Appellate Division rejected this argument observing that a party's maintenance obligation is retroactive to the date the application for maintenance was first made (see Domestic Relations Law § 236[B][6][a]). However, the party is also entitled to a credit for any amount of temporary maintenance ... already paid” (*Huffman v. Huffman*, 84 AD3d 875, 876). In arguing that the maintenance award was out of proportion to the duration of the marriage, the husband failed to recognize that, pursuant to the version of Domestic Relations Law § 236(B)(6)(a) in effect at the time of the commencement of this action, one of the factors a court should take into account in deciding the amount and duration of a maintenance award is “the existence and duration of a pre-marital joint household” (Domestic Relations Law § 236[B][6][a][6]). The wife testified that the couple lived together from 1984 to 2010, approximately 26 years. Thus, an 11-year award of maintenance was not out of proportion with the duration of the joint household. The maintenance award was appropriate for the wife to become self-supporting given the factors involved, including the duration of the pre-marital joint household, as well as the wife's age, absence from the workforce, reduced earning capacity, and limited education (see Domestic Relations Law § 236[B][6][a]).

Surrogate's Court Lacks Authority under Domestic Relations Law § 111–c to Deny Recognition of Foreign Adoption Order

In *Matter of Child A*, --- N.Y.S.3d ----, 2016 WL 7380939, 2016 N.Y. Slip Op. 08510 (2d Dept., 2016) the petitioners commenced proceedings seeking an order “denying recognition” of a foreign adoption order pursuant to Domestic Relations Law § 111–c, or, in the alternative, vacating the adoption order pursuant to Domestic Relations Law § 114(3) on the grounds of fraud and newly discovered evidence (children’s mental health issues). The Appellate Division affirmed the order which dismissed the proceedings. It held the Surrogate’s Court lacked authority under Domestic Relations Law § 111–c to deny recognition of the adoption order. Although a court may deny a petition for registration of a foreign adoption order on the ground that it does not satisfy the requirements set forth in Domestic Relations Law § 111–c(1) (see Domestic Relations Law § 111–c[3]), the statute, by its plain language, was not intended to function as a means to abrogate a foreign adoption or deny recognition of a foreign adoption order on the basis of fraud. Rather, Domestic Relations Law § 111–c requires New York courts to recognize and give full legal force and effect to foreign adoption orders provided that certain conditions are met, and provides a mechanism for New York residents to validate foreign adoption orders. The Surrogate’s Court similarly lacked authority under Domestic Relations Law § 114(3) to vacate the adoption order. That statute provides that, “[i]n like manner as a court of general jurisdiction exercises such powers, a judge or surrogate of a court in which the order of adoption was made may open, vacate or set aside such order of adoption for fraud, newly discovered evidence or other sufficient cause.” (Domestic Relations Law § 114[3]). The plain language of that statute only empowers a New York court to vacate its own adoption orders, and not those issued in a foreign sovereign nation (see *Matter of Walker*, 64 N.Y.2d 354, 360).

Appellate Division, Third Department

Third Department Holds that Equitable Distribution, Maintenance and Interim Support Awards to Wife Rebut “Less Monied Spouse” Presumption

In *Macaluso v Macaluso*, --- N.Y.S.3d ----, 2016 WL 7234697, 2016 N.Y. Slip Op. 08418 (3d Dept., 2016) the Appellate Division, inter alia, rejected the wife’s argument that Supreme Court abused its discretion in denying her request for \$20,000 in counsel fees. It observed that because this action was “commenced on or after October 12, 2010, there was a statutory ‘rebuttable presumption that counsel fees shall be awarded to the less monied spouse’ . It found that the equitable distribution, maintenance and substantial interim award of fees, including temporary support payments that allowed the wife to amass several thousand dollars in savings, and durational maintenance giving her time to obtain a job commensurate with her impressive qualifications and a \$5,000 interim award applied toward approximately \$20,000 in legal bills that were only related to the divorce in part (the invoices also included services related to the parties agreement and Family Court proceedings), rebutted the presumption. After considering “the financial circumstances of both parties together with all the other circumstances of the case, the Court was unpersuaded that the wife demonstrated the need for a further award of counsel fees. It noted that Supreme Court also pointed out that the wife did not provide required affidavits or otherwise detail the degree to which the legal expenses incurred by her were attributable to the divorce.

December 16, 2016

Appellate Division, Second Department

Family Court Has the Authority to Award an Attorney's Fee in Custody Proceedings Based on the Financial Circumstances of the Parties and the Circumstances of the Case.

In *Matter of Catto v Howell*, --- N.Y.S.3d ----, 2016 WL 6991671, 2016 N.Y. Slip Op. 08072(2d Dept.,2016) the Appellate Division reversed an order of the Family Court which denied the mother's motion for an award of an attorney's fee. After the parties reached a settlement resolving several petitions, inter alia, to modify an existing court-sanctioned custody arrangement, the mother moved for an award of an attorney's fee in the sum of \$33,471.32. The Appellate Division observed that the Family Court has the authority to award an attorney's fee in custody proceedings when warranted under the circumstances of the case" (Family Ct Act § 651[b]; Domestic Relations Law § 237[b]; *Matter of Feng Lucy Luo v. Yang*, 104 AD3d 852, 852). The award of reasonable counsel fees is a matter within the sound discretion of the trial court. Any such award 'is to be based on the financial circumstances of the parties and the circumstances of the case as a whole, which may include the relative merit of the parties' positions, but should not be predicated solely on who won and who lost. It found that given the relative merits of the parties' positions, and their respective financial circumstances, an award of an attorney's fee to the mother in the sum of \$33,471.32 was appropriate.

Prior Dismissal of Appeal for Want of Prosecution Acts as Bar to a Subsequent Appeal as to All Questions That Were Presented on the Earlier Appeal

In *Horn v Horn*, --- N.Y.S.3d ----, 2016 WL 7109263, 2016 N.Y. Slip Op. 08198 (2d Dept., 2016) the parties were married in 1991 and they had two children. The Appellate Division held, inter alia, that Supreme Court providently exercised its discretion in directing the defendant to pay two-thirds of the balance of a home equity line of credit. In general, expenses incurred prior to the commencement of a divorce action constitute marital debt and should be equally shared by the parties. However, a financial obligation incurred by one party in pursuit of his or her separate interests should remain that party's separate liability. Inasmuch as the evidence established that the debt was incurred for the dual purpose of improving the marital residence and paying bills as well as funding the defendant's separate business interest in which the plaintiff had no share, the defendant failed to show that the debt as to the defendant's separate business interest should be shared equally.

The Appellate Division held that to the extent that defendant contested the propriety of the pendente lite relief awarded in a 2009, order, review of that issue was barred by the doctrine of *Bray v. Cox* (which held that a prior dismissal for want of prosecution acts as a bar to a subsequent appeal as to all questions that were presented on the earlier appeal.)

(38 N.Y.2d 350). It found that defendant could have raised that issue in his prior appeal from that order, which was dismissed by the Court for failure to perfect in accordance with the rules of the Court, and that dismissal constituted an adjudication on the merits with respect to all issues which could have been reviewed on that appeal. It declined to exercise its discretion to determine the propriety of the pendente lite relief awarded in the 2009 order.

Family Court Not Authorized under Family Court Act § 352.3(1) to Issue an Order of Protection in Favor of a Witness

In *Matter of Richard H.*, 40 N.Y.S.3d 551, 2016 N.Y. Slip Op. 07322 (2d Dept., 2016) Family Court, adjudicated Richard H. a juvenile delinquent, and issued an order of protections which directed Richard H. to stay away from Rey J. and his home, school, and place of employment, and to refrain from harassing, intimidating, threatening, or otherwise interfering with Rey J. The Appellate Division reversed holding that Family Court was not authorized under Family Court Act § 352.3(1) to issue an order of protection in favor of Rey J., who was a witness to, but not a victim of, the offenses (see *Matter of Elias E.*, 83 A.D.3d at 834, 921 N.Y.S.2d 276; Family Ct. Act § 352.3[1]).

Appellate Division, Third Department

Appellate Division Explains Doctrine of Ripeness in Finding Claim Is Nonjusticiable

In *Allard v Allard*, --- N.Y.S.3d ----, 2016 WL 7129129, 2016 N.Y. Slip Op. 08288 (3d Dept., 2016) the parties 1989 separation agreement that was incorporated, but not merged, into a their judgment of divorce provided that plaintiff was “entitled to sole and exclusive possession, use and ownership of the marital residence,” which was transferred to her and that “[w]hen and if the house is sold,” defendant and plaintiff are to share equally the equity or profit from the sale. In 2014, defendant filed a motion to enforce the separation agreement, seeking an order directing the immediate sale of the property or, in the alternative, directing plaintiff to pay off the mortgages on the property, alleging that plaintiff breached the agreement by obtaining the additional loans and thereby encumbering his contingent interest in the property. Supreme Court denied defendant’s motion as moot. The Appellate Division found that defendant’s motion was properly denied, upon distinct but similar grounds. It found that under the plain language of the agreement, defendant was entitled to a share of the equity or profits resulting from a sale of the marital residence only “[w]hen and if” the residence is sold. Thus, plaintiff was under no obligation to sell the home. Supreme Court correctly found that defendant was seeking an opinion with regard to a possible future event that has not yet occurred, and that there was no presently existing case or controversy to be adjudicated. Under the doctrine of ripeness, where the harm sought to be enjoined is contingent upon events which may not come to pass, a claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract. Here, the harm that defendant sought to avoid, that is, the diminution of his share of the equity or profit that might someday result from a sale of the residence because of the encumbrances of plaintiff’s loans, would occur

only if the residence was eventually sold, a future contingency that may never come to pass. Moreover, as plaintiff stated that she planned to keep the property and leave it to her children in her will, there was no practical likelihood that the future contingency will occur. Accordingly, defendant's contentions were not ripe for review and were not justiciable.

Supreme Court

Court Denies Wife's Application for Service of the Summons for Divorce by Publication to Facebook Where No Demonstration That Service by Facebook Was Reasonably Calculated to Apprise Defendant of Matrimonial Action.

In *Qaza v Alshalabi*, --- N.Y.S.3d ----, 2016 WL 7109698, 2016 N.Y. Slip Op. 26402 (Sup. Ct., 2016) Supreme Court denied the wife's application pursuant to CPLR 308(5) for service of the summons for divorce by publication to the facebook social networking website. In her affidavit in support plaintiff alleged that she and defendant were married on June 22, 2011 in New York State but that defendant left the marital residence in September 2011 without providing her any contact information. Plaintiff argued that defendant had been deported and that she believes he was living in Saudi Arabia. She alleged that she "made every effort to locate" defendant to personally serve him with the summons for divorce but had not been successful. She contended that Saudi Arabia was not a signatory to The Hague Convention and, therefore, plaintiff could not ensure service in the foreign jurisdiction. She argued that she only discovered that defendant was in Saudi Arabia because defendant maintained two (2) profiles on Facebook listing that as his location. Supreme Court found that the facts and circumstances were distinguishable from *Safadjou v. Mohammadi* relied upon by plaintiff. In *Safadjou v. Mohammadi* the Court permitted service by e-mail pursuant to CPLR 308(5). However, there the record established that the plaintiff and defendant had been communicating by e-mail and, therefore, the Court found that "plaintiff made the requisite showing that service by e-mail was 'reasonably calculated to apprise defendant of the pending lawsuit and thus satisfie[d] due process'" (*Safadjou v. Mohammadi*, 105 A.D.3d 1423, 1425, 964 N.Y.S.2d 801 [4 Dept.,2013], citing *Harkness v. Doe*, 261 A.D.2d 846, 847, 689 N.Y.S.2d 586 [4th Dept.,1999]). Supreme Court found that plaintiff failed to sufficiently authenticate the Facebook profile as being that of defendant and did not show, assuming arguendo that it was defendant's Facebook profile, that defendant actually used this Facebook page for communicating. There was no indication that the profile had been used since April 2014, and no sworn statement that she communicated with defendant through this profile. As such, plaintiff did not demonstrate that, under the facts presented, service by Facebook was reasonably calculated to apprise defendant of the matrimonial action.

Youthful Offender Adjudications Are Adult Proceeding and Do Not Qualify a Person as "Dependent" on a "Juvenile Court" Within the Meaning of 8 U.S.C. § 1101(a)(27)(J)

In the Matter of Jose H. 40 N.Y.S.3d 710 (Sup. Ct., 2016) Supreme Court denied the application of Jose H. for an order setting out Special Findings that would make him eligible for Special Immigrant Juvenile status which, if granted by immigration authorities,

would permit him to stay in the United States. See 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11. The petitioner argued that he was “dependent” on a “juvenile court” because he was “legally committed to, or placed under the custody of, an agency or department of a State” when this Court—after the petitioner’s conviction of felony assault for ambushing and hacking an unarmed man with a machete—adjudicated him a Youthful Offender and sentenced him to state prison. Supreme Court found that this strained interpretation of the federal statute failed and denied the application. It observed that the “juvenile court” in New York state is the Family Court. While the New York Supreme Court is a court of general jurisdiction and a judge of the Supreme Court may sit to adjudicate a Family Court case, this Supreme Court judge did not do that in the petitioner’s case. Family Court was without jurisdiction to entertain the petitioner’s case because he was charged, as an adult, with a felony. In other words, the petitioner was not legally committed or placed in custody by a “juvenile court,” as required for Special Immigrant Juvenile status, see 8 U.S.C. § 1101(a)(27)(J), because this Court was not exercising “juvenile court” jurisdiction when it sent him to state prison. Youthful Offender adjudications are adult, rather than juvenile, proceedings in New York. Consequently, the petitioner did not qualify as “dependent” on a “juvenile court” within the meaning of the federal statute.

December 1, 2016

Appellate Division, Second Department

Absent Provision Barring Family Court Enforcement of Divorce Judgment it May Be Enforced in Supreme Court or Family Court

In *Castello v Castello*, --- N.Y.S.3d ----, 2016 WL 6605162, 2016 N.Y. Slip Op. 07287 (2d Dept., 2016) the Appellate Division observed when the Supreme Court signed the proposed judgment of divorce, it struck a provision which would have expressly granted concurrent jurisdiction to the Family Court with respect to the issues of child support and maintenance. The Appellate Division held that the striking of that provision does not bar the Family Court from exercising concurrent jurisdiction. Unless the Supreme Court expressly retains exclusive jurisdiction to enforce the terms of a judgment of divorce, the support provisions of the judgment may be enforced in the Family Court as well. The judgment of divorce did not contain a provision limiting enforcement jurisdiction to the Supreme Court.

Appellate Division Holds Postnuptial Agreement Which Was Not Properly Acknowledged as Required by Domestic Relations Law § 236(B)(3) Was Ratified by Accepting its Benefits

In *Gardella v Remizov*, --- N.Y.S.3d ----, 2016 WL 6885860, 2016 N.Y. Slip Op. 07924 (2d Dept., 2016) the parties to this matrimonial action were married in 2000. In October 2002, the parties entered into a postnuptial agreement, which provided, among other things, that the marital residence and the plaintiff’s private medical practice were the plaintiff’s separate property. In 2006, the parties entered into a second postnuptial agreement, which provided that four parcels of real property in Florida acquired by the parties during the marriage had

been purchased with the plaintiff's separate property, and further addressed the distribution of those four parcels in the event of a divorce. In 2010, the parties entered into a separation agreement, which addressed, inter alia, issues of maintenance and equitable distribution of the parties' respective assets. At the time, the plaintiff, a neurologist, was earning approximately \$600,000 per year, and the defendant, a wine salesman, was earning approximately \$40,000. The separation agreement provided, among other things, that the defendant would have no interest in any of the assets acquired during the parties' marriage, including six parcels of real property, the plaintiff's partnership interest in a neurological practice, and the plaintiff's bank and brokerage accounts, and that he waived his right to spousal maintenance. The defendant was not represented by counsel when he executed the separation agreement. In November 2011, the plaintiff commenced the action for a divorce. Supreme Court granted plaintiff's motion for summary judgment dismissing the defendant's counterclaims to set aside the agreement, and denied defendant's cross motion for summary judgment on his counterclaims to set aside the agreements, to nullify the 2002 postnuptial agreement for lack of acknowledgment, and for financial disclosure. The Appellate Division found that given the vast disparity in the parties' earnings, the evidence that the defendant had no assets of value, and the defendant's documented medical condition which inhibits his future earning capacity, the defendant's submissions were sufficient to create an inference that the separation agreement was unconscionable. In addition, the defendant's evidence indicating that the plaintiff sold almost \$1 million in securities in the months preceding his execution of the separation agreement, the value of which were not accounted for in the list of her bank and brokerage accounts therein, raised a triable issue of fact as to whether the plaintiff concealed assets. It held that under these circumstances, the Supreme Court should have exercised its equitable powers and directed further financial disclosure, to be followed by a hearing to test the validity of the separation agreement.

The Appellate Division further found, that the 2006 agreement was valid, and that while the defendant correctly contended that the 2002 postnuptial agreement was not properly acknowledged in the manner required by Domestic Relations Law § 236(B)(3) (see *Galetta v. Galetta*, 21 NY3d 186, 192), the evidence established that the defendant ratified that agreement by accepting the benefits of it and by waiting more than eight years to seek its nullification. No inquiry into the validity of the 2002 postnuptial agreement or the 2006 postnuptial agreement would be necessary or warranted.

Parent Who Obtains Order Compelling Another Person to Pay Child Support Will Be Judicially Estopped from Taking Inconsistent Position That Other Person Was Not a Parent to the Child for Purposes of Visitation

In *Paese v Paese*, --- N.Y.S.3d ----, 2016 WL 6604674, 2016 N.Y. Slip Op. 07304 (2d Dept., 2016) the defendant had three children from prior relationships, including the subject child. The plaintiff moved in with the defendant and her children and raised the subject child as his daughter. The plaintiff and the defendant later married and then separated. After the separation, the defendant filed a petition in the Family Court seeking child support from the plaintiff for all of her children, including the subject child. A Support Magistrate found that the plaintiff was chargeable with the support of the subject child and his two biological children, and directed him to pay child support and contribute to child care expenses. In May

2013, the plaintiff commenced an action for a divorce. The Supreme Court consolidated the Family Court proceeding with the Supreme Court action and issued a temporary access order pursuant to which the plaintiff had access to the subject child and his biological children. In January 2015, the defendant moved, inter alia, to remove the subject child from the temporary access order, declare the plaintiff a third-party stranger to the subject child. Supreme Court denied the motion, determining that the defendant was judicially estopped from arguing that the plaintiff was not the subject child's parent for the purpose of visitation because she previously sought and obtained an award of child support for the child. During the trial, when asked about the order denying her motion to remove the subject child from the temporary access order, the defendant testified that she did not agree with the order because, among other things, she did not believe that the plaintiff should be paying support for the subject child. The trial was to resume several weeks later, at which time the Supreme Court informed the parties that based on the defendant's clear and unequivocal waiver of child support for the subject child, the court would not direct the plaintiff to pay child support for the subject child, which was the sole basis of its judicial estoppel ruling. Therefore, the court ruled, the plaintiff did not have standing to seek visitation, his request for access to the subject child was denied, and there was no need to complete the trial with respect to visitation. The court issued an order accordingly.

The Appellate Division reversed and remitted for completion of the trial with respect to visitation. It observed that one way that an individual may obtain standing to proceed as a "parent" is through the doctrine of judicial estoppel (see *Matter of Brooke S.B. v. Elizabeth A. C.C.*, 28 NY3d 1). Under the doctrine of judicial estoppel, "a party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed". Thus, where a parent obtains an order compelling another person to pay child support based on the parent's successful argument that the other person was a parent to the child, the parent who obtained child support will be judicially estopped from taking the inconsistent position that the other person was not, in fact, a parent to the child for purposes of visitation. It held that Supreme Court erred in finding that the plaintiff lacked standing to seek visitation with the subject child. The defendant was judicially estopped from arguing that the plaintiff was not a parent for the purpose of visitation. First, by asserting in her child support petition that the plaintiff was chargeable with support for the subject child, the plaintiff assumed the position before the Family Court that the plaintiff was the subject child's parent, as it is parents who are chargeable with the support of their children (Family Ct Act § 413[1][a]). Next, based on her assertion that the plaintiff was chargeable with the subject child's support, the defendant successfully obtained an order compelling the plaintiff to pay child support for the subject child. Under this order, the plaintiff was required to pay child support for his children, including the subject child. Furthermore, the record did not support the court's finding that the defendant unequivocally waived the right to child support. Therefore, the defendant was judicially estopped from arguing that the plaintiff is not a parent for the purpose of visitation.

Appellate Division, Third Department

Unauthenticated Recording of a Telephone Conversation Between the Mother and the Child Was Inadmissible in Custody Proceeding

In *Matter of Williams v Rolf*, 2016 WL 6884034 (3d Dept.,2016) a proceeding to modify a prior custody order, the Appellate Division held that a recording of a telephone conversation between the mother and the child was inadmissible. In November 2012 the child had initiated a telephone call to her attorney and the call was answered by the attorney's answering service. After a brief conversation with an answering service employee, the connection was not terminated and the child's ensuing conversation with the mother was inadvertently monitored and recorded by the answering service. The recording was subsequently disclosed to the child's attorney, who then furnished a compact disc of the recorded conversation to the attorneys for both the mother and the father. The recording was played at the hearing and received into evidence over the objection of the mother's attorney. The Appellate Division agreed with the mother that the recording of her conversation with the child should not have been received into evidence because the recording was not properly authenticated. The Appellate Division observed that the predicate for admission of tape recordings in evidence is clear and convincing proof that the tapes are genuine and that they have not been altered. Absent such proof, the [witness's] concession that the voice on the tapes is his or hers and that he or she recalls making some of the statements on the tapes does not exclude the possibility of alteration and, therefore, does not sufficiently establish authenticity to make the tapes admissible" (*People v. Ely*, 68 N.Y.2d 520, 522 [1986]). The foundation laid for the introduction of the recording into evidence was the mother's testimony that the telephone call was made by the child using the mother's cell phone, the voices on the recording were hers and the child's, she listened to the recording "[q]uite a few" times and her friend, Amanda Coon, was present when the recording was made. After this testimony, Family Court admitted the recording into evidence. The mother's testimony was insufficient to authenticate the recording because she did not testify as to whether or not the recording was the complete and unaltered conversation between her and the child, and "there was no attempt to offer proof about who recorded the conversation, how it was recorded (e.g., the equipment used) or the chain of custody" (*Grucci v. Grucci*, 20 NY3d at 897).

Appellate Division, Fourth Department

Date of Commencement of the Foreign Action Could Not Serve as the Valuation Date for Equitable Distribution of Marital Property in Action for Equitable Distribution Following Foreign Judgment of Divorce.

In *Drake v Mundrick*, --- N.Y.S.3d ----, 2016 WL 6816775, 2016 N.Y. Slip Op. 07792 (4th Dept., 2016) On September 12, 2011, plaintiff commenced a action for equitable distribution following the issuance of an amended foreign judgment of divorce. Before the trial commenced, Supreme Court informed the parties that the court would use the date of commencement of the foreign action of divorce, i.e., May 1, 2007, as the date for valuation of the marital property. The Appellate Division reversed and remitted. It held that the court erred in using the 2007 date instead of the 2011 date as the valuation date. Domestic Relations Law § 236(B)(4)(b) provides that, the "valuation date or dates may be anytime from the date of commencement of the action to the date of trial". Although both the action for

dissolution of the marriage in 2007 and this action “to obtain ... distribution of marital property following a foreign judgment of divorce” are included in the statutory section entitled “[m]atrimonial actions” (§ 236[B][2][a]) it concluded that the date of commencement of the foreign action could not serve as the valuation date for equitable distribution of the marital property because the foreign action for divorce was not “an action in which equitable distribution [was] available,” and the foreign court in this case thus lacked jurisdiction over any of the parties’ marital assets. A new trial on equitable distribution is required where, as here, we have determined that the court used an incorrect valuation date.

November 16, 2016

Net Worth Affidavit Form Revised Effective August 1, 2016

The Affidavit of Net Worth Form which is required to be served by both parties, pursuant to DRL §236 [B] [2] and 22 NYCRR §202.16(b), was revised effective August 1, 2016. The new form, which is gender neutral, includes new categories of expenses and removes certain expense categories. The most significant change is that it requires that the value of assets and the amount of liabilities and debts shall be listed as of “date of commencement” of the action in addition to the “current amount.”

Other significant changes in the form include new sections under “Liabilities” for “Credit Card Debt” and “Home Equity and Other Lines of Credit;” former Item VII, Support Requirements, was removed; and former item VIII Counsel Fees was removed and replaced with the following:

“VII. LEGAL & EXPERT FEES

Please state the amount you have paid to all lawyers and experts retained in connection with your marital dissolution, including name of professional, amounts and dates paid, and source of funds. Attach retainer agreement for your present attorney.”

The parties are now required to indicate if the net worth statement is not the first one they have filed. The following language appears at the end of the form: “This is the _____ Statement of Net Worth I have filed in this proceeding.”

It appears that item 12.1 Contingent Interests (stock options, interests subject to life estates, prospective inheritances) contains a confusing typographical error. It requires the affiant to list “g. source of acquisition to acquire.” However, it is clear from the balance of the assets portion of the form that this was meant to read “Source of funds to acquire”, a term used throughout the form.

The Net Worth Affidavit form can be downloaded in pdf, word and fallible format from <http://www.nycourts.gov/divorce/forms.shtml>

Preliminary Conference Stipulation/Order Form Revised Effective August 1, 2016

The Preliminary Conference Stipulation/Order form required to be served pursuant to 22 NYCRR §202.16(f) was revised effective August 1, 2016. It was re-formatted and contains new provisions related to the post-divorce maintenance guidelines and notice of the automatic orders.

DRL §236 [B] [6] [g], which is applicable in actions commenced on or after January 25, 2016 (Laws of 2015, Ch 269) provides that where either or both parties are unrepresented, the court shall not enter a maintenance order or judgment unless the court informs the unrepresented party or parties of the post-divorce maintenance guideline obligation. Subdivision M. titled “NOTICE OF GUIDELINE MAINTENANCE” contains a notice intended to comply with DRL §236 [B] [6] [g], in cases where there is an unrepresented party. The Notice advises the parties that under the Maintenance Guidelines Law there is an obligation to award the guideline amount of maintenance on income up to \$178,000 to be paid by the party with the higher income (the maintenance payor) to the party with the lower income (the maintenance payee) according to a formula, unless the parties agree otherwise or waive this right.

The new form contains a new Subdivision J titled AUTOMATIC STATUTORY RESTRAINTS (DRL §236[B][2]), in which each party acknowledges that he or she has received a copy of the Automatic Statutory Restraints/Automatic Orders required by DRL §236[B][2], and that he or she understands that he or she is bound by those Restraints/Orders during the pendency of this action, unless terminated, modified, or amended by order of the Court upon motion of either party or upon written agreement between the parties duly executed and acknowledged.

The other significant changes in the form are as follows:

BACKGROUND INFORMATION, was moved to Item A, at the beginning of the form and the information formerly at the beginning of the form was moved into item A.5. That part of Item A which requires the parties to identify and state the nature of any premarital, marital, separation and other agreements was modified to add “and/or Orders which affect the rights of either of the parties in this action.” Like the former preliminary conference statement it also contains a space to include a date for either party to “challenge the agreement”. However, unlike the former form, the new form contains a waiver provision which specifies that if “No challenge is asserted by that date, it is waived unless good cause is shown.”

Subdivision B GROUNDS FOR DIVORCE (1-3) contains spaces for the parties to insert the dates the pleadings were served or will be served. Subdivision B (4) which is where the parties indicate that the issue of grounds “is unresolved” was modified to remove “a jury is

or is not required". In the new form Subdivision B (4) specifies that if "the issue of grounds is resolved, the parties agree that Plaintiff/Defendant will proceed on an uncontested basis to obtain a divorce on the grounds of DRL § 170(7) and the parties waive the right to serve a Notice to Discontinue pursuant to CPLR 3217(a) unless on consent of the parties."

That part of former Subdivision C, which stated that "The issue of custody is resolved __ unresolved__" was removed from the form, and the references to a "parenting plan" in the event custody issues are resolved or unresolved were removed.

The following was added to Subdivision C CUSTODY, as (3):

ATTORNEY FOR CHILD(REN) or GUARDIAN AD LITEM: Subject to judicial approval, the parties request that the Court appoint an Attorney for the parties' minor child(ren) ("AFC"). The cost of the AFC's services shall be paid as follows:

FORENSIC: Subject to judicial approval, the parties request that the Court appoint a neutral forensic expert to conduct a custody/parental access evaluation of the parties and their child(ren). Subject to Judicial approval, the cost of the forensic evaluation shall be paid as follows:_____.

The following was added to Subdivision D FINANCIAL: "(4) Counsel Fees are resolved unresolved."

Subdivision G. (1) titled Preservation of Evidence was modified to add the requirement that a party shall maintain not only all financial records in his or her possession but all financial records "under his or her control" through the date of the entry of a judgment of divorce.

Subdivision G (2) titled Document Production was also modified to remove the 45 day period to exchange records and require the exchange of checking account, brokerage account and savings account records for both "joint and individual accounts."

The following language was removed from Subdivision G: "Any costs associated with the use of the authorization shall be paid by _____ OR reserved for the Court once the amount is determined.

No later than _____, the parties shall notify the Court of all items to be provided above that have not been provided.

Spaces were added to Subdivision G (2) for the parties to list the dates for both parties to respond to notices of discovery and inspection, and interrogatories.

Spaces that were in the former preliminary conference order for the parties to list the dates that party depositions and third party depositions were to be completed have been removed.

"Compliance with discovery demands shall be on a timely basis pursuant to the CPLR" was removed from Subdivision G.

Subdivision H, VALUATION/FINANCIAL was re-written but is substantially the same as in the former form.

The checklist for assets requiring valuation in former Item 1 was removed as well as the sentence :” The date of valuation be _____ for items _____ and shall be the date of commencement of this action for items _____.”

The words “no later than _____” were removed from the following sentence in Item 1: ‘If a party requires fees to retain an expert and the parties cannot agree upon the source of the funds, an application for fees shall be made.’

The time limitations for the exchange of expert reports in Item 2, Experts to be Retained by a Party, where there is no date specified, was modified to extend the time to exchange expert reports: “Absent any date specified, they are to be exchanged 60 days prior to trial or” 30 days after receipt of the report of the neutral expert, whichever is later.”

Subdivision I, ” Confidentiality/Non-Disclosure Agreement “ which appeared in the former form, was removed.

Finally, the following was added to subdivision N: “All discovery as set forth herein above is expected to be completed prior to the compliance conference.”

The Preliminary Conference form can be downloaded in pdf, word and fallible format from <http://www.nycourts.gov/divorce/forms.shtml>

Court of Appeals

Court of Appeals Holds that Mail Service of Order on Party Represented by Counsel is Ineffective for Purposes of Filing Objections to Family Court Support Order

In Matter of Odunbaku v Odunbaku, 2016 NY Slip Op 07705 (2016) the Court of Appeals held that if a party is represented by counsel, the time requirements set out in Family Court Act § 439 (e) for objections to a support magistrate's final order, when the order is served by mail, do not begin to run until the order is mailed to counsel.

The mother retained Staten Island Legal Services to represent her in her efforts to obtain child support from respondent father, with whom she had a son. Through counsel, who represented her throughout the proceedings she obtained a support order. Subsequently a different support magistrate granted the father's petition for downward modification and reduced the father's child support obligation. The order and findings, dated July 24, 2013, was mailed by the Clerk of Family Court directly to the father and to the mother, but not to the father's lawyer or the mother's lawyer. On September 3, 2013, 41 days after the orders were mailed, the mother, through counsel, filed objections. Family Court denied the objections as untimely, relying on Family Court Act § 439 (e), which provides that

"[s]pecific written objections to a final order of a support magistrate may be filed by either party with the court within thirty days after receipt of the order in court or by personal service, or, if the objecting party or parties did not receive the order in court or by personal service, thirty-five days after mailing of the order to such party or parties" (emphasis added). The Court ruled that "the mailing of a copy of the order and findings of fact to a party of the proceedings satisfied the requirements of § 439 (e) and [22 NYCRR] 205.36 (b)" and that "neither the Family Court Act nor [22 NYCRR 205.36 (b)] specifically requires that the Clerk of Court shall mail a copy of the Support Magistrate's order and decision to a party's attorney."

The mother appealed relying on Matter of Bianca v Frank (43 NY2d 168 [1977]). The Appellate Division affirmed relying on 22 NYCRR 205.36 (b) which provides that "[a]t the time of the entry of the order of support, the clerk of [Family Court] shall cause a copy of the findings of fact and order of support to be served either in person or by mail upon the parties to the proceeding or their attorneys."

The Court of Appeals reversed holding that Matter of Bianca v Frank was dispositive. There, it held that once counsel has appeared in a matter a Statute of Limitations or time requirement cannot begin to run unless that counsel is served with the determination or the order or judgment sought to be reviewed". The Bianca Court recognized that this principle would not apply if a legislative enactment specifically excluded the necessity of serving counsel by stating the legislative "intention to depart from the standard practice . . . in unmistakable terms" . The Court noted that the rationale of Bianca is straightforward. "[O]nce a party chooses to be represented by counsel in an action or proceeding, whether administrative or judicial, the attorney is deemed to act as his agent in all respects relevant to the proceeding. Thus any documents, particularly those purporting to have legal effect on the proceeding, should be served on the attorney the party has chosen to handle the matter on his behalf."

The Court held that Bianca governed and the reference to the mailing of the order to a "party or parties" in Family Court Act § 439 (e) must be read to require that the order be mailed to the party's counsel, in order for the statutory time requirement to commence. While section 439 (e) uses the term "party," the statute does not convey in language that could not be mistaken that mailing to a represented party is dispositive for time requirement purposes and mailing to counsel is unnecessary, notwithstanding Bianca.

November 1, 2016

Denial of Visitation Warranted Where Compelling Reasons and Substantial Evidence Show Visitation Would Be Detrimental to the Child.

In Harry S v Olivia S, --- N.Y.S.3d ----, 2016 WL 5935054, 2016 N.Y. Slip Op. 06761 (1st Dept.,2016) the Appellate Division affirmed an order which denied the fathers request for visitation with the children. It held that although denial of visitation is a "drastic remedy," it is warranted where compelling reasons and substantial evidence show that visitation would be

detrimental to the child. The father had a history of violence against the mother and there was an extant order of protection in favor of the mother and both children. The father made no effort to foster and maintain a relationship with the children during the extended period of time (6 years for the younger child, 5 years for the older) the children lived with relatives abroad, an arrangement that the father himself proposed. Despite Family Court's determination that physical, in person visitation with their father would have a negative impact on the children's well being, evident in the emotional distress they were exhibiting, the court nonetheless encouraged the father to repair his relationship with the children by, among other things communicating with them by electronic or telephonic means, and sending them gifts. The court specifically ordered the mother to encourage, not discourage, such contact and it also ordered the mother to enroll the children in individual therapy for the purpose of attempting to foster a relationship between them and their father. The court also recommended that the father participate in therapy to address his anger issues and learn how to engage with the children in a positive manner. Though the father's contact was limited at the present time, it was in line with the children's wishes and very strong preferences.

Appellate Division, Second Department

Appellate Division Holds The Agreement Provision Granting Childs Therapist the Right to Determine Visitation is Void

In *Matter of Rogan v Guida*, --- N.Y.S.3d ----, 2016 WL 5928789, 2016 N.Y. Slip Op. 06716 (2d Dept.,2016) in March 2012, the father filed a petition for visitation with the parties' child, who was living with the mother. On March 29, 2013, the parties consented to the entry of an order directing, in relevant part, "that there shall be no contact between the father and the child except as recommended by the child's therapist." In August 2014, the father petitioned the Family Court to vacate or modify the order, alleging that it was unenforceable as drafted, and sought a modification on the ground that a change in circumstances had occurred. Family dismissed the father's petition, and denied the father's application. The Appellate Division found that the father's factual assertions in support of an alleged change in circumstances were unsubstantiated and conclusory, and that he failed to make the requisite showing for modification. However, there was merit to his argument that the order dated March 29, 2013, as drafted, improperly delegated to the child's therapist sole authority to determine whether the father would be permitted to have any future contact with the child. Therefore, it held that the Family Court should have denied the mother's motion to dismiss the father's petition as sought to vacate the paragraph of the order which directed "that there shall be no contact between the father and the child except as recommended by the child's therapist," and granted that branch of the father's petition. The Appellate Division observed that since the entry of the order dated March 29, 2013, the father had no visitation with the subject child, and that this situation could not be allowed to continue indefinitely. It observed that it was for the Family Court—not the child's therapist—to exercise its own discretion to determine how, when, and under what terms and conditions the father's visitation with the child, pursuant to the order dated March 29, 2013, was to resume. It

directed the Family Court to determine the circumstances under which visitation was to resume if the parties could not agree on such a plan.

Counsel Fees Denied Wife Without Prejudice Where Submissions Did Not Contain Statements Demonstrating Compliance with 60 Day Rule in 22 NYCRR 1400.2

In *Montoya v Montoya*, --- N.Y.S.3d ----, 2016 WL 6089190, 2016 N.Y. Slip Op. 06807 (2d Dept., 2016) the Appellate Division affirmed an order of the Supreme Court which denied the plaintiff's application for counsel fees without prejudice because the plaintiff's submissions did not contain proper itemized billing statements from her attorney demonstrating that she was billed at least every 60 days, as required by 22 NYCRR 1400.2. It observed that court rules impose certain requirements upon attorneys who represent clients in domestic relations matters (see 22 NYCRR part 1400). These rules were designed to address abuses in the practice of matrimonial law and to protect the public, and the failure to substantially comply with them will preclude an attorney's recovery of a legal fee from his or her client or from the adversary spouse (see *Rosado v. Rosado*, 100 AD3d 856; *Wagman v. Wagman*, 8 AD3d 263). A showing of substantial compliance must be made on a prima facie basis as part of the moving party's papers. The evidence proffered by the plaintiff in support of her application demonstrated that her attorney failed to substantially comply with the rules requiring periodic billing statements at least every 60 days. Accordingly, the Supreme Court providently exercised its discretion in denying, without prejudice, her application for an award of counsel fees.

Authors Note:

Compare with *Vitale v. Vitale*, 112 A.D.3d 614, 615, 977 N.Y.S.2d 258, 260 (2d Dept., 2013) where the motion by the plaintiff's first attorney was denied because there was no significant disparity in the parties' financial circumstances. There the Court did not state it was "without prejudice" as in *Montoya*. The Court added: "In addition, the failure of the plaintiff's former attorney to substantially comply with 22 NYCRR 1400.2 and 1400.3 precluded him from seeking unpaid fees from the plaintiff and, therefore, the defendant may not be compelled to pay such fees (see *Rosado v Rosado*, 100 AD3d 856 [2012])."

We note that the *Montoya* Court's initial reliance on *Wagman* to preclude an attorney's recovery of a legal fee from the adversary spouse appears to be misplaced. *Wagman* dealt solely with the recovery of legal fees from a client, not from an adversary spouse. *Rosado* relied on *Wagman* and appears to have extended the rule to applications for counsel fees from the adversary spouse. See *Verkowitz v. Torres*, 2009 N.Y. Slip Op. 31124(U), 2009 WL 1455303.

Appellate Division, Third Department

Third Department Underscores Child's Right to Confidentiality.

In *Matter of John V v Sarah W*, --- N.Y.S.3d ----, 2016 WL 6106560, 2016 N.Y. Slip Op.

06911 (3d Dept., 2016) a custody modification proceeding, the Appellate Division, mother argued that Family Court committed reversible error by allowing the child to testify as a fact witness in the presence of counsel but not the parties, and by not sealing the child's testimony. Although this argument was not preserved for review, the Court took the opportunity to underscore the importance of protecting a child's right to confidentiality, which is paramount and superior to the rights of the parties. Even if, as occurred here, a child assents to his or her testimony being shared with his or her parents, Family Court must not put a child in the position of having his or her relationship with either parent further jeopardized by having to publicly relate his or her difficulties with them or be required to openly choose between them. Moreover, because the mother corroborated the father's hearsay account of the incident that occurred between the child and her fiancé, it perceived no reason for the child to have testified as a fact witness and reiterated that such a practice should be used sparingly and only when absolutely necessary.

Appellate Division Emphasizes That Calling a Child to Testify in Custody Proceeding Is Generally Neither Necessary Nor Appropriate

In *Matter of Rutland v O'Brien*, --- N.Y.S.3d ----, 2016 WL 6106584, 2016 N.Y. Slip Op. 06908 (3d Dept.,2016) the Appellate Division, inter alia, rejected the mother's contention that Family Court erred in admitting text messages, obtained by him from the mother's Facebook account, since the account was available on the son's iPod without password protection (see generally CPLR 4506). It agreed with the mother's assertion that Family Court erred in permitting the father to call the daughter's counselor, a licensed clinical social worker, to testify about confidential, privileged matters in the absence of a knowing waiver from the daughter (see CPLR 4508[a][1]), notwithstanding the absence of any objection by the attorney for the children. However, given the abundant evidence of conflict between the parties, it found the error was harmless.

In a footnote the Appellate Division observed that during the trial testimony of the children, who were called as witnesses by the father, the parents remained outside the courtroom, but the record was not sealed. The children were required to testify at length, subject to extensive cross-examination by counsel, as well as extensive questioning by Family Court. It emphatically reemphasize[d] that calling a child to testify in a Family Ct Act article 6 proceeding is generally neither necessary nor appropriate. It noted that to the extent that the children were questioned as to their preferences, by all counsel and the court, such questioning should have been confined to the Lincoln hearing.

Third Department Holds Strict Adherence to Family Court Act § 439[e] Deadline for Objections Not Required.

In *Matter of Hobbs v Wansley*, --- N.Y.S.3d ----, 2016 WL 6106371, 2016 N.Y. Slip Op. 06933 (3d Dept., 2016) the Appellate Division reversed an order of the Family Court which dismissed the mother's objections to its support order without consideration of the merits based on her untimely filing. It held that Family Court ought to have considered the merits of her objections despite the fact that they were untimely filed on the first morning that the

courthouse was open after the objections had been due. It found that the circumstances that caused the untimely filing were “extraordinary” for the purposes of excusing the untimeliness. It held that strict adherence to the deadline in Family Court Act § 439[e] is not required. Family Court has discretion to overlook a minor failure to comply with the statutory requirements regarding filing objections and address the merits. (Citing *Matter of Ryan v. Ryan*, 110 AD3d 1176, 1178 [2013]; see *Matter of Riley v. Riley*, 84 AD3d 1473, 1474 [2011]). The uncontested evidence established that the mother attempted to file her objections on the afternoon of the final day upon which the objections would be timely. She averred that she arrived at the courthouse at 4:45 p.m. to file the objections, having relied on the hours of operation for that courthouse as listed on the New York State Unified Court System (NYSUCS) website. NYSUCS advertised the hours of operation of the courthouse as being from “9:00 a.m. to 5:00 p.m.” Despite these advertised hours, the courthouse was closed when the mother arrived. The parties agreed that the actual regular hours of operation of the courthouse included the courthouse closing at 4:30 p.m., which explained its closure when the mother arrived. Considering the proof establishing that the mother would have timely submitted her objections but for the inaccurate information provided by the NYSUCS website, Family Court ought to have excused her untimely filing. It remitted for Family Court to consider the mother’s objections on the merits.

Authors note: To the same effect see *Worner v. Gavin*, 112 A.D.3d 956, 957, 978 N.Y.S.2d 88, 89 (2d Dept., 2013); *Corcoran v. Stuart*, 215 A.D.2d 340, 341, 627 N.Y.S.2d 356, 356 (3d Dept., 1995).

October 16, 2016

Appellate Division, First Department

Fathers Right to Visitation Denied Where Compelling Reasons and Substantial Evidence Show That Visitation Would Be Detrimental to the Child

In *Harry S v Olivia S*, --- N.Y.S.3d ----, 2016 WL 5935054, 2016 N.Y. Slip Op. 06761 (1st Dept., 2016) the Appellate Division affirmed an order which denied the fathers request for visitation with the children. It held that although denial of visitation is a “drastic remedy,” it is warranted where compelling reasons and substantial evidence show that visitation would be detrimental to the child. The father had a history of violence against the mother and there was an extant order of protection in favor of the mother and both children. The father made no effort to foster and maintain a relationship with the children during the extended period of time (6 years for the younger child, 5 years for the older) the children lived with relatives abroad, an arrangement that the father himself proposed. Despite Family Court’s determination that physical, in person visitation with their father would have a negative impact on the children’s well being, evident in the emotional distress they were exhibiting,

the court nonetheless encouraged the father to repair his relationship with the children by, among other things communicating with them by electronic or telephonic means, and sending them gifts. The court specifically ordered the mother to encourage, not discourage, such contact and it also ordered the mother to enroll the children in individual therapy for the purpose of attempting to foster a relationship between them and their father. The court also recommended that the father participate in therapy to address his anger issues and learn how to engage with the children in a positive manner. Though the father's contact was limited at the present time, it was in line with the children's wishes and very strong preferences.

Appellate Division, Second Department

Order Issued on Fathers Consent That "There Shall Be No Contact Between the Father and the Child Except as Recommended by the Child's Therapist" Held Improper

In *Matter of Rogan v Guida*, --- N.Y.S.3d ----, 2016 WL 5928789, 2016 N.Y. Slip Op. 06716 (2d Dept.,2016) in March 2012, the father filed a petition for visitation with the parties' child, who was living with the mother. On March 29, 2013, the parties consented to the entry of an order directing, in relevant part, "that there shall be no contact between the father and the child except as recommended by the child's therapist." In August 2014, the father petitioned the Family Court to vacate or modify the order, alleging that it was unenforceable as drafted, and sought a modification on the ground that a change in circumstances had occurred. Family dismissed the father's petition, and denied the father's application. The Appellate Division found that the father's factual assertions in support of an alleged change in circumstances were unsubstantiated and conclusory, and that he failed to make the requisite showing for modification. However, there was merit to his argument that the order dated March 29, 2013, as drafted, improperly delegated to the child's therapist sole authority to determine whether the father would be permitted to have any future contact with the child. Therefore, it held that the Family Court should have denied the mother's motion to dismiss the father's petition as sought to vacate the paragraph of the order which directed "that there shall be no contact between the father and the child except as recommended by the child's therapist," and granted that branch of the father's petition. The Appellate Division observed that since the entry of the order dated March 29, 2013, the father has had no visitation with the subject child, and that this situation could not be allowed to continue indefinitely. It observed that it was for the Family Court—not the child's therapist—to exercise its own discretion to determine how, when, and under what terms and conditions the father's visitation with the child, pursuant to the order dated March 29, 2013, was to resume. It directed the Family Court to determine the circumstances under which visitation was to resume if the parties could not agree on such a plan.

October 1, 2016

Recent Legislation

Domestic Relations Law § 245 amended effective September 29, 2016

Domestic Relations Law § 245, which authorizes the remedy of contempt, pursuant to Judiciary Law §756 et. seq., to enforce a judgment or order for the payment of a sum of money awarded in a matrimonial action, was amended to allow an application for contempt to be made without any prior application for enforcement by any other means. The amendment eliminates the requirement of demonstrating presumptively, to the satisfaction of the court, in the order to show cause bringing on the application, that payment cannot be enforced pursuant to DRL§ 243, DRL§ 244, CPLR 5241 or CPLR 5242.

Domestic Relations Law § 245, as amended provides:

§ 245. Enforcement by contempt proceedings of judgment or order in action for divorce, separation or annulment. Where a spouse, in an action for divorce, separation, annulment or declaration of nullity of a void marriage, or for the enforcement in this state of a judgment for divorce, separation, annulment or declaration of nullity of a void marriage rendered in another state, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the aggrieved spouse may make application pursuant to the provisions of section seven hundred fifty-six of the judiciary law to punish the defaulting spouse for contempt, and where the judgment or order directs the payment to be made in installments, or at stated intervals, failure to make such single payment or installment may be punished as therein provided, and such punishment, either by fine or commitment, shall not be a bar to a subsequent proceeding to punish the defaulting spouse as for a contempt for failure to pay subsequent installments, but for such purpose such spouse may be proceeded against under the said order in the same manner and with the same effect as though such installment payment was directed to be paid by a separate and distinct order, and the provisions of the civil rights law are hereby superseded so far as they are in conflict therewith. Such application may also be made without any previous sequestration or direction to give security or any application for enforcement by any other means. No demand of any kind upon the defaulting spouse shall be necessary in order that he or she be proceeded against and punished for failure to make any such payment or to pay any such installment; personal service upon the defaulting spouse of an uncertified copy of the judgment or order under which the default has occurred shall be sufficient. (Laws of 2016, Ch 345, § 1, enacted September 29, 2016, and effective immediately as provided in §2.)

Appellate Division, Second Department

Doctrine of Inconsistent Positions Does Not Estop Wife from Maintenance Where She Filed Two Separate Bankruptcy Petitions, Which Alleged, in Part, That She Was Not Entitled to Any Alimony, Maintenance, or Support Payments.

In Canzona v Canzona, --- N.Y.S.3d ----, 2016 WL 5107999, 2016 N.Y. Slip Op. 06055 (2d Dept.,2016), the Appellate Division observed that “Judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal

proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed". "The doctrine is invoked to estop parties from adopting such contrary positions because the judicial system cannot tolerate this playing fast and loose with the courts". It held that the Supreme Court properly determined that the defendant was not judicially estopped from seeking an award of maintenance because she previously filed two separate bankruptcy petitions, which alleged, in part, that she was not entitled to any alimony, maintenance, or support payments. The parties were still married at the time the bankruptcy petitions were filed, and the defendant was not required to list any possible future rights to maintenance payments in the bankruptcy petitions, which were filed years before the judgment of divorce was issued. Moreover, while the doctrine of judicial estoppel has been applied in matrimonial actions, its application in this case to prevent the defendant from presenting evidence regarding her needs would not have been appropriate.

Family Court

Service by email pursuant to CPLR § 308(5) authorized in Termination of Parental Rights Case

In *Matter of JT*, --- N.Y.S.3d ----, 2016 WL 4766643, 2016 N.Y. Slip Op. 26286 (Fam. Ct., 2016) the County DCFS filed a petition seeking to terminate the parental rights of the respondent to the child, J. T., alleging that he had abandoned the child. The County moved for an order granting substituted service of the summons and petition by electronic means pursuant to CPLR § 308(5). Family Court granted the motion. It observed that Family Court Act § 617 governs the service requirements for proceedings brought to terminate parental rights and sets forth that a summons and petition shall be delivered to the person summoned at least twenty days before the time designated for an appearance before the Court. FCA § 617 permits alternative means of service after reasonable efforts have been undertaken for personal service. Family Court Act § 617(c) states that personal service on an individual in a foreign country shall be made in accordance with the provisions of Surrogate's Court Procedure Act § 307. It is only after a finding that personal service would be impracticable under SCPA § 307(3)(c) that the Court may then order substituted service in such manner as the Court directs pursuant to CPLR § 308(5). Upon such a finding CPLR § 308(5) vests a court with the discretion to direct an alternative method for service of process. Upon the initial finding that personal service is impractical the Court has broad discretion in determining an alternative means of service. It noted that New York Courts have granted e-mail service of process as an appropriate method when statutory methods have proven to be ineffective or impossible. (See *Safadjou v. Mohammadi*, 105 AD3d 1423; *Alfred E. Mann Living Trust v. ETRIC Aviation S.A.R.L.*, 78 A.D.3d 137, 910 N.Y.S.2d 418; *Baidoo v. Blood-Dzraku*, 48 Misc.3d 309, 5 N.Y.S.3d 709; *Alfred E. Mann Living Trust v. ETRIC Aviation S.A.R.L.*, 78 A.D.3d 137, 910 N.Y.S.2d 418; *Matter of Keith X.*, 124 A.D.3d 1056, 2 N.Y.S.3d 268) Due process requires that the method of service granted must be reasonably calculated under all of the circumstances. In granting the motion, the Family Court found that the father was deported from the United States to Jordan prior to the child being

removed from the mother's care and his exact whereabouts were unknown. Upon the child being removed from the mother's care the caseworker maintained communication with the father through electronic mail and the father requested additional information pertaining to the Court proceedings in e-mail transmissions. At no time did the father provide any further information as to his physical address to the caseworker. Based upon these findings the County had sufficiently demonstrated that it was impractical for personal service of process to be effectuated. The Court found that upon the commencement of the underlying neglect petition the caseworker had multiple communications with the father through electronic means and none of the transmissions were returned as undeliverable'. The father acknowledged receipt of information via e-mail during the pendency of the neglect proceeding and made requests for additional documentation from the caseworker. The father did not provide the caseworker with a physical address nor any other reasonable means of communication besides the e-mail address which was utilized to facilitate communication between them.

September 16, 2016

Appellate Division, Second Department

Appellate Division Holds Supreme Court Properly Rejected Contention Constructive Trust Should Be in Amount of \$1,000,000, the Amount of Life Insurance Policy Required under Divorce Judgment. Purpose of DRL § 236[B][8][a] Is to Ensure That the Spouse or Children Receive the Economic Support for Payments That Would Have Been Due Had the Payor Spouse Survived.

In *Mayer v Mayer*, --- N.Y.S.3d ----, 2016 WL 4533573, 2016 N.Y. Slip Op. 05911 (2d Dept., 2016) the plaintiff was the second wife of Paul S. Mayer (the father). Their judgment of divorce dated October 23, 2000 obligated him to pay child support and educational expenses for the children of that marriage, Alanna and Matthew, and maintain a term life insurance policy in the face amount of \$1,000,000 for the benefit of Alanna and Matthew, with the plaintiff being named as trustee on their behalf, "until such time as his support obligation is fully satisfied." In 2001, the father married the defendant Kristen M. Mayer (Kristen). The father and Kristen had two children, Jonah and Ryan. In 2005, due to the father's claimed inability to pay the premiums on the \$1,000,000 policy required under the judgment of divorce, the policy was converted into two policies insuring his life, both of which were issued by the defendant New York Life Insurance and Annuity Corporation (NYLIAC). One policy, with a face amount of \$200,000, listed the father as the owner and the plaintiff as the beneficiary. The other policy, with a face amount of \$100,000, listed the plaintiff as both the owner and the beneficiary. The plaintiff paid the premiums on the \$100,000 NYLIAC policy. In 2006, Family Court held the father in contempt for, failing to maintain the \$1,000,000 policy required by the judgment of divorce and directed him to comply with the life insurance provision of the judgment of divorce. There was evidence that the father could not obtain a

new policy in the amount of \$1,000,000 because of ill health. There also was evidence, that in addition to the \$100,000 and \$200,000 NYLIAC policies, the father maintained other life insurance policies totaling \$750,000, which listed various beneficiaries: Kristen, Jonah, and Ryan; Alanna and Matthew; and the two children of the father's first marriage, Scott and Jonathan. The Family Court's order provided that if the father could not obtain a \$1,000,000 policy, he would be required to change the beneficiaries on those other policies to name Alanna and Matthew as the sole beneficiaries.

When the father died in 2011 he was significantly in arrears in the support he was obligated to pay with respect to Alanna and Matthew, and the plaintiff discovered that he had failed to comply with the directive in the Family Court's May 2006 order that he either maintain a \$1,000,000 policy for the benefit of Alanna and Matthew or that he change the beneficiaries of his existing policies (other than the two NYLIAC policies) to Alanna and Matthew as sole beneficiaries. The plaintiff also discovered that in 2010 the father changed the beneficiary on the \$200,000 NYLIAC policy and removed the plaintiff as beneficiary and named as beneficiaries Kristen (60%), Jonah (5%), and Ryan (5%); Alanna (5%) and Matthew (5%); and Scott (10%) and Jonathan (10%).

In this action to impose a constructive trust upon the proceeds of the life insurance policies that insured the life of the father the Supreme Court granted plaintiff's motion for summary judgment to the extent of imposing a trust upon some of the proceeds of the life insurance policies on the father's life. The Court determined that the proper amount of the proceeds subject to the trust should be equal to the father's child support and educational expense obligations under the judgment of divorce and what he would have been required to pay had he lived. The court also determined that the trust amount would not be reduced by the proceeds the plaintiff had received under the \$100,000 NYLIAC policy. Further, the court concluded that issues of fact remained as to the actual amount of the father's support obligations under the judgment of divorce. The court denied all other requests for relief. Upon reargument it adhered to so much of its prior determination as imposed a constructive trust upon the proceeds of certain life insurance policies insuring the father's life in an amount equal to the father's child support and educational expense obligations under the judgment of divorce, including the amounts for which he would have been responsible had he lived. The court concluded that the life insurance provision was not intended as a stand-alone entitlement. Next, the court agreed with Kristen that the proceeds the plaintiff received from the \$100,000 NYLIAC policy should be taken into account in determining the amount of insurance proceeds subject to the constructive trust, to the extent that the proceeds from the \$100,000 NYLIAC policy would be applied ratably with the proceeds of the father's other policies to satisfy his child support and educational expense obligations. The court determined, however, that the plaintiff was entitled to a credit for the premiums she had paid to implement and maintain the \$100,000 NYLIAC policy. Finally, the court vacated its prior determination denying the New York Life defendants' motion for summary judgment dismissing the amended complaint insofar as asserted against them and granted that motion.

The Appellate Division observed that a party's obligation to pay maintenance and child support terminates upon that party's death (see Domestic Relations Law § 236[B][1] [a]; [5-a][g]; [6][f][3]). The purpose of Domestic Relations Law § 236[B][8][a] is not to provide an

alternative award of maintenance or child support, but solely to ensure that the spouse or children will receive the economic support for payments that would have been due had the payor spouse survived. Accordingly, where life insurance is appropriate, it should be set in an amount sufficient to achieve that purpose. It should not be in an amount that would provide a windfall. It held that Supreme Court correctly interpreted Domestic Relations Law § 236(B)(8)(a) in determining that the amount of the insurance proceeds subject to the constructive trust should be the amount of the father's child support and educational expense obligations had he lived. The court properly rejected the plaintiff's contention that the proceeds subject to the trust should equal the face amount of the life insurance policy required under the judgment of divorce, \$1,000,000, minus the life insurance proceeds Alanna and Matthew had received. Additionally, the court did not err in determining that the proceeds of the \$100,000 NYLIAC policy, reduced by the premiums the plaintiff paid on that policy, should be taken into account ratably in determining the amount of the constructive trust. The purpose of the \$100,000 NYLIAC policy was to ensure that the father's death would not cause economic injury to Alanna and Matthew in the form of the loss of their support and payment of their educational expenses.

Second Department Holds that Contributing Spouse Must Trace Source of Contribution to get Separate Property Credit. (Corrected)

In *Shkreli v Shkreli*, --- N.Y.S.3d ----, 2016 WL 4198586, 2016 N.Y. Slip Op. 05752 2016 WL 4198586 (2d Dept., 2016) the parties were married on June 30, 1984. In May 2012, the plaintiff commenced the action for a divorce. In early 2012, prior to the commencement of this action, the plaintiff liquidated a retirement account and obtained a \$250,000 mortgage on the marital residence. He used \$100,000 of the mortgage proceeds to repay his sister-in-law, who had lent him that amount of money to pay off the previous mortgage on the marital residence.

The Appellate Division held that Supreme Court also properly determined that the marital residence, which was purchased during the marriage, was marital property. Where one spouse contributed monies derived from separate property toward the acquisition of the marital residence," he or she generally will receive "a credit for that contribution" (*Fields v. Fields*, 15 N.Y.3d 158, 166, 905 N.Y.S.2d 783, 931 N.E.2d 1039). Here, the plaintiff failed to establish the value of his separate property contribution to the purchase of the marital residence. He presented no evidence as to how much money he contributed to the purchase of the house he co-owned with his brother prior to the marriage or the value of his interest in the house when he acquired it. With respect to the sum of money that was used to purchase the property on which the marital residence was built, the plaintiff presented no evidence as to whether the money was separate or marital property. Under the circumstances, the court properly determined that the marital residence was marital property.

The Appellate Division also held that Supreme Court properly found that the plaintiff wastefully dissipated certain marital assets and awarded the defendant a credit for the wasteful dissipation of such assets. Other than the \$100,000 payment to his sister-in-law and the payment of certain dental expenses for himself and the parties' daughter, the plaintiff presented no evidence as to what he did with the remaining proceeds from the \$250,000

mortgage he obtained just prior to the commencement of the action and the money from the liquidated retirement account. Further, he failed to provide any credible explanation for the source of funds, in excess of \$125,000, that he deposited in a separate bank account in his name in February 2012, with subsequent unexplained cash withdrawals.

Second Department Holds Non-biological, Non-adoptive Partner Has Standing to Seek Visitation and Custody under Drl § 70(a) Where He Demonstrated That He and Partner Entered into Pre-conception Agreement to Conceive Children and to Raise Them Together as Their Parents

In *Matter of Frank G v Renee P.-F.*, --- N.Y.S.3d ----, 2016 WL 4646017, 2016 N.Y. Slip Op. 05946 (2d Dept.,2016) Joseph P. and Frank G. were domestic partners who asked Joseph's sister, Renee P.-F. to act as a surrogate. Renee executed a surrogacy contract in which she agreed to be impregnated with Frank's sperm and to surrender her parental rights in order for Joseph to adopt the child or children. The understanding between herself, Joseph, and Frank was that Joseph and Frank would be the parents of the children, and that she would remain a part of the children's lives. After undergoing in vitro fertilization, Renee gave birth to fraternal twins in February 2010. During the first four years of the children's lives, Joseph and Frank equally shared the rights and responsibilities of parenthood, although Joseph did not legally adopt the children. The children regarded both of them as their parents. In early 2014, Joseph and Frank separated, and the children continued to reside with Frank. Joseph, acting in a parental role, visited and cared for the children on a daily basis. In May 2014, Frank suddenly refused to allow Joseph or Renee to have any access to the children, and in December 2014, Frank moved to Florida with the children. Renee filed for custody, and Joseph subsequently sought custody of the children. Family Court denied Frank's motion, in effect, to dismiss Joseph's custody petition on the ground, inter alia, that Joseph lacked standing under Domestic Relations Law § 70.

The Appellate Division affirmed. It observed that Domestic Relations Law § 70 does not define "parent." In *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, the Court of Appeals supplied a definition of "parent" to mean solely the biological mother or biological father, or a legal parent by virtue of an adoption but during the pendency of this appeal, the Court of Appeals, in *Matter of Brooke S.B. v. Elizabeth A. C.C.*, --- N.Y.3d ----, --- N.Y.S.3d ----, ---N.E.3d ----, 2016 N.Y. Slip Op. 05903 (2016), overruled *Alison D.* because, inter alia, its definition of "parent" had "become unworkable when applied to increasingly varied familial relationships". In *Brooke S.B.*, the Court held that, where a partner to a biological parent "shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70(a)" It found that Joseph sufficiently demonstrated by clear and convincing evidence that he and Frank entered into a pre-conception agreement to conceive the children and to raise them together as their parents. Although the surrogacy contract is not enforceable as against Renee to deprive her of standing under Domestic Relations Law § 70 (see Domestic Relations Law § 124[1]), it was evidence of the parties' unequivocal intention that Frank and Joseph become the

parents of the children. Moreover, Frank and Joseph equally shared the rights and responsibilities of parenthood, and were equally regarded by the children as their parents. Therefore, Joseph established standing to seek custody or visitation under Domestic Relations Law § 70

In a related case, *Matter of Giavonna F. G.-G.*, --- N.Y.S.3d ----, 2016 WL 4645460, 2016 N.Y. Slip Op. 05948 (2d Dept.,2016) the Appellate Division held that for the reasons stated in its decision and order on a related appeal from an order dated August 21, 2015 (see *Matter of G. v. P.-F.*, ---AD3d ----, --- N.Y.S.3d ----, 2016 WL 4646017) Family Court properly, in effect, denied Frank G.'s motion to vacate the award of temporary visitation to Joseph P. made on March 16, 2015. It held that contrary to Frank G.'s contentions, Renee P.-F.'s parental rights were not terminated by virtue of her entering into a surrogacy contract. Surrogate parenting contracts have been declared contrary to the public policy, and are void and unenforceable (see Domestic Relations Law § 122). Moreover, Domestic Relations Law § 124(1) expressly states that "the court shall not consider the birth mother's participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations."

The Appellate Division also held that Frank G.'s motion for permission to relocate with the children to Florida could not be granted without an evidentiary hearing to determine whether the relocation is in the children's best interests. In this regard, Frank G., the parent seeking to relocate with the children, had the burden of establishing by a preponderance of the evidence that the proposed move would be in the children's best interests.

Citation Update

The following is the citation for *Matter of Brooke, S. B.* which appeared in the September 1, 2016 issue: *Matter of Brooke S.B., v Elizabeth A. C.C.*,--- N.E.3d ----2016 WL 4507780, 2016 N.Y. Slip Op. 05903.

September 1, 2016

Court of Appeals

Court of Appeals Overrules *Alison D.* and Re-defines "Parent" for Custody and Visitation Purposes

In *Matter of Brooke S.B., v Elizabeth A. C.C.*, two related cases, the Court of Appeals revisited *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]) which held that in an unmarried couple, a partner without a biological or adoptive relation to a child is not that child's "parent" for purposes of standing to seek custody or visitation under Domestic Relations Law § 70 (a), notwithstanding their "established relationship with the child". The Court of Appeals agreed that the Petitioners in these cases, who similarly lacked any biological or adoptive connection to the children, should have standing to seek custody and

visitation pursuant to Domestic Relations Law § 70 (a) in light of more recently delineated legal principles, which required it to conclude that that definition of "parent" established by it in *Alison D.* has become unworkable when applied to increasingly varied familial relationships. The Court, in an opinion by Judge Abdus-Salaam overruled *Alison D.* and held that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70.

The Court of Appeals pointed out that the petitioners had argued that its holding that Domestic Relations Law § 70 permits a non-biological, non-adoptive parent to achieve standing to petition for custody and visitation requires it to specify the limited circumstances in which such a person has standing as a "parent" under Domestic Relations Law § 70. It observed that because of the fundamental rights to which biological and adoptive parents are entitled, any encroachment on the rights of such parents and, especially, any test to expand who is a parent, must be appropriately narrow. It rejected the premise that it must now declare that one test would be appropriate for all situations, or that the competing tests proffered by Petitioners and amici were the only options that should be considered. It noted that the Petitioners had alleged in both cases before it that the parties entered into a pre-conception agreement to conceive and raise a child as co-parents. It held that these allegations, if proven by clear and convincing evidence, were sufficient to establish standing. Because it decided these cases based on the facts presented to it, it was premature for the Court to consider adopting a test for situations in which a couple did not enter into a pre-conception agreement. The Court specified that it did not decide whether, in a case where a biological or adoptive parent consented to the creation of a parent-like relationship between his or her partner and child after conception, the partner can establish standing to seek visitation and custody. Inasmuch as the conception test applied here, it did not opine on the proper test, if any, to be applied in situations in which a couple has not entered into a pre-conception agreement. It merely concluded that, where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child. Whether a partner without such an agreement can establish standing and if so, what factors a petitioner must establish to achieve standing based on equitable estoppel was a matter left for another day, upon a different record. The Court stressed that its decision addressed only the ability of a person to establish standing as a parent to petition for custody or visitation; the ultimate determination of whether those rights shall be granted rests in the sound discretion of the court, which will determine the best interests of the child.

Appellate Division, Second Department

Second Department Holds that Contributing Spouse Must Trace Source of Contribution to get Separate Property Credit.

In *Shkreli v Shkreli*, --- N.Y.S.3d ----, 2016 WL 4198586, 2016 N.Y. Slip Op. 05752 2016 WL 4198586 (2d Dept., 2016) the parties were married on June 30, 1984. In May 2012, the plaintiff commenced the action for a divorce. In early 2012, prior to the commencement of this action, the plaintiff liquidated a retirement account and obtained a \$250,000 mortgage on the marital residence. He used \$100,000 of the mortgage proceeds to repay his sister-in-law, who had lent him that amount of money to pay off the previous mortgage on the marital

residence.

The Appellate Division held that Supreme Court also properly determined that the marital residence, which was purchased during the marriage, was marital property. Where one spouse contributed monies derived from separate property toward the acquisition of the marital residence," he or she generally will receive "a credit for that contribution" (Fields v. Fields, 15 N.Y.3d 158, 166, 905 N.Y.S.2d 783, 931 N.E.2d 1039). The definition of "parent" established by it in Alison D. has become unworkable . Here, the plaintiff failed to establish the value of his separate property contribution to the purchase of the marital residence. He presented no evidence as to how much money he contributed to the purchase of the house he co-owned with his brother prior to the marriage or the value of his interest in the house when he acquired it. With respect to the sum of money that was used to purchase the property on which the marital residence was built, the plaintiff presented no evidence as to whether the money was separate or marital property. Under the circumstances, the court properly determined that the marital residence was marital property.

The Appellate Division also held that Supreme Court properly found that the plaintiff wastefully dissipated certain marital assets and awarded the defendant a credit for the wasteful dissipation of such assets. Other than the \$100,000 payment to his sister-in-law and the payment of certain dental expenses for himself and the parties' daughter, the plaintiff presented no evidence as to what he did with the remaining proceeds from the \$250,000 mortgage he obtained just prior to the commencement of the action and the money from the liquidated retirement account. Further, he failed to provide any credible explanation for the source of funds, in excess of \$125,000, that he deposited in a separate bank account in his name in February 2012, with subsequent unexplained cash withdrawals.

August 16, 2016

Appellate Division, First Department

Preliminary Conference Stipulation Which Is "So Ordered" Is Void Where it Does Not Comply with Domestic Relations Law former § 236(B)(5-a)

In *Anonymous v Anonymous*, 2016 WL 4131751 (1st Dept.,2016) Plaintiff commenced the action for divorce in June 2011. On October 5, 2011, the parties signed a preliminary conference stipulation, which was so-ordered by the court, which directed defendant to pay temporary maintenance of \$250 per week, plaintiff's cell phone expenses up to 1,000 minutes, all fixed and other household expenses, and all costs of the child, including but not limited to private nursery school tuition and health costs.

The wife moved for an upward modification of maintenance based upon documentation she had subpoenaed showing that the husbands income was greater than he had indicated. The motion court concluded that the PC order was unenforceable, because it did not state that the parties were advised of the temporary maintenance calculations under Domestic Relations Law former § 236(B)(5-a), did not state the presumptive amount

pursuant to that calculation, and did not state the reason for deviating from that amount. It determined that the entire stipulation was invalid, because its remaining financial terms were intertwined with the temporary maintenance terms. The court next calculated the appropriate temporary maintenance, applying the formula set forth in the DRL, which is based on the parties' gross income. Defendant had also submitted a letter from his accountant estimating his 2014 income at \$300,000 and the court deemed defendant's income to be \$300,000 for the purposes of calculating temporary maintenance. The court concluded that defendant should pay plaintiff temporary maintenance in the sum of \$7,500 per month, retroactive to the date of plaintiff's motion. The court clarified that that sum was intended to cover all of plaintiff's reasonable expenses, including housing; thus, the court did not order defendant to pay any expenses to third parties on plaintiff's behalf, such as the maintenance fees on the marital apartment, which he had been paying. The Appellate Division affirmed. It held that the preliminary conference stipulation was invalid as a matter of law, because it failed to comply with the requirements of Domestic Relations Law former § 236(B)(5-a)(f). That statute required that, where, as here, a "validly executed agreement or stipulation voluntarily entered into between the parties in an action commenced [on or after October 13, 2010] ... deviates from the presumptive award of temporary maintenance, the agreement or stipulation must specify the amount that such presumptive award of temporary maintenance would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount" (former Domestic Relations Law § 236[B][5-a][f]). This provision of the statute "may not be waived by either party or counsel" and because the remaining terms of the PC order were intertwined with the temporary maintenance terms, the entire order was invalid.

Appellate Division, Second Department

Proper to Impute Income Where Paid Expenses Exceed Income Substantially and No Explanation for the Difference

In *Fench v Fench*, --- N.Y.S.3d ---, 2016 WL 4007328, 2016 N.Y. Slip Op. 05624 (2d Dept., 2016) the parties were married in 2000 and they had one child together. In 2011, the plaintiff commenced the action for a divorce. Supreme Court, inter alia, determined that the defendant should be awarded sole custody of the child, that the plaintiff was entitled to maintenance of \$500 per month for 42 months, and that the defendant "is responsible to prepare and pay for" a Qualified Domestic Relations Order (QDRO) for the equitable distribution of gains and losses on his pension. Thereafter, the court entered a judgment of divorce, which directed the plaintiff to file the QDRO at her sole cost and expense.

The Appellate Division held, inter alia, that the court erred in imputing only \$55,000 of income per year to the defendant. The defendant's statement of net worth disclosed expenses of \$99,588 per year, not inclusive of additional expenses attributed to certain Spring Street properties. While a portion of the defendant's expenses might account for

certain credit card debt, the remainder of those expenses were paid, indicating that the defendant's income exceeded the \$55,000 annual amount determined by the court. In his testimony, the defendant was unable to explain how his reported pension and rental incomes enabled him to cover his expenses. It increased the maintenance payable to the plaintiff to the sum of \$1,500 per month for 54 months.

The Appellate Division modified the judgment to conform to the decision. The judgment failed to conform to the decision upon which it was based, to the extent that the judgment directed the plaintiff to file a QDRO at her sole cost and expense, whereas the decision, as held that the defendant "is responsible to prepare and pay for" any QDRO. When there is an inconsistency between a judgment and the decision upon which it is based, the decision controls, and such inconsistency may be corrected on appeal.

Biological Grandparent may seek Visitation Even after Parental Rights Terminated

In *Matter of Weiss v Orange County DSS*, --- N.Y.S.3d ----, 2016 WL 4099227, 2016 N.Y. Slip Op. 05716(2d Dept.,2016), the Appellate Division reversed an order of the Family Court which dismissed the maternal grandmother's petition for visitation, without a hearing, on the basis that she lacked standing to seek visitation as a result of a previous termination of the mother's parental rights. This was error. A biological grandparent may seek visitation with a child even after parental rights have been terminated or the child has been freed for adoption (see *People ex rel. Sibley v. Sheppard*, 54 N.Y.2d 320, 326) In any event, the dispositional portions of the orders terminating the mother's parental rights were vacated on the mother's related appeal (see *Matter of Isabella R. W.*, --- AD3d ----).

Family Court

Family Court holds the fact that a child has witnessed domestic violence is not alone sufficient to establish neglect.

In *Matter of Jubilee S.*, -- N.Y.S.3d ----, 2016 WL 3981110, 2016 N.Y. Slip Op. 26231 (Fam. Ct.,2016) Family Court observed that Domestic violence in the presence of a child may be a permissible basis upon which to make a finding of neglect. However, exposing a child to acts of domestic violence "is not presumptively neglectful. Not every child exposed to domestic violence is at risk of impairment" (*Nicholson v. Scopetta*, 3 N.Y.3d at 375). Proof that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired as a result of witnessing the domestic violence is required to support a finding of neglect. A child's out-of-court statements may form the basis for a finding of neglect if they are sufficiently corroborated by other evidence tending to support their reliability (see FCA § 1046[a][vi]) Unlike physical injury, which can be observed or established by medical records, whether a child's mental or emotional condition has been

impaired or placed at risk of impairment “may be murky” The fact that a child has witnessed domestic violence is not sufficient to establish that the child’s mental or emotional condition has been actually impaired or placed in imminent risk of impairment. “Impairment of mental or emotional condition,” is specifically defined to include “a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including incorrigibility, ungovernability or habitual truancy; provided, however, that such impairment must be clearly attributable to the inability of the respondent to exercise a minimum degree of care toward the child.” (FCA § 1012(f)). The fact that the child allegedly reported that she and the other children were “scared” and ran to the bedroom when fights between the parents broke out did not support a finding of “substantially diminished psychological or intellectual functioning” as described in the statute. Something more substantial is required. As ACS failed to provide competent evidence to corroborate the child’s hearsay statement or to prove that any of the children suffered any actual harm to their physical, mental, or emotional condition or that they were placed in imminent risk of suffering any such harm, the petition was dismissed.

Family Court Holds That Referee to Hear and Report Does Not Have Jurisdiction to Grant Temporary Order to Show Cause for an Order of Protection, but Sustains Order of Protection Granted Pursuant to That Order to Show Cause

In *J.B., v. C.C.*, --- N.Y.S.3d ----, 2016 WL 4070400, 2016 N.Y. Slip Op. 26241 (Fam Ct, 2016) an order of reference directed that a Referee hear and report on the father’s petition seeking to modify an order of custody. During the course of the proceedings, the mother filed an order to show cause seeking an order of protection against the petitioner in favor of her and the child. The father argued that the Court lacked subject matter jurisdiction to grant the order of protection recommended on the ground, inter alia: 1) that the mother failed to allege a family offense within the meaning of F.C.A. § 812; 2) the order to show cause failed to state a cause of action; 3) the referee did not have the power to hear and determine and therefore could not grant a temporary order to show cause; and 4) there was no petition or counter-claim filed for an order of protection as required by F.C.A. §§ 154–b and 656. It agreed that the referee did not have the power to grant a temporary order to show cause for an order of protection, but rejected the argument that an order of protection may not be granted because the mother did not file either a petition or a counter-claim for the order of protection. It observed that F.C.A. § 656 states that: “No order of protection may direct any party to observe conditions of behavior unless the party requesting the order of protection has served and filed a petition or counter-claim in accordance with section one hundred fifty-four-b of this act.” It held that the mother’s order to show cause was equivalent to a petition, or at the very least, to a counter-claim and therefore, an order of protection may issue. It noted that an order of protection under Article Six of the Family Court Act may be issued by a court “in assistance or as a condition of any other order made under this part.” F.C.A. § 656. The section allowing for such an order of protection does not delineate the

same requirements for an order of protection as one issued pursuant to Article Eight of the Family Court Act. Under Article Eight, a petition must set forth, inter alia, an allegation that the respondent committed certain specified acts such as assault, attempted assault, disorderly conduct, harassment, etc., the relationship between the petitioner and the respondent, the name of any child in the household, and a request for an order of protection. F.C.A. § 821. Section 656 does not list these requirements, but only states that a petition or a counter-claim filed in response to a petition requesting an order of protection must be filed. In this case, although the mother filed an answer to the father's petition, she did not file a counter-claim requesting an order of protection. The mother moved for an order of protection by order to show cause. Her order to show cause met all the requirements of a petition under Article Eight. The father had notice that the mother was seeking an order of protection until the child's 18th birthday and was provided with sworn allegations that formed the basis for her request. The father responded to the order to show cause and, as described in the referee's report, the order to show cause was fully litigated in the course of the hearing held before her. Thus, the order to show cause filed by the mother met the due process requirements for an order of protection issued under Article Six.

Editors comment: The court held that the Referee lacked jurisdiction to sign the order to show cause which brought on the motion for the order of protection. Therefore, there was no motion for an order of protection for the Referee to grant.

August 1, 2016

Appellate Division, Second Department

Denial of Right to Rebut Mother's Affidavits and Evidence Warrants New Trial

In Matter of Hezi v Hezi, --- N.Y.S.3d ----, 2016 WL 3704443, 2016 N.Y. Slip Op. 05498 (2d Dept.,2016) when the hearing on the mother's petition to enforce the college expenses provisions of the parties' stipulation of settlement was shortened due to time constraints, the Support Magistrate permitted the parties to submit two-page closing arguments in writing. The mother submitted three lengthy affidavits and numerous exhibits not presented at the hearing, which the Support Magistrate considered and partially relied upon in granting the mother's petition. The Appellate Division reversed. The father had no opportunity to cross-examine the mother regarding her post-hearing statements, or to object to her exhibits. Family Court Act § 433(a) requires that a respondent "shall be given opportunity to be heard and to present witnesses." A hearing must consist of an adducement of proof coupled with an opportunity to rebut it. The Support Magistrate erred in considering the mother's affidavits and unverified financial information, rather than testimony supported by appropriate documentary evidence, in determining the mother's petition. As the father was deprived of the opportunity to rebut the mother's affidavits and exhibits, the matter was remitted for a new hearing and determination.

Courts Must Determine On A Case-By-Case Basis What Qualifies As An Intimate Relationship Within The Meaning Of FCA § 812(1)

In Matter of Singh v DiFrancisco, --- N.Y.S.3d ----, 2016 WL 3703191, 2016 N.Y. Slip Op. 05504 (2d Dept.,2016) appellant commenced a proceeding seeking an order of protection against the father of the appellant's grandson. The appellant alleged, inter alia, that he resided with the child and his daughter, the mother of the child, in the second floor apartment of the same building where the respondent resided on the first floor, and that on several dates in December 2014, the respondent pushed him, impeded his access to his home, and threatened him. In June 2015, the respondent moved, in effect, to dismiss the petition for lack of subject matter jurisdiction on the ground that the relationship between himself and the appellant did not qualify as an "intimate relationship" within the meaning of Family Court Act § 812(1)(e). Family Court granted the motion and dismissed the petition with prejudice. The Appellate Division reversed. It observed that the legislature left it to the courts to determine on a case-by-case basis what qualifies as an intimate relationship within the meaning of Family Court Act § 812(1)(e), based upon consideration of factors such as '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. The determination as to whether persons are or have been in an 'intimate relationship' within the meaning of Family Court Act § 812(1)(e) is a fact-specific determination which may require a hearing. It held that in light of the parties' conflicting allegations as to whether they had an "intimate relationship" within the meaning of Family Court Act § 812(1)(e), the Family Court, prior to determining the respondent's motion, in effect, to dismiss, should have conducted a hearing on that issue. The matter was remitted to the Family Court for a hearing to determine whether the Family Court had subject matter jurisdiction under Family Court Act § 812(1)(e), for a new determination thereafter of the respondent's motion, and further proceedings thereafter, if warranted.

Family Court May Not Make Special Findings and Allow Child To Petition USCIS For SIJS Where Child Has Reached 21 Years Of Age But No Order Of Guardianship Has Been Obtained.

In Matter of Maria C.R. v Rafael G, --- N.Y.S.3d ----, 2016 WL 3703194, 2016 N.Y. Slip Op. 05503 (2d Dept.,2016) on July 30, 2014, the petitioner filed a petition in the Family Court to be appointed as guardian of a child who was then 20 years old. The petitioner also sought an order making special findings so as to allow the child to apply for special immigrant juvenile status under federal law. A hearing on the petition was repeatedly adjourned for various reasons, and ultimately scheduled to take place in January 2015. However, on October 16, 2014, the child attained the age of 21 years. Family Court, without a hearing, dismissed the guardianship petition "due to lack of jurisdiction." The Appellate Division affirmed. In an opinion by Justice Sgroi, it observed that Family Court Act § 661(a) which governs "[g]uardianship of the person of a minor or infant" provides, in pertinent part, that "[f]or purposes of appointment of a guardian of the person pursuant to this part, the terms infant or minor shall include a person who is less than twenty-one years old who consents to the appointment or continuation of a guardian after the age of eighteen." By the clear wording of the statute, the Family Court's subject matter jurisdiction to grant the guardianship petition expired on the date of the child's 21st birthday, or October 16, 2014.

Nor was there any authority for the court to issue Letters of Guardianship nunc pro tunc to the date of the filing of the petition. Where a court is divested of subject matter jurisdiction, it cannot exercise such jurisdiction by virtue of an order nunc pro tunc (see *Davis v. State of New York*, 22 A.D.2d 733, 733; see also *Stock v. Mann*, 255 N.Y. 100, 103).

The Court observed that a “special immigrant” is a resident alien who is under 21 years old, is unmarried, and has been either declared dependent on a juvenile court or legally committed to the custody of an individual appointed by a state or juvenile court (see 8 USC § 1101[a][27][J][i]; 8 CFR 204.11). In New York, a child may request that the Family Court, recognized as a juvenile court under federal regulations, issue an order making special findings and a declaration as part of the process to petition USCIS for SIJS. The findings of fact must establish that: (1) the child is under 21 years of age; (2) the child is unmarried; (3) the child is dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court; (4) reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis; and (5) it is not in the child’s best interests to be returned to his or her home country. With the declaration and special findings, the eligible child may then seek the consent of the Department of Homeland Security for SIJS. Moreover, pursuant to federal law, a child “may not be denied special immigrant status under SIJS after December 23, 2008 based on age if the alien was a child on the date on which the alien applied for such status”. “The term ‘child’ for purposes of this statute means an unmarried person under twenty-one years of age”.

The Appellate Division concluded that a New York Family Court may not issue an order making special findings and a declaration allowing a child to petition the USCIS for SIJS where, as here, the child has reached 21 years of age but no order of guardianship has yet been obtained. Guardianship status, which the Family Court can only grant to individuals under 21, is a condition precedent to a declaration allowing a child to seek SIJS. It held that once the child turned 21 years old, the Family Court no longer possessed authority to determine the guardianship petition. Furthermore, since dependency upon a juvenile court is a prerequisite for the issuance of an order making the declaration and specific findings to enable a child to petition for SIJS, the Family Court also properly denied the petitioner’s SIJS motion.

New Evidence May Not Be Submitted In Support Of Objections To Support Violation Petition.

In *Matter of Loveless v Goldbloom*, --- N.Y.S.3d ----, 2016 WL 3910575, 2016 N.Y. Slip Op. 05571 (2d Dept.,2016) the Appellate Division in observing, inter alia, that Family Court properly denied the mother’s objections to the dismissal of her child support violation petition, that the court properly refused to consider the emails the mother submitted with her objections since new evidence may not be submitted in support of objections.

Appellate Division, Third Department

Not Improper To Consider Depreciation In Valuing Assets Of A Business Or To Value Other Equipment By Halving Its Cost Basis

In *Cervoni v Cervoni*, --- N.Y.S.3d ----, 2016 WL 3748133, 2016 N.Y. Slip Op. 05538 (3d Dept.,2016) the Appellate Division rejected the husbands argument that the valuation of certain company equipment and the method of division was improper. Most of the company's equipment was valued by an expert appraiser, and Supreme Court valued some other equipment by halving its cost basis as listed on a 2013 equipment depreciation schedule in evidence. It held that there is nothing improper in considering depreciation in valuing the assets of a business and, given that "valuation is an exercise properly within the fact-finding power of the trial courts," it could not say that Supreme Court erred in valuing those items as it did. However, it did reduce the award by the value of half of the equipment whose value was erroneously double counted by the court.

Appearance by Counsel at Family Offense Hearing Is Not a Default

In *Matter of Leighann W v Thomas X*, 2016 WL 3748567 (3d Dept.,2016) the father appealed from a custody order and order of protection, as well as from the denial of his subsequent motion to vacate those orders. The Appellate Division held that while the order of protection and custody order were ostensibly entered on the father's default, no default occurred. The father appeared for the first part of the fact-finding hearing and, while he was absent for the final day of the hearing, his counsel was in attendance. His counsel declined Family Court's offer for him to refrain from participating and render the father's absence a "pure default," and then engaged fully by, among other things, cross-examining a witness. The orders that ensued were therefore not issued upon default, and the father was free to appeal from them

Finding Of Ineffective Assistance of Counsel Requires Proponent Demonstrate He Was Deprived Of Reasonably Competent and, thus, Meaningful Representation

In *Matter of Bennett v Abbey*, --- N.Y.S.3d ----, 2016 WL 3748562, 2016 N.Y. Slip Op. 05524 (3d Dept., 2016) the Appellate Division rejected the mother's argument that she was denied the effective assistance of counsel in this custody proceeding. The Appellate Division observed that a finding of ineffective assistance of counsel requires that the proponent demonstrate that he or she was deprived of reasonably competent and, thus, meaningful representation. Counsel's representation need not be perfect and, as it is not the role of the Court to second-guess counsel's trial strategy or tactics, a party seeking to prevail on an ineffective assistance of counsel claim must do something more than engage in hindsight speculation as to the viability of counsel's strategy. Although the mother chastised counsel for failing to subpoena certain child protective services records, counsel may well have made a tactical decision that, in light of the mother's admission that she previously had been under the supervision of the local department of social services, production of such records would not reflect favorably upon his client. As for counsel's performance at the hearing, counsel's decision to forgo an opening statement is not necessarily indicative of ineffective legal representation. Similarly, the failure to call particular witnesses does not necessarily constitute ineffective assistance of counsel—particularly where the record fails to reflect that the desired testimony would have been favorable.

Supreme Court

Recipient of Maintenance and Child Support Directed To Wife To Mortgage, Utilities And All Carrying Charges Associated With The Home And All Of Her Own Personal Expenses, Pendente Lite, So Long As She Lived There

In *CG v FG*, --- N.Y.S.3d ----, 2016 WL 3748767, 2016 N.Y. Slip Op. 26220 (Sup Ct, 2016) the wife sought an award of pendente lite maintenance and child support. The Court found that presumptive amount of guidelines maintenance was \$24,479 a year, and the Husband's child support obligation under the CSSA guidelines was \$21, 879 a year. The Court observed that awards of temporary maintenance and child support are intended to be all inclusive. See *Woodford v. Woodford*, 100 AD3d 875 (2d Dept.2012); See also, *Harris v. Harris*, 97 AD3d 534 (2d Dept.2012). The recipient of guidelines maintenance and child support is required to pay all of his or her own reasonable expenses including, but not limited to, any mortgage or rent, and all carrying charges, after receiving the amount awarded. See *Khaira v. Khaira*, 93 AD3d 194 (1st Dept.2012); See also, *Francis v. Francis*, 111 AD3d 454 (1st Dept.2013). It therefore directed the wife to pay the mortgage, utilities and all carrying charges associated with the home where she resided together with all of her own personal expenses, pendente lite, so long as she lived there.

July 16, 2016

Appellate Division, First Department

Judgment of Divorce Vacated after Seven Years for Untimely submission of Proposed Judgment

In *Robert v Robert*, --- N.Y.S.3d ----, 2016 WL 3545275 (Mem), 2016 N.Y. Slip Op. 05241 (1st Dept.,2016) the Appellate Division affirmed an order which granted defendant's motion to reopen the judgment of divorce, to the extent of vacating the judgment and dismissing the case for failure to prosecute. It held that irrespective of the applicability of CPLR 3216 or whether the numerous conditions precedent to dismissal therein were satisfied prior to dismissal here, the untimely submission of the proposed judgment of divorce violated the Uniform Rules for Trial Courts (22 NYCRR) ' 202.48, which provides, in pertinent part, that A[p]roposed 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@ and that A[f]ailure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown.@ The court directed plaintiff to settle judgment, which he failed to do. With respect to the seven-year delay, the court found that there was no good cause shown as plaintiff had failed to provide any explanation for the delay. Accordingly, the court was correct in vacating the erroneously signed judgment of divorce and dismissing the case as abandoned.

Appellate Division, Second Department

Appellate Division Finds Waiver Of Private School Payments By Acceptance Of 50% For Nine Years

In *Matter of Murphy v Murphy*, --- N.Y.S.3d ----, 2016 WL 3532867, 2016 N.Y. Slip Op. 05154 (2d Dept.,2016) the parties separation agreement dated August 25, 2000, which was incorporated but not merged into a judgment of divorce dated May 28, 2002 provided that the father would pay a pro rata share, set at the time of the agreement at 70%, of private school and college tuition for the children. For the next nine years, the father paid 50% of the children=s educational expenses. When the father stopped making any payment for educational expenses, the mother commenced a proceeding, inter alia, to enforce the provisions of the separation agreement pertaining to those expenses. The Appellate Division held that the Family Court should have granted the father=s objection to the order which fixed arrears for those expenses on the ground that the mother waived her right to a 70% contribution to tuition from the 2001/2002 school year until the filing of her enforcement petition. A waiver, which does not require consideration, constitutes no more than the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable. It may arise by either an express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage. The mother acknowledged at the hearing that she had affirmatively requested that the father pay half of the children=s tuition bills, including making the notation *Ayour half@* or similar direction, on some, though not all, of the tuition statements she sent to the father. This evidence, coupled with the mother=s acceptance of the 50% payments for nine years, demonstrated that she intentionally abandoned her right to a 70% contribution prior to the filing of her enforcement petition. Accordingly, it held that in calculating the father=s arrears for educational expenses, the Support Magistrate should not have included the difference between 50% and 70% of the children=s tuition for the years preceding the filing of the enforcement petition.

Appellate Division, Fourth Department

Best Evidence Rule Explained by Appellate Division

In *Miller v Miller*, 2016 WL 3562298 (4th Dept.,2016) a proceeding to modify a custody order, the Appellate Division, in reversing an order which dismissed the petition, agreed with the father and the AFC that the JHO erred in refusing to admit in evidence the report of the court-appointed psychologist on the ground that the report was not the *Abest evidence@* because the psychologist was available to testify. The *A >oft-mentioned and much misunderstood=* best evidence rule simply requires the production of an original writing where its contents are in dispute and sought to be proven@ (*Schozer v. William Penn Life Ins. Co. of N.Y.*, 84 N.Y.2d 639, 643), and thus that rule was not applicable here. It rejected the contention of the AFC that the court erred in requiring the admission in evidence of three cellular telephones as the best evidence of the content of text messages between, inter alia, the parties, particularly in view of the father=s failure to offer in evidence

an authenticated Acopy-and-paste document of [the] text message conversation[s]@ (People v. Agudelo, 96 AD3d 611, 611B612, lv denied 20 NY3d 1095)

Appellate Divison May Take Notice Of New Facts Which Indicate That Record No Longer Sufficient For Determining Child's Best Interests

In Matter of Amrane v Belkhir, --- N.Y.S.3d ----, 2016 WL 3560818, 2016 N.Y. Slip Op. 05249 (4th Dept.,2016) the Appellate Division=s order determining the appeal pointed out that the attorney for the three older children informed the Court at oral argument that, in a subsequent proceeding commenced after the appeal was perfected, Family Court awarded the father temporary custody of the second and third eldest of the minor children; the eldest of the minor children remained with the mother and will be 18 years old in July. It noted that it may take notice of new facts to the extent they indicate that the record before it is no longer sufficient for determining the best interests of the second and third eldest of the minor children, and that was the case here. It therefore directed Family Court on remittal to determine the best interests of those children.

July 1, 2016

Appellate Division, Second Department

Medical Bills coupled with Testimony Sufficient Prima Facie Evidence of Nonpayment

In Matter of Schiero v Perrotta, --- N.Y.S.3d ----, 2016 WL 3265463, 2016 N.Y. Slip Op. 04722 (2d Dept.,2016) the mother filed a violation petition alleging, inter alia, that the father had failed to pay his pro rata share of the children's unreimbursed medical expenses. At the hearing, the mother testified that she had incurred \$980 in medical expenses for the children, and she attempted to offer into evidence copies of medical bills and proof of payment. The Support Magistrate refused to admit the medical invoices into evidence on the ground that the medical invoices were hearsay, and were not admissible through the mother's testimony, and concluded that the mother failed to demonstrate the amounts of each individual medical expense or when they were incurred and, therefore, dismissed her petition for reimbursement. The Appellate Division reversed. It held that the Support Magistrate improperly precluded the mother from introducing evidence to support that branch of her petition which sought payment from the father for his pro rata share of the children's unreimbursed medical expenses. The mother's testimony provided a sufficient foundation for the admission of the medical bills and her proof of payment of those bills, as she had personal knowledge of their contents. Consequently, the mother should have been permitted to meet her initial burden of presenting prima facie evidence of the father's nonpayment through the submission of the medical bills and her sworn testimony (see Matter of Rutuelo v. Rutuelo, 98 AD3d 518, 518; Matter of Palmer v. Palmer, 71 AD3d 1152, 1152; Matter of Uriarte v. Ippolito, 54 AD3d 379, 379).

Family Court Violated Fundamental Due Process Rights When it Instructed Mother Not to Consult with Her Attorney During Recesses

In *Matter of Turner v Valdespino*, --- N.Y.S.3d ----, 2016 WL 3265444, 2016 N.Y. Slip Op. 04724 (2d Dept.,2016) the mother's hearing testimony in this custody proceeding spanned several court dates and took place over a period of months. At the end of four hearing dates, while the mother's testimony was continuing, the Family Court instructed the mother not to discuss her testimony with her attorney during the recess. One of these recesses was overnight, two recesses were for approximately one week, and one recess was more than three months. Family Court granted the father's petition for sole legal and physical custody and, in effect, denied the mother's petition. The Appellate Division reversed and remitted for a new hearing. It held that Family Court violated the mother's fundamental due process rights when it instructed her not to consult with her attorney during recesses, which resulted in her being unable to speak to her attorney over extended periods of time. Although the issue was unpreserved for appellate review, it exercised its power to reach it in the interest of justice because the Family Court's conduct deprived the mother of due process (see *Altshuler Shaham Provident Funds, Ltd. v. GML Tower, LLC*, 21 NY3d 352, 361 n 4; *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165).

Appellate Division, Fourth Department

Failure to Afford the Mother Opportunity to Cross-examine Key Witness Constituted Denial of Due Process, Which Required Reversal

In *Matter of Dominic B.*, 138 A.D.3d 1395, 30 N.Y.S.3d 769, 2016 N.Y. Slip Op. 03287 (4th Dept., 2016) a neglect proceeding, the Appellate Division held, in reversing the order appealed from, that in granting the petition Family Court erred in relying on a psychological evaluation of the mother that was not received in evidence. It held that it is a fundamental requirement of due process that the decision maker's conclusions must rest solely on legal rules and the evidence adduced at the hearing" (*Matter of Kurzon v. Kurzon*, 246 A.D.2d 693, 695, 668 N.Y.S.2d 242). Although the parties had expressly stipulated that the evaluation would not be used as evidence in any fact-finding hearing in this matter, or as a basis for seeking to amend the neglect petition, the court relied heavily upon the evaluation in reaching its determination. It also concluded that the court's failure to afford the mother the opportunity to cross-examine a key witness, i.e., a caseworker for petitioner, constituted a denial of her right to due process, which also required reversal (see *Matter of Middlemiss v. Pratt*, 86 A.D.3d 658, 659, 926 N.Y.S.2d 720).

Denial of Right to Testify and Present Witnesses Constitutes Denial of Due Process Which Warrants Reversal

In *Matter of Gerhardt v Baker*, --- N.Y.S.3d ----, 2016 WL 3202538, 2016 N.Y. Slip Op. 04531 (4th Dept.,2016) the Appellate Division reversed an order of the Family Court on the ground that the father was not properly advised of his right to counsel and the Support Magistrate erred in failing to conduct a proper hearing on the father's modification petition. It held that while a hearing on a petition for modification of a support obligation need not follow any particular format the hearing in this matter was "inherently flawed' ". The father was not offered an opportunity to testify, nor was he permitted to present the sworn testimony of any other witnesses, and the cursory handling of this matter by the Support Magistrate did not provide a substitute for the meaningful hearing to which the father was entitled.

June 16, 2016

Court of Appeals Rejected Adequate Relevant Information Test in Custody Disputes

In *S.L. v J.R.*, ___NY3d ___, 2016 WL 3188982 (2016) the Court of Appeals, in an opinion by Judge Garcia, reversed an order of the Appellate Division, which affirmed Supreme Court's decision in a custody case not to conduct an evidentiary hearing based on its determination that the court possessed "adequate relevant information to enable it to make an informed and provident determination as to the child's best interest." The Court rejected the "undefined and imprecise" adequate relevant information" standard applied by the courts below which tolerates an unacceptably-high risk of yielding custody determinations that do not conform to the best interest of a child nor adequately protect a parent whose fundamental right, the right to control the upbringing of a child, hangs in the balance. The Court observed that in rendering a final custody award without a hearing, Supreme Court appeared to rely on, among other things, hearsay statements and the conclusion of a court-appointed forensic evaluator whose opinions and credibility were untested by either party. It pointed out that a decision regarding child custody should be based on admissible evidence, and there was no indication that a "best interest" determination was ever made based on anything more reliable than mere "information." Moreover, while Supreme Court purported to rely on allegations that were "not controverted," the affidavit filed by Mother plainly called into question or sought to explain the circumstances surrounding many of the alleged "incidents of disturbing behavior." The Court of Appeals held that these circumstances do not fit within the narrow exception to the general right to a hearing. It reaffirmed the principle that, as a general matter, custody determinations should be rendered only after a full and plenary hearing. It declined, to fashion a "one size fits all" rule mandating a hearing in every custody case statewide. However, where, as here, facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute, a custody hearing is required. Significantly, the Court held that " a court opting to forego a plenary hearing must take care to clearly articulate which factors were, or were not, material to its determination, and the evidence supporting its decision." Under the circumstances of this case, a plenary hearing was necessary.

Appellate Division, First Department

In Absence of Proof of Value “In Kind” Distribution of Personal Property Was Not Disturbed

In *Turbeville v Turbeville*, --- N.Y.S.3d ----, 2016 WL 3390238, 2016 N.Y. Slip Op. 04878 (1st Dept.,2016) the Appellate Division held that the Special Referee properly determined that the relevant statutory factors warranted awarding plaintiff a portrait of the couple, which they jointly obtained as a wedding gift. While the parties claimed the portrait had value because the artist was prominent, they failed to provide the court with an actual value. In the absence of proof of value, the Referee’s in kind distribution of personal property was not disturbed.

Appellate Division, Second Department

Appellate Division Construes Family Court Act Article 5–b, a New Version of the Uniform Interstate Family Support Act

In *Ardell v Ardell*, --- N.Y.S.3d ----, 2016 WL 3177140, 2016 N.Y. Slip Op. 04409 (2d Dept.,2016) the parties had three children together, all of whom were born in New York. In 2004, the family moved to Sweden. The father was a Swedish citizen. The parties were divorced in June 2011 pursuant to a partial judgment of the Attunda District Court, Sollentuna, Sweden. In July 2012, the Svea Court of Appeal, Stockholm, Sweden, awarded the parties joint legal custody of the children, with the mother having primary physical custody of the children and the father having visitation. In October 2012, the mother moved to New York with the children. The father remained in Sweden, although he later moved to Singapore in connection with his employment. He retained his Swedish citizenship and remained registered with the Swedish authorities at his home address in Stockholm. In 2013, the parties entered into a child support agreement that was entered as a judgment by the Attunda District Court on September 23, 2013. In July 2015, the mother commenced a proceeding in the Family Court for a de novo award of child support or, in the alternative, to modify the Swedish support order. The father moved to dismiss the petition on the ground, inter alia, of lack of jurisdiction. Family Court denied the motion. The Appellate Division reversed.

The Appellate Division observed that in 2015, New York adopted, as Family Court Act article 5–B, a new version of the Uniform Interstate Family Support Act , that, among other things, incorporates the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, of which Sweden is a member. Although the new version became effective January 1, 2016, Family Court Act § 580–903 provides that the new version “shall apply to any action or proceeding filed or order issued on or before the effective date.”

The Appellate Division noted that Family Court Act § 580–201(a) provides that, in a proceeding to establish or enforce a support order, a tribunal of this state may exercise

personal jurisdiction over a nonresident individual if, among other things, the individual resided with the child in this state, the individual resided in this state and provided prenatal expenses or support for the child, or the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse (see Family Ct Act § 580-201[a] [3], [4], [6]. It was undisputed that the children were conceived in New York, that the father lived with them in New York, and that he presently paid support for them. However, Family Court Act § 580-201(b) provides that the bases for personal jurisdiction set forth in Family Court Act § 580-201(a) “may not be used to acquire personal jurisdiction for a tribunal of this state to modify a ... foreign support order ... unless the requirements of [Family Court Act §] 580-615 ... are met.” Family Court Act § 580-615 allows tribunals of this state to modify foreign child support orders in certain circumstances, “[e]xcept as otherwise provided in [Family Court Act §] 580-711.” Family Court Act § 580-711(a) provides: “A tribunal of this state may not modify a Convention child support order if the obligee remains a resident of the foreign country where the support order was issued unless: “(1) the obligee submits to the jurisdiction of a tribunal of this state, either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity; or “(2) the foreign tribunal lacks or refuses to exercise jurisdiction to modify its support order or issue a new support order.” Any child support order issued after a prior child support order has been issued constitutes a “modification” of the prior child support order within the meaning of the UIFSA (see Matter of Spencer v. Spencer, 10 NY3d 60, 67-68).

The Appellate Division rejected the mother’s contention that, after the father moved to Singapore, he was no longer “a resident of the foreign country where the support order was issued,” and that Family Court Act § 580-711(a) therefore did not apply. The father submitted evidence demonstrating that, notwithstanding his move to Singapore, he remained registered as a resident of Stockholm pursuant to the laws of Sweden. It was also clear that the father did not expressly submit to the jurisdiction of the courts of this state, and that he objected to the jurisdiction at the first available opportunity. Also the record did not demonstrate that the courts of Sweden lack or refused to exercise jurisdiction to modify the Swedish support order or issue a new support order. Accordingly, the courts of this state do not have jurisdiction to issue a new support order unless there was a reason not to recognize the Swedish support order (see Family Ct Act § 580-711[b]; 580-708[c]). Family Court Act § 580-708 provides that tribunals of this state shall recognize registered support orders issued by tribunals located in members of the Convention except under certain specified circumstances, including where recognition of the order “is manifestly incompatible with public policy, including the failure of the issuing tribunal to observe minimum standards of due process, which include notice and an opportunity to be heard” (Family Ct Act § 580-708[b][1]). Here the mother failed to demonstrate that recognition of the Swedish support order was manifestly incompatible with public policy.

Fundamental Right to Due Process Violated by Denying Mother Right to Confer with Counsel

In Matter of Turner v Valdespino, --- N.Y.S.3d ----, 2016 WL 3265444, 2016 N.Y. Slip Op. 04724 (2d Dept.,2016) the mother’s hearing testimony in this custody proceeding spanned several court dates and took place over a period of months. At the end of four hearing dates,

while the mother's testimony was continuing, the Family Court instructed the mother not to discuss her testimony with her attorney during the recess. One of these recesses was overnight, two recesses were for approximately one week, and one recess was more than three months. Family Court granted the father's petition for sole legal and physical custody and, in effect, denied the mother's petition. The Appellate Division reversed and remitted for a new hearing. It held that Family Court violated the mother's fundamental due process rights when it instructed her not to consult with her attorney during recesses, which resulted in her being unable to speak to her attorney over extended periods of time. Although the issue was unpreserved for appellate review, it exercised its power to reach it in the interest of justice because the Family Court's conduct deprived the mother of due process (see *Altshuler Shaham Provident Funds, Ltd. v. GML Tower, LLC*, 21 NY3d 352, 361 n 4; *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165).

Appellate Division, Fourth Department

Denial of Due Process Due to Inherently Flawed Hearing

In *Matter of Gerhardt v Baker*, --- N.Y.S.3d ----, 2016 WL 3202538, 2016 N.Y. Slip Op. 04531 (4th Dept.,2016) the Appellate Division reversed an order of the Family Court on the ground that the father was not properly advised of his right to counsel and the Support Magistrate erred in failing to conduct a proper hearing on the father's modification petition. It held that while a hearing on a petition for modification of a support obligation need not follow any particular format the hearing in this matter was "inherently flawed" . The father was not offered an opportunity to testify, nor was he permitted to present the sworn testimony of any other witnesses, and the cursory handling of this matter by the Support Magistrate did not provide a substitute for the meaningful hearing to which the father was entitled.

Respondent Who Fails to Appear Personally but Is Represented by Counsel Who Is Present When the Case Is Called Is Not in Default

In *Matter of Daniels v Davis*, --- N.Y.S.3d ----, 2016 WL 3202918, 2016 N.Y. Slip Op. 04593 (4th Dept.,2016) the Appellate Division reversed an order of protection requiring appellant to refrain from offensive conduct toward petitioner. It held that Family Court erred in disposing of the matter on the basis of respondent's purported default. A respondent who fails to appear personally in a matter but nonetheless is represented by counsel who is present when the case is called is not in default in that matter

June 1, 2016

Appellate Division, Second Department

Doctrine of Necessaries in Alive and Well in New York - Creditor seeking to recover debt against nondebtor spouse must demonstrate primary debtor unable to satisfy the debt out of own resources, that necessaries furnished on nondebtor spouse's credit, and that

nondebtor spouse has ability to satisfy debt

In Jones LLP v Sitomer, --- N.Y.S.3d ----, 2016 WL 2726532, 2016 N.Y. Slip Op. 03709 (2d Dept, 2016) an action to recover legal fees against the wife of the decedent under a theory of common-law necessities the Supreme Court granted the defendant summary judgment dismissing the complaint. The Appellate Division affirmed. It observed that under the common-law doctrine of necessities, a spouse who receives necessary goods or services is primarily liable for payment. A creditor seeking to recover a debt against the nondebtor spouse must demonstrate that the primary debtor was unable to satisfy the debt out of his or her own resources, that necessities were furnished on the nondebtor spouse's credit, and that the nondebtor spouse has the ability to satisfy the debt. Legal services provided to a spouse in a matrimonial action have been considered necessities. Here, the defendant established that the plaintiff's services were not furnished on her credit. Rather, the services were furnished in the expectation of "the proceeds" of the litigation, specifically articulated in the charging lien which the husband had agreed to during the litigation which terminated upon his death. Since the action abated, there were no proceeds of the litigation. Further, it was clear from this record that, although the husband may have had sufficient resources to pay the plaintiff, which included marital assets appropriated by him and court-ordered spousal support, he was unwilling to voluntarily pay the plaintiff, owing to their adversarial relationship.

Second Department Holds Public Policy Does Not Forbid Offsetting Add-on Expenses Against an Overpayment of Child Support

In Matter of Goehringer v Voza-Nicholosi, --- N.Y.S.3d ----, 2016 WL 2890099 (Mem), 2016 N.Y. Slip Op. 03880(2d Dept.,2016) the Appellate Division found that as the father demonstrated both 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 he was properly granted a downward modification of his child support obligation. The court pointed out that while child support overpayments may not be recovered by reducing future support payment, "public policy does not forbid offsetting add-on expenses against an overpayment" (Coull v. Rottman, 35 A.D.3d 198, 201, 828 N.Y.S.2d 295).

Second Department Holds That in Absence of Clear Indication That One Party Was More Culpable than Other, Parties Should Share Equally in Paying the Fees of Parenting Coordinator

In Matter of Headley v Headley, --- N.Y.S.3d ----, 2016 WL 2726323, 2016 N.Y. Slip Op. 03740 (2d Dept., 2016) the mother moved, in effect, to vacate so much of the orders dated October 6, 2014, and October 28, 2014, as directed her to share equally in the costs of the parenting coordinator, based upon her financial circumstances. The court denied the mother's motion. The Appellate Division affirmed. It held that in custody and visitation matters, a court may appoint a parenting coordinator to mediate between the parties and oversee the

implementation of their court-ordered parenting plan. In the absence of any clear indication that one party was more culpable than the other, the parties should share equally in paying the fees of the parenting coordinator". Since the record contained no indication that the mother was the less culpable party, the Supreme Court correctly determined that the parties should share equally the costs of the parenting coordinator. Contrary to the mother's contention, nothing in the record demonstrated that the court failed to consider the parties' financial situations in reaching this determination, or that this outcome was inequitable.

Appellate Division, Third Department

Appellate Division Affirms Order Denying Visitation to Grandparent Who Had Standing Was Not in Child's Best Interests

In *Matter of Andenburg v Vandenburg*, 137 A.D.3d 1498, 28 N.Y.S.3d 736, 2016 N.Y. Slip Op. 02488 (3d Dept., 2016) the Appellate Division affirmed an order of the Family Court which concluded that petitioner grandmother had established standing to seek visitation, but that visitation was not in the child's best interests. It observed that the determination of whether visitation with a grandparent is in the child's best interests requires evaluation of a variety of factors, including the nature and extent of the existing relationship between the grandparent and child, the basis and reasonableness of the parent's objections, the grandparent's nurturing skills and attitude toward the parents, the attorney for the child's assessment and the child's wishes. Courts should not lightly intrude on the family relationship against a fit parent's wishes as the presumption that a fit parent's decisions are in the child's best interests is a strong one. (*Matter of E.S. v. P.D.*, 8 N.Y.3d at 157). The record established a breakdown of the relationship between petitioner and the mother and that efforts to repair their relationship had been unsuccessful. One attempt to resolve their differences nearly led to a physical altercation. While the existence of animosity between petitioner and the mother was not, in isolation, sufficient to support denying petitioner visitation with the child, several witnesses consistently testified that petitioner had a quick temper, used foul language in the presence of her grandchildren and often directed disparaging or demeaning comments at various members of her family, including children. Considering the testimony, which was credited by Family Court, and the attorney for the child's support for the denial of visitation to petitioner, it concluded that there was a sound and substantial basis for Family Court's determination that an order of visitation, in the face of respondents' objections, was not in the child's best interests.

May 16, 2016

Appellate Division, Second Department

Imposition of Sanctions Requires That Court Provide a Reasonable Opportunity to Be Heard

In *Oppedisano v Oppedisano*, --- N.Y.S.3d ----, 2016 WL 1652314, 2016 N.Y. Slip Op. 03148 (2d Dept., 2016) the Supreme Court held a hearing as to whether to impose sanctions against the plaintiff because it suspected that a person who allegedly was both a relative of

the plaintiff and a court employee was trying to influence the court and interfere with the action. After terminating the hearing without testimony from the person in question, the court imposed sanctions of \$5,000 each against the plaintiff and his counsel, nonparty Andrew Wigler. The court found that the plaintiff had violated a court order prohibiting discussion about the case with anyone who was not a party. The court also found that the plaintiff and Wigler had intentionally filed a frivolous CPLR article 78 proceeding in order to derail the hearing and also concluded that Wigler had made a frivolous application to exclude the plaintiff's prior counsel from the courtroom during the hearing. The Appellate Division reversed. It held that Supreme Court improvidently exercised its discretion in imposing sanctions against the plaintiff for violating its order not to discuss the case with any nonparty. 22 NYCRR 130-1.1(d) provides that sanctions may be imposed only after a reasonable opportunity to be heard. By denying the plaintiff the right to cross-examine the person with whom the plaintiff allegedly spoke about this case, and who allegedly tried to influence the court, the court failed to give the plaintiff a reasonable opportunity to be heard. It also improvidently exercised its discretion in imposing sanctions against the plaintiff and Wigler for filing a CPLR article 78 proceeding and making a request to exclude the plaintiff's former counsel from the courtroom during the hearing because it did not give the plaintiff or Wigler a reasonable opportunity to be heard as to whether this conduct constituted frivolous conduct subject to sanctions, and did not give the plaintiff or his counsel notice that they could be sanctioned for such conduct. Furthermore, the court failed to set forth in its order why it found the offending conduct of the plaintiff or his counsel to be frivolous, and why the amount imposed was appropriate.

Supreme Court

Supreme Court Holds No Authority Mandates a Party, Who Denies Possessing Requested Documents, to Obtain Records, from a Third Party, for the Benefit of the Opposing Party

In *Sanon v Sanon*, Slip Copy, 2016 WL 1688596 (Table), 2016 N.Y. Slip Op. 50657(U) (Sup. Ct., 2016) the husband claimed he had nothing further to disclose because he swore that he did not have many of the requested documents in his possession. Supreme Court observed that CPLR 3120 compels production of documents not only in the possession of a party but under their "control." *Fugazy v. Time, Inc.*, 24 A.D.2d 443, 260 N.Y.S.2d 853 (1st Dept.1965). Conversely, a party may not be compelled to produce information that does not exist or which he does not possess. *Rosado v. Mercedes-Benz of North America, Inc.*, 103 A.D.2d 395, 480 N.Y.S.2d 124 (2nd Dept.1984). Disclosure is required if plaintiff currently retains possession and control, items must be preexisting and tangible to be subject to discovery and production, and a party cannot be compelled to create new documents or items in response to a disclosure demand. *Heins v. Public Stor.*, 36 Misc.3d 1217(A) (Sup.Ct. Suffolk Cty.2012); *Gatz v. Layburn*, 9 A.D.3d 348, 780 N.Y.S.2d 157 (2nd Dept.2004); *Castillo v. Henry Schein, Inc.*, 259 A.D.2d 651, 686 N.Y.S.2d 818 (2nd Dept.1999).

Supreme Court rejected the wife's argument that the husband had "control" over the accounts and other information because "these are his accounts with his name on them." The court held that the term "control" as used in CPLR 3120 is most often applied to instances in which a party has direct control over records or personnel such as successor corporations

or corporate subsidiaries of parties. It has also been applied to require discovery from employees of a party. The court found no authority that mandates a party, who denies possessing requested documents, is required to obtain corporate records, possessed by a third party, for the benefit of the opposing party under CPLR 3101 or CPLR 3120.

The court held that the corporate records of the husband's dental practice, while corporate records owned and controlled by the corporation, were still under the husband's control because they were the records of a corporate entity over which he had control and hence, he was obligated to disclose those records.

The court rejected the argument, advanced by the husband, that he could evade his disclosure obligations by suggesting that his wife has control of certain requested documents or that documents are equally accessible to her. The Court held that if he had the documents, he must produce them, regardless of whether the wife had access to the documents or even if she has the same documents in her possession.

The Court held that the wife was entitled to documents which related to the husband's financial activities and valuation of marital property after the date of commencement of the action. *Dorsa v. Dorsa*, 50 A.D.3d 842, 856 N.Y.S.2d 208 (2nd Dept.2008); *Lennon v. Lennon*, 124 A.D.2d 788, 508 N.Y.S.2d 507 (2nd Dept.1986). However, the wife in this case had no marital interest in documents detailing separate property expenses incurred after the commencement of the action. Although she did have a legitimate interest in documents which demonstrated the income of the husband after the commencement.

May 1, 2016

Appellate Division, First Department

Attorneys Fees Incurred for Making a Motion for Sanctions are not Recoverable

In *Gottlieb v Gottlieb*, --- N.Y.S.3d ----, 2016 WL 1590060, 2016 N.Y. Slip Op. 03083 (1st Dept.,2016) the Appellate Division held that an award of attorneys' fees incurred in making and pursuing motions for sanctions and in participating in the sanctions hearing, should be vacated as impermissible "fees on fees."

Appellate Division, Second Department

Second Department Holds Rule Against Double Counting Does Not Apply Where the Asset to Be Distributed Is a 'Tangible Income-producing Asset,' Such as a Medical Practice, Rather than an Intangible Asset, Such as a Professional License, the Value of Which Can Only Be Determined Based on Projected Earnings.

In *Palydowycz v Paldowycz*, --- N.Y.S.3d ----, 2016 WL 1442123, 2016 N.Y. Slip Op. 02793 (2d Dept.,2016) the parties were married in 1989. The defendant was an eye surgeon who owned two medical practices and a 9.7561% interest in an ambulatory surgical center. Pursuant to a trial stipulation the defendant agreed to pay the plaintiff \$14,000 per month for a period of six years, which would be denominated as spousal maintenance, although they were also intended to satisfy the defendant's child support obligation. During the trial the plaintiff's expert had concluded that the combined value of the two medical practices was \$1,830,000, and that the value of the defendant's 9.7561% interest in the surgical center was \$638,000. During the trial Supreme Court granted a motion which denied the plaintiff any distributive award based upon the value of his medical practices and interest in the ambulatory surgical center reasoning that awarding the plaintiff a distributive share of these assets would constitute double counting because the income stream the plaintiff's expert used to value the defendant's medical practices and interest in the ambulatory surgical center was the same income stream used to determine his maintenance obligation. The Appellate Division reversed. It held that the rule against double counting applies where the projected earnings used to value an intangible asset, such as a professional license, are also used to calculate a maintenance award (see *Keane v. Keane*, 8 NY3d 115, 121; *Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 704). However, it is only where the asset is totally indistinguishable and has no existence separate from the income stream] from which it is derived' that double counting results. In *Keane*, the Court of Appeals cautioned against applying a bright line rule that "any income-producing asset distributed as marital property may not also be considered a source of income for maintenance purposes" (8 NY3d at 121). In cases decided by the Court subsequent to the Court of Appeals' decision in *Keane*, it has repeatedly concluded that distributing a party's business and awarding maintenance based upon the income earned from that business does not constitute impermissible double counting because a business is a tangible, income-producing asset. It also extended this rationale to the distribution of a medical practice in *Griggs v. Griggs* (44 AD3d 710, 713), it stated that the rule against double counting "does not apply where, as here, the asset to be distributed is a 'tangible income-producing asset,' rather than an intangible asset, such as a professional license, the value of which can only be determined based on projected earnings." It found that the defendant's medical practices, which employed other individuals including several doctors, and his interest in an ambulatory surgical center, were not intangible assets which are "totally indistinguishable" from the income stream upon which his maintenance obligation was based, and the valuation method used by the plaintiff's expert to determine the fair market value of these assets did not change their essential nature. Accordingly, the Supreme Court erred in concluding that it had no discretion to award the plaintiff any distributive share of the value of these assets because the parties considered the defendant's entire 2010 income in reaching a stipulation as to his maintenance obligation. It held that to the extent that *Rodriguez v. Rodriguez* (70 AD3d 799) is inconsistent with its determination, it should no longer be followed.

Appellate Division Affirms Provision Increasing Durational Maintenance Award to Wife by \$100 per Week to Adjust for Adverse Economic Consequences Which Would Result to Her from Defendant's Refusal to Grant Her a Get.

In *Mizrahi-Srour v Srpur*, --- N.Y.S.3d ----, 2016 WL 1442274, 2016 N.Y. Slip Op. (2d Dept.,2016) the Appellate Division affirmed a judgment which, inter alia, awarded the plaintiff maintenance of \$100 per week for five years, which would be increased to \$200 per week if the defendant did not provide a Get to the plaintiff within 60 days, distributed 70% of the marital assets to the plaintiff, and awarded the plaintiff \$70,000 counsel fees. The parties were married on October 13, 1996, and had four children. On October 21, 2009, the plaintiff commenced this action for divorce. During the marriage, the parties operated a business called the Mosso Group. The plaintiff held a 50% interest in that business. The Appellate Division held that Supreme Court providently exercised its discretion in precluding the defendant from introducing evidence of business finances. The defendant's repeated failures to comply with court orders relating to discovery were willful and contumacious, and justified the sanction imposed. It also held that the provision increasing the durational maintenance award to the plaintiff by \$100 per week to adjust for the adverse economic consequences which would result to her from the defendant's refusal to grant her a Get was proper and was not an impermissible interference with religion. Considering the economic misconduct of the defendant and his frustration of any attempt to value the family business, which he apparently abandoned, the Supreme Court properly awarded the plaintiff 70% of the known marital estate, which consisted of the marital residence, two life insurance policies, and retirement funds. The record supported Supreme Court's finding that the defendant dissipated marital assets by choosing to abandon the business until the litigation concluded. The award of counsel fees to the plaintiff was warranted, since "[t]here shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse" (Domestic Relations Law § 237[a]). Further, the defendant generated substantial fees with his obstructive litigation tactics.

Appellate Division, Third Department

Mere Fact That a Party's Request for Interim Counsel Fees Is Denied at the Outset of the Litigation Does Not Preclude a Court from Making Such an Award at the Conclusion Thereof

In *Teaney v Teaney*, --- N.Y.S.3d ----, 2016 WL 1452764, 2016 N.Y. Slip Op. 02896 (3d Dept.,2016) the Appellate Division observed that pendente lite awards necessarily represent a snapshot of a party's financial circumstances and corresponding need at a particular point in time. The mere fact that a party's request for interim counsel fees is denied at the outset of the litigation does not preclude a court from making such an award at the conclusion thereof, after taking into consideration, among other things, the counsel fees incurred, the length and complexity of the case and how the parties ultimately fared after issues of equitable distribution and child support were finally resolved. In this regard, Domestic Relations Law § 237(a) expressly contemplates that multiple applications for counsel fees may be made by a party. Although each application necessarily must be assessed upon its own merits, the denial of a party's request for interim relief simply does not

limit or preclude a party's subsequent request for counsel fees at the conclusion of the litigation. It noted that comments made by the court during an appearance where it characterized prior orders denying the wife's applications for interim counsel fees as law of the case and indicating that the wife's subsequent application should be limited to fees incurred after the date of the last order denying fees, "while constituting a slight misstatement of the law, is not appealable, and nothing on the face of Supreme Court's written order reflect[ed] that the court actually employed this restrictive analysis."

Supreme Court

Defendants Refusal to File a Joint Income Tax Return with Wife Held to Be Wasteful

In *E.R.S. v. B.C.S.*, Slip Copy, 2016 WL 1438814 (Table), 2016 N.Y. Slip Op. 50529(U)(Sup. Ct.,2016) Plaintiff alleged that he was forced to file a married, filing separately tax return because defendant refused to file a joint return, and as a result, he incurred a tax liability of \$10,000 instead of a tax refund of \$2,000. The parties had filed jointly for 15 years. He claimed defendant owed him \$6,000 due to her refusal to file jointly with him. Supreme Court found, inter alia, that Defendant failed to defeat plaintiff's claim that her refusal to file a joint income tax return with her was anything but wasteful. In accordance with *Levitt v. Levitt*, 97 AD3d 543 (2nd Dept.2012), the Court gave defendant the opportunity to file an amended return with plaintiff on or before April 15, 2016 for the tax year 2014 and directed that the parties shall share equally the return, giving plaintiff a credit for the sums he paid in excess of the approximately \$2,000 expected return. It directed that if defendant failed to file an amended joint 2014 tax return with plaintiff, she shall pay plaintiff the sum of \$6,000. (50% of the amount of the refund they would have received plus 50% of the tax liability plaintiff incurred by filing separately.)

April 16, 2016

Court of Appeals

Court of Appeals Holds That Consent to Record Conversation of Child with Another Person Includes Vicarious Consent, on Behalf of a Minor Child

In *People v Badalamenti*, 2016 WL 1306683 (2016) the Court of Appeals held that the definition of consent, in the context of "mechanical overhearing of a conversation" pursuant to Penal Law § 250.00(2), includes vicarious consent, on behalf of a minor child. It established a "narrowly tailored" test for vicarious consent that requires a court to determine (1) that a parent or guardian had a good faith belief that the recording of a conversation to which the child was a party was necessary to serve the best interests of the child and (2) that there was an objectively reasonable basis for this belief. The Court cautioned that its holding should not be interpreted as a vehicle to attempt to avoid criminal liability for the crime of eavesdropping when a parent acts in bad faith and lacks an objectively reasonable belief that a recording is necessary in order to serve the best interests of his or her minor child. Penal Law § 250.05 and CPLR 4506 cannot be so easily circumvented. The procedural

vehicles of pretrial hearings must be used to determine the admissibility of any recordings and will result in the suppression of any parent's recording that a court determines did not meet the narrowly tailored and objective test. In making this admissibility determination, a court should consider the relevant factors, which include, but are not limited to, the parent's motive or purpose for making the recording, the necessity of the recording to serve the child's best interests, and the child's age, maturity, and ability to formulate well-reasoned judgments of his or her own regarding best interests.

In 2008, defendant lived with his girlfriend and her five-year-old son on the second floor of a two-family house. On May 6, 2008, the father tried to reach the mother on her cellphone, using his own cellphone. He called several times without reaching her; the calls went directly to voicemail. Finally, a call went through, but no-one said anything to the father. However, the line was open, and the father was able to hear what was occurring in defendant's apartment. Defendant and the child's mother were yelling at the child, who was crying. Defendant threatened to beat him and punch him in the face. The father, using another cellphone, tried to call the landline telephone in the apartment, but no-one answered. At this point, the father decided to record what he was hearing using a voice memo function on his cellphone. On the recording, which was played to the jury at defendant's trial, defendant told the five-year-old boy that he was going to hit him 14 times for lying and that this would hurt more than a previous beating. The father saved the recording on his cellphone. He did not contact the police.

In a subsequent prosecution for, inter alia, endangering the welfare of a child, the Court allowed the father's recording into evidence at trial, over the objection of the Defendant protested that the making of the recording amounted to eavesdropping, prohibited by Penal Law § 250.05, and that the recording was therefore inadmissible pursuant to CPLR 4506(1).

The Court of Appeals pointed out that generally, in New York, "[t]he contents of any overheard or recorded communication, conversation or discussion, or evidence derived therefrom, which has been obtained by conduct constituting the crime of eavesdropping, as defined by section 250.05 of the penal law, may not be received in evidence in any trial, hearing or proceeding before any court or grand jury" (CPLR 4506[1]). Penal Law § 250.05, in turn, provides that "[a] person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication." Eavesdropping is a class E felony. Wiretapping is defined as "the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment" (Penal Law § 250.00[1]). " 'Mechanical overhearing of a conversation' means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment" (Penal Law § 250.00[2]).¹

The Court held that the father's actions on his cellphone did not constitute "wiretapping" because, with respect to the telephonic communication he recorded, he was "a sender or receiver thereof" (Penal Law § 250.00[1]). It rejected Defendant's argument that the father's actions amounted to the crime of "mechanical overhearing of a conversation" (Penal Law §§ 250.05, 250.00[2]), and that the recording was consequently inadmissible. The Court agreed that the father's actions matched the statutory elements. It concluded that the father gave consent to the recording on behalf of his child. It held that if a parent or guardian has a good

faith, objectively reasonable basis to believe that it is necessary, in order to serve the best interests of his or her minor child, to create an audio or video recording of a conversation to which the child is a party, the parent or guardian may vicariously consent on behalf of the child to the recording.

Appellate Division, Second Department

Doctrine of Comity Applied to Properly Recognize Petitioner as a Parent, Thereby Conferring Standing for Her to Seek Visitation with the Children, Notwithstanding Failure to Comply with California's Artificial Insemination Law

In *Matter of Kelly S v Farah M.*, --- N.Y.S.3d ----, 2016 WL 1355552, 2016 N.Y. Slip Op. 02676(2d Dept., 2016) Kelly S. and Farah M. entered into a registered domestic partnership in California. In 2004, they decided to start a family, and asked nonparty Anthony S., if he would be willing to donate his sperm. He agreed to donate his sperm, and Kelly S. became pregnant through artificial insemination, and gave birth to I.S., who was not a subject of this appeal. Farah M. legally adopted I.S. The parties subsequently decided to have another child, and Anthony S. again agreed to be the sperm donor. On this occasion, Farah M. became pregnant by artificial insemination. The artificial insemination procedure was performed at home by Farah M., rather than by a physician, and the parties did not draft or sign a written consent agreement. On March 24, 2007, Farah M. gave birth to the Z.S. The child was given Kelly S.'s surname, and Kelly S. was listed as a parent on the child's birth certificate. In August 2008, the parties were legally married in California. That same year, they decided to have a third child, and Farah M. became pregnant through artificial insemination, with Anthony S. donating the sperm. The artificial insemination procedure was again performed at home by Farah M., and not by a physician. Farah M. gave birth to the child E.S. on April 27, 2009. E.S. was given Kelly S.'s surname, and Kelly S. was listed as a parent on the child's birth certificate. In or around 2012, the parties relocated with the three children to New York. The parties subsequently separated, and Kelly S. moved to Arizona in or around the summer of 2013, while Farah M. remained in New York with the three children.

In May 2014, Kelly S. filed a visitation petition in the Family Court seeking visitation with Z.S. and E.S. Family Court denied Farah M.'s motion to dismiss the petition on the ground of lack of standing, concluding that since both children were born when the parties were registered domestic partners or married, Kelly S. was presumed to be a parent under California law, and that presumption should be afforded comity. The court, sua sponte, dismissed paternity petitions to declare Anthony S the father, filed by Farah M. As a matter of comity, the Family Court recognized Kelly S.'s parentage of Z.S. and E.S., and held that Kelly S. had standing to seek custody and visitation with the subject children at a best interests hearing.

The Appellate Division held that as a matter of comity, the Family Court properly recognized Kelly S. as a parent of the children under New York law, thereby conferring standing for her to seek visitation with the children, notwithstanding the parties' failure to comply with California's artificial insemination law. It observed that in *Obergefell v. Hodges* (--- U.S. ----, ----, 135 S.Ct. 2584, 2607-2608, 192 L.Ed.2d 609), the United States Supreme Court

granted same-sex couples the fundamental right to marry in all states, and declared that there is no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state based solely on its same-sex character. The Appellate Division reasoned that if Kelly S. was the parent of the children under California law, principles of comity required her to be recognized as a parent in New York. It found that under California law, Kelly S. was presumed to be the natural parent of E.S. by virtue of the parties' marriage pursuant to California Family Code § 7611(a). Furthermore, the Family Court, as a matter of comity, properly recognized Kelly S. as the parent of the children under New York law (citing *Debra H. v. Janice R.*, 14 N.Y.3d at 600–601, 904 N.Y.S.2d 263, 930 N.E.2d 184; *Counihan v. Bishop*, 111 A.D.3d at 595, 974 N.Y.S.2d 137).

The Appellate Division held that the parties' failure to comply with California's artificial insemination law did not preclude the recognition of Kelly S.'s parentage under California law. The version of California Family Code § 7613 in effect at the time the order appealed from was issued provided that the parties' failure to comply with the requirements of California Family Code § 7613 only meant that the presumption established by that statute may not be relied upon to establish Kelly S.'s parentage. Kelly S. was still entitled to the presumption of parentage arising under California Family Code §§ 297.5(d), and 7611(a) and (c)(1). The Court rejected Farah M.'s argument that since the parties failed to satisfy the requirements of New York's artificial insemination law, Domestic Relations Law § 73, "the public policy of Domestic Relations Law § 73 would prohibit" recognition of Kelly S. as the parent of the children. The Appellate Division held that the failure to comply with Domestic Relations Law § 73 does not automatically preclude recognition of parental rights. In *Laura WW. v. Peter WW.* (51 A.D.3d 211, 856 N.Y.S.2d 258), the Appellate Division, Third Department found that "[n]either the language nor legislative history of Domestic Relations Law § 73 suggests that it was intended to be the exclusive means to establish paternity of a child born through the [artificial insemination by donor] procedure". The court relied, instead, on the common law "rebuttable presumption that ... a child born to a married woman, is the legitimate child of both parties," which the court recognized was "one of the strongest and most persuasive known to the law. It found that the decision in *Laura WW.* reflects that New York public policy does not preclude recognition of parental rights based upon the failure to strictly comply with Domestic Relations Law § 73. The Appellate Division also held that under the circumstances presented, the court properly determined that Farah M. may not rebut the presumption of parentage in favor of Kelly S. arising under California law by filing paternity petitions against the sperm donor, and correctly determined that Kelly S. has standing to seek visitation with the children at a best interests hearing.

U.S. Court of Appeals, Second Circuit

Second Circuit Holds That in Determining Whether to Award Costs and Expenses under International Child Abduction Remedies Act, District Courts must Weigh Relevant Equitable Factors, Including Intimate Partner Violence.

In *Souratgar v Fair*, 2016 WL 1168733 (2d Cir., 2016) the Second Circuit reversed a judgment ordering Respondent Lee Jen Fair to pay to the prevailing petitioner-appellee, Abdollah Naghash Souratgar, \$283,066.62 in expenses under the International Child Abduction Remedies Act, which directs district courts to issue such an order "unless the respondent

establishes that such order would be clearly inappropriate.” 22 U.S.C. § 9007(b)(3). It held that the determination requires district courts to weigh relevant equitable factors, including intimate partner violence. Having reviewed all relevant equitable factors, it concluded that, because the respondent showed that the petitioner engaged in multiple, unilateral acts of intimate partner violence against her and that her removal of the child from the habitual country was related to that violence, and because there were no countervailing factors in the record in favor of the petitioner, such an award would be “clearly inappropriate.”

After Lee departed Singapore, Souratgar filed a petition in the Southern District of New York seeking the return of Shayan to Singapore as provided by the Hague Convention and ICARA. After a hearing the district court granted the petition after concluding that Souratgar had established a prima facie case under the Hague Convention and that Lee had failed to prove either of her two asserted affirmative defenses. See *Souratgar I*, 2012 WL 6700214, at *4–17. Lee appealed, and the Court affirmed the judgment. *Souratgar II*, 720 F.3d at 100. Souratgar then moved in the district court for an order directing Lee to pay his expenses related to Shayan’s return to Singapore. Lee argued that an order directing her to pay Souratgar’s expenses would be clearly inappropriate for two reasons: (1) “Souratgar’s past abusive behavior” against Lee and (2) Lee’s “inability to pay.” The district court determined that neither argument was persuasive.

Lee had argued that Article 13(b) should apply as a defense to return because, if returned to Singapore, Shayan would face a grave risk of physical and psychological harm due to Souratgar’s violence. The district court ultimately disagreed, finding no risk of physical or psychological harm to Shayan. In coming to this conclusion, the district court considered and made numerous factual findings about each party’s allegations of abuse at the hands of the other.

The district court considered Lee’s allegations that Souratgar: (1) on May 31, 2008, when Lee was pregnant, “hit and kicked her on her head and body,” ; (2) in March 2009, “struck her multiple times on her right shoulder while the child was breastfeeding in her arms,” ; (3) during an argument in late 2009 or early 2010, “took the child out of her arms and started to beat her on the head and back,” ; (4) on January 5, 2010, followed Lee to a neighbor’s house and pulled her back into the marital home, where Souratgar “continued to beat her” causing “scratches and redness on her arms where he had grabbed her,” ; (5) on August 15, 2011, when Lee met Souratgar at his office to pick up packages that belonged to her, “pulled [Lee’s] hands and also pushed” her, from which she “suffered some bruises and scratches on” her chest and hands,; (6) on November 22, 2011, chased Lee by car, attempting to overtake her vehicle “in a reckless and dangerous manner,” and (7) “forced [Lee] to engage in certain sexual acts,” The district court discredited some of these allegations, including the allegation of sexual assault, but found most of them to be credible. The district court made a factual finding that Souratgar perpetrated repeated acts of intimate partner violence against Lee.

By contrast, the district court considered Souratgar’s allegation that Lee “had tried to attack him with a knife and chopper a few times,” but found Souratgar’s “account to be exaggerated and not credible. Nowhere in the district court’s decision is there any other suggestion that Lee had committed any violence, nor have we found any in our independent review of the record.

The Second Circuit observed that ICARA's presumption of an award of expenses to a prevailing petitioner is subject to a broad caveat denoted by the words, 'clearly inappropriate.' " Whallon v. Lynn, 356 F.3d 138, 140 (1st Cir.2004). This caveat retains "the equitable nature of cost awards," so that a prevailing petitioner's presumptive entitlement to an award of expenses is "subject to the application of equitable principles by the district court." Generally, in determining whether expenses are "clearly inappropriate," courts have considered the degree to which the petitioner bears responsibility for the circumstances giving rise to the fees and costs associated with a petition. Where, as here, the respondent's removal of the child from the habitual country is related to intimate partner violence perpetrated by the petitioner against the respondent, the petitioner bears some responsibility for the circumstances giving rise to the petition. In line with this reasoning, district courts in other circuits have concluded that "family violence perpetrated by a parent is an appropriate consideration in assessing fees in a Hague case."

The Second Circuit held that the district court was therefore correct to consider Souratgar's unilateral violence in its determination of whether to order Lee to pay expenses under ICARA. See Souratgar III, 2014 WL 704037, at *9. However, it concluded that the district court exceeded its discretion in awarding expenses to Souratgar in light of its fact-finding and its related analysis of the relevant equitable factors. In the course of reviewing the petition, the district court made explicit factual findings that Lee had not committed the violent acts alleged by Souratgar but that Souratgar had repeatedly perpetrated violence against her. Souratgar I, 2012 WL 6700214, at *11. But because Lee had fled the marital home to her sister's home within Singapore before fleeing the country, the district court found that she "ha[d] not established that the past abuse of her was causally related to her decision to leave Singapore." Souratgar III, 2014 WL 704037, at *9. The Second Circuit differed with the district court's conclusion on this point. First, this finding was belied by the record: The district court found that Souratgar's violence toward Lee did not stop when she left their home. See Souratgar I, 2012 WL 6700214, at *9, *11 (discussing violent incidents in August 2011 and November 2011, after her May 2011 departure from the marital home). Second, it found that Lee's testimony showed, and Souratgar did not genuinely dispute, that her departure was related to Souratgar's history of intimate partner violence. Therefore, it found that Souratgar bears some responsibility for the circumstances giving rise to the petition.

Having reviewed all relevant equitable factors, because the respondent had shown that the petitioner engaged in multiple, unilateral acts of intimate partner violence against her and that her removal of the child from the habitual country was related to that violence, and because there were no countervailing factors in the record in favor of the petitioner, the Second Circuit held that an award of expenses would be "clearly inappropriate."

In so holding, the Court expressed no opinion about circumstances beyond the facts of this appeal, particularly where countervailing equitable factors are present. It specified that it did not attempt to catalog the possible countervailing equitable factors that a district court may properly weigh. This task is better left to the district courts to develop on a case-by-case basis so that they retain "broad discretion" in applying equitable principles to implement "the Hague Convention consistently with our own laws and standards." As a matter of clarification, it agreed with the district court that a respondent's inability to pay an award is a relevant equitable factor for courts to consider in awarding expenses under ICARA. It noted that intimate partner violence in any form is deplorable, but found that it need not determine in this matter what quantum of violence must have occurred to warrant

a finding that fees are “clearly inappropriate,” given the repeated violence established in the record here. Those determinations it left to be resolved as they arise in future cases.

Given the record in this case, rather than remand, it could not envision any scenario where an award of expenses would not be clearly inappropriate, and therefore reversed the order and vacated the judgment.

April 1, 2016

Appellate Division, First Department

Appellate Division Uphold Sanction Against Husband for Commencing Frivolous Action

In *Gottlieb v Gottlieb*, --- N.Y.S.3d ---, 2016 WL 1137304, 2016 N.Y. Slip Op. 02135 (1st Dept.,2016) the parties, who were married in 2005, had one child, a daughter born in 2007. The parties previously stipulated that plaintiff would have primary custody of the child, and defendant withdrew his special proceeding to enjoin plaintiff from obtaining a religious divorce before a Beth Din. The Appellate Division held, inter alia, by filing and continuing a special proceeding to enjoin proceedings before the Beth Din of America, defendant engaged in frivolous within the meaning of the Part 130 rules because the action had no legal or factual merit (22 NYCRR 130-1.1[c]). Plaintiff was proceeding before the Beth Din for a religious divorce based upon a binding arbitration agreement (BAA) she claimed had been signed by the parties prior to their marriage and years before defendant's stroke. Instead of examining the BAA when he was notified by the Beth Din of the hearing, defendant immediately claimed it was a forgery, largely based on his recollection that he was not in Jamaica Estates (Queens County) on November 29, 2004, the date on which the BAA was executed. Defendant seized upon certain scrivener's errors in the BAA to bolster his forgery claim, ignoring sworn attestations by two witnesses who saw him sign the BAA, the notarization, and his ability to identify the physical signature as his own, even though he had having no specific memory of its execution. It was not until one year later, at his deposition, that defendant finally acknowledged the signature was his, essentially conceding that his claim of forgery had absolutely no merit. Even then defendant delayed withdrawing his petition, waiting until the very day of the hearing to do so. By failing to fully investigate whether this claim had any legal or factual basis, defendant forced plaintiff to expend unnecessary legal fees in opposing the meritless petition. This required plaintiff's counsel to conduct discovery, including defendant's deposition, and also prepare for an unnecessary trial, that never went forward. The trial court properly awarded plaintiff legal fees incurred to defend the special proceeding as the appropriate sanction amount (22 NYCRR 130-1.1 [a]). No hearing was required to determine the amount of the fees, because the parties stipulated in writing that the issue of counsel fees could be decided upon written submissions.

The Appellate Division reversed the sanctions attributable to defendant's failure to pay his share of the forensic evaluator's fees in time for the originally scheduled trial. Defendant claimed he could not afford the expense. The trial court rejected the proffered excuse because defendant's parents were paying most of his other litigation fees. Defendant's parents, however, were under no legal or contractual obligation to pay the forensic

evaluator's fees. Therefore, it was immaterial whether or not they could have done so. The trial court made no finding that defendant's expressed inability to individually pay the forensic evaluator's fees was untrue. There was no evidence that defendant, who was disabled and unable to work, had other monies available to him from which to pay the forensic evaluator's trial retainer and other fees. When the court notified both sides that the trial would not take place until the forensic evaluator's fees were paid in full, defendant offered to have these fees deducted from his remaining share of the escrowed funds. The Court held that defendant's conduct did not meet the definition of frivolous conduct (22 NYCRR 130-1.1[c]), and to the extent the sanctions awarded by the trial court were attributable to the late payment of the forensic evaluator's fees, they were vacated.

The Appellate Division deemed defendant's Notice of Appeal to include his parents (who were held in contempt and fined for failure to comply with a subpoena) because they had "a united and inseverable interest in the judgment's subject matter, which itself permits no inconsistent application among the parties" (Hecht v. City of New York, 60 N.Y.2d 57, 62 [1983]). Moreover, on rare occasions, in granting relief to an appealing party, the nonappealing party may also benefit (see Cover v. Cohen, 61 N.Y.2d 261, 277-278 [1984]), particularly where, as here, the issues are hopelessly entangled (see Citnalta Constr. Corp. v. Caristo Assoc. Elec. Contr., 244 A.D.2d 252, 254 [1st Dept 1997]). Upon doing so and in consideration of the merits, it affirmed the trial court's finding of contempt in connection with defendant's parents' failure to comply with trial subpoenas and court orders directing them to produce documents for trial.

Appellate Division, Second Department

Appellate Division Holds That Supreme Court Did Not Improvidently Exercise its Discretion in Providing That the Award of Spousal Maintenance Would Be Prospective Only

In Brody v Brody, --- N.Y.S.3d ----, 2016 WL 886300, 2016 N.Y. Slip Op. 01630 (2d Dept.,2016) the Appellate Division affirmed, as a proper exercise of discretion, a judgment which awarded the defendant the sum of \$13,000 per month in spousal maintenance for a period of 24 months. It found that the parties had been married for approximately 6½ years when the plaintiff commenced this action; the defendant was 48 years old at the time of the divorce, that she will not be the primary caretaker for the children, and she could pursue full-time employment. She was awarded \$8,000 in monthly child support payments. The Supreme Courts found that that the defendant had not utilized the child support award primarily for the benefit of the children. The court additionally found that the defendant had not, over the course of this very lengthy litigation, taken any steps to prepare herself for a career despite having had the ability and opportunity to do so were supported by the record.

The Appellate Division held that Supreme Court did not improvidently exercise its discretion in providing that the award of spousal maintenance would be prospective only, and that the plaintiff would not be required to reimburse the defendant for the cost of medical insurance premiums and unreimbursed medical expenses that she paid. These

determinations were supported by, among other things, the court's findings that: the defendant utilized a significant portion of the \$8,000 per month child support payments to cover her own personal expenses; the defendant had the ability to become self-supporting during the litigation, but "made other choices"; and the plaintiff adequately provided for the needs of the defendant and the parties' children during the entire pendency of this litigation (citing *Grumet v. Grumet*, 37 AD3d 534, 536; *Markopoulos v. Markopoulos*, 274 A.D.2d 457, 459).

Pendente Lite Maintenance Denied Where Parties Married Two Years and Action for Divorce Pending Four Years.

In *Jin C v Juliana L*, --- N.Y.S.3d ----, 2016 WL 1126083, 2016 N.Y. Slip Op. 02045 (2d Dept.,2016) the Appellate Division held that Supreme Court properly denied the mother's motion for pendente lite maintenance. It found that Supreme Court correctly noted that the parties were married for less than two years, that the litigation had continued for almost four years, and that after the commencement of this action, the mother transferred more than \$100,000 to her family in Indonesia.

The Appellate Division held that Supreme Court properly denied the mother's motion for permission to take the child to visit Indonesia. At the custody hearing, the mother admitted leaving the marital residence with the child on December 7, 2009, and not contacting the father for the next two months to ask if he wanted to see the child. The Supreme Court properly determined that the mother was a flight risk.

Subsequent Commencement of Matrimonial Action Is Not a Ground to Dismiss a Prior Family Offense Proceeding Commenced in Family Court

In *Matter of Hassan v Hassan*, --- N.Y.S.3d ----, 2016 WL 886166, 2016 N.Y. Slip Op. 01671 (2d Dept.,2016) the Appellate Division reversed an order of Family Court which dismissed the Family Offense petition, over petitioners objection, on the ground that there was a pending matrimonial action in Supreme Court. The Appellate Division observed that Domestic Relations Law § 252(1) provides that in a matrimonial action, both the Supreme Court and the Family Court "shall" entertain applications for orders of protection. Where a matrimonial action is pending in the Supreme Court, the Family Court continues to have jurisdiction over a family offense proceeding, although the Supreme Court in a matrimonial action may also adjudicate whether a spouse has committed a family offense. The subsequent commencement of the matrimonial action was not a ground to dismiss the family offense proceeding commenced in the Family Court, which should have been adjudicated on the merits, since it was commenced in a proper forum.

Appellate Division, Third Department

Support Magistrate Exceeded His Authority by Actually Providing Evidence to the Mother During the Hearing and Using His Questions to Ensure That She Introduced That Evidence

In *Matter of Washington v Edwards*, --- N.Y.S.3d ----, 2016 WL 902241, 2016 N.Y. Slip Op. 01706 (3d Dept.,2016) the Appellate Division reversed an order which held respondent in violation of a support order. It observed that a support magistrate shall conduct the hearing in the same manner as a court trying an issue without a jury in conformance with the procedures set forth in the [CPLR]" (22 NYCRR 205.35[a]; see Family Ct Act § 439[d]). After the mother testified that the father had only paid approximately \$100 a year in support since the order, she said she did not have any documentary evidence to support her allegation. At the conclusion of her testimony, the Support Magistrate questioned the mother as to whether she had any further evidence in regard to her petition. After she answered in the negative, the Support Magistrate provided her with a copy of the Broome County Office of Child Support Enforcement Support Obligation Summary, which summarized the amounts owed and the payment history regarding the 2010 order and indicated that the father was in arrears. Over the father's objection, the Support Magistrate then questioned the mother regarding the contents of the summary. At the conclusion of the case, the Support Magistrate repeated his question to the mother as to whether she had any documents that she would like to enter into evidence. After she again answered in the negative, the Support Magistrate inquired whether the mother was requesting that the summary report be admitted into evidence, at which point she answered affirmatively and, over the father's continued objections, the document was admitted into evidence. The Support Magistrate thereafter used the contents of the summary report as the basis for his calculation of the amount that the father was in arrears. The Appellate Division held that while a Support Magistrate "may properly question witnesses to insure that a proper foundation is made for the admission of evidence and question a witness in an effort to clarify confusing testimony as well as to facilitate the orderly and expeditious progress of the hearing" the Support Magistrate exceeded his authority here. By actually providing the evidence to the mother during the hearing and using his questions to ensure that she introduced that evidence, it could not say that the Support Magistrate was merely ensuring that a proper foundation was set for the admission of the evidence or facilitating the expeditious progress of the hearing.

Appellate Division, Fourth Department

Failure to Submit Affidavits Required by Domestic Relations Law § 237 Warrants Denial of Counsel Fees

In *Stuart v Stuart*, --- N.Y.S.3d ----, 2016 WL 1165330, 2016 N.Y. Slip Op. 02185 (4th Dept.,2016) the Appellate Division found that the trial court failed to comply with Domestic Relations Law § 237 when it ordered plaintiff to pay \$2,000 in counsel fees without an affidavit from either party "detailing the financial agreement[] between the party and the attorney. Such affidavit shall 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." An affidavit of that type is not included in the record for either party. Because [defendant] did not submit

documentation identifying the services rendered by her attorney or the fees incurred, the court was precluded from awarding attorney's fees to her.

Appellate Division Holds That Petitioner's Reaction to Communications Alleged to Constitute Harassment Is Immaterial in Establishing Respondent's Intent to Commit That Family Offense

In *Matter of Shephard v Ray*, --- N.Y.S.3d ----, 2016 WL 1164779, 2016 N.Y. Slip Op. 02239 (4th Dept.,2016) the order of protection was based upon the Referee's finding that respondent told petitioner during a lengthy telephone call that he did not know what he would do if he saw her with another man, sent her two or three text messages stating that he hoped to reconcile with her, and then left on petitioner's car several mementos that petitioner had given him along with the message that he would "never forget [her], bye." The Appellate Division reversed. It observed that under Penal Law § 240.26[3] "A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person ... [h]e or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose" . The intent element may be inferred from conduct as well as the surrounding circumstances. (*People v. Kelly*, 79 AD3d 1642, 1642). It found that the evidence of intent was legally insufficient. Notwithstanding the Referee's implicit finding that petitioner was upset by the communications, her reaction is immaterial in establishing respondent's intent (*People v. Caulkins*, 82 AD3d 1506, 1507). Furthermore, the circumstances failed to establish that respondent acted with the requisite intent. The conduct was comprised of relatively innocuous acts that were insufficient to establish that respondent engaged in a course of conduct with the intent to harass, alarm or annoy petitioner.

March 16, 2016

Appellate Division, Second Department

Appellate Division Holds That While Visitation to Parent Conditioned on Child's Wishes Is Disfavored Giving Daughter Discretion with Respect to Her Mid-week Visitation Did Not Tend Unnecessarily to Defeat Right of Visitation.

In *Anonymous 2011-1 v Anonymous 2011-2*, --- N.Y.S.3d ----, 2016 WL 718286, 2016 N.Y. Slip Op. 01275 (2d Dept.,2016) the Appellate Division affirmed an order which modified the custody provisions of the parties judgment of divorce which provided that the parties shared residential custody of the children on alternating weeks, to award the mother primary residential custody of parties' two children, and awarded the parties joint legal custody and decision-making authority. The Appellate Division held that although the parties were antagonistic toward one another the record supported the court's finding that, despite their antagonism, the parties had been able to agree on most decisions concerning the children. The record supported the court's finding that if either parent were awarded sole decision-making authority, there would be a danger that it would be used to exclude the other parent from meaningful participation in the children's lives. In addition, the court appointed a parenting coordinator, who could assist the parents in resolving any disputes they may have concerning decisions about the children.

The Appellate Division rejected the father's contention that the Supreme Court erred in giving the daughter discretion with respect to her mid-week visitation with him. It stated that it is true that awarding visitation to a parent conditioned on the child's wishes is disfavored where it "tends unnecessarily to defeat the right of visitation." However, in this case, the Supreme Court awarded the father mid-week visitation with the daughter in the weeks before the mother's weekends, with the daughter to have "the option to spend either Wednesday night or Thursday night, or both, at the father's home." It found that while the provision conferred upon the daughter a limited measure of flexibility regarding the timing and duration of her mid-week visitation with the father, it did not tend unnecessarily to defeat the right of visitation.

Postnuptial Agreement Signed by Notary Public Was Not Properly Acknowledged, and Therefore Was Unenforceable.

In *Ballesteros v Ballesteros*, --- N.Y.S.3d ----, 2016 WL 803152, 2016 N.Y. Slip Op. 01450 (2d Dept.,2016) prior to their marriage the parties signed a prenuptial agreement "opting-out" of New York's statutory scheme governing maintenance and equitable distribution. In 2009, after they were married the husband agreed to sign a document entitled "Promissory Note" in which he agreed to purchase a condominium for the wife, in the event of a divorce, in an amount not less than \$250,000. The wife drafted the agreement, and both she and the husband signed it. The husband told the wife he would return the agreement to her after he had it notarized. A notary signed the agreement but did not attach a certificate of acknowledgment. In reversing the judgement which enforced the agreement, the Appellate Division found that the agreement, despite its title of a "Promissory Note," was an agreement between spouses subject to Domestic Relations Law § 236(B)(3). Pursuant to Domestic Relations Law § 236(B)(3), "[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." A written agreement between parties made before or during a marriage which does not meet the formalities of Domestic Relations Law § 236(B)(3) is not enforceable (*Galetta v. Galetta*, 21 N.Y.3d 186; *Matisoff v. Dobi*, 90 N.Y.2d 127). Therefore, a postnuptial agreement that is signed but not acknowledged is invalid and unenforceable in

a matrimonial action. Here, although the postnuptial agreement was signed by a notary public, it was not properly acknowledged. Therefore, the agreement was unenforceable.

Appeals That Are Not Based upon Complete and Proper Records must Be Dismissed.

In *Bousson v Bousson*, --- N.Y.S.3d ----, 2016 WL 718254 (Mem), 2016 N.Y. Slip Op. 01279 (2d Dept.,2016) the Appellate Division dismissed the appeal from an order which failed to award appellant counsel fees. It pointed out that it is the obligation of the appellant to assemble a proper record on appeal that contains all of the relevant papers; appeals that are not based upon complete and proper records must be dismissed. The appendix submitted by the appellant did not include the trial transcript which was the basis for the court's determination after trial, with respect to his motion for an award of counsel fees. Since the appellant has failed to submit a record that would enable the Court to render an informed decision on the merits, the appeal from that portion of the judgment was dismissed

Appellate Division, Third Department

Error to Delegate to Father Authority to Determine If Mother Should Have Visitation

In *Matter of Harrell v Fox*, --- N.Y.S.3d ----, 2016 WL 818912, 2016 N.Y. Slip Op. 01534 (3d Dept.,2016) the Appellate Division held, inter alia, that it is error to delegate to the father complete authority to determine whether there should be any visitation between the mother and children and under what conditions such contact should occur.

Court's "Mixed Record" Format Utilized to Obtain the Child's Testimony in Custody Proceeding Improper. Practice of Calling Child as Witness Discourage.

In *Matter of Gonzalez v Hunter*, 2016 WL 819016 (3d Dept.,2016) the Appellate Division pointed out that several weeks before the trial commenced the Family Court conducted what it referred to as an "in camera" appearance with the child during which counsel for the parties and the attorney for the child were present, but not the parents. The court characterized the proceeding as a "mixed record," in that the court would consider the child's testimony in making findings of fact, but the record would be sealed to the extent that neither party would have access. The attorney for the child reminded the court at the start that the father's attorney was calling the child as a fact witness. No objections were raised, and the child was questioned under oath on both direct and cross-examination as to certain visitation events, as well as her preferences for continued visitation with the mother and where she wanted to live. The Appellate Division expressed its concern with Court's "mixed record" format utilized to obtain the child's testimony noting that in the context of a Family

Ct Act article 6 proceeding, the Court has emphasized that a Lincoln hearing is the preferred manner for ascertaining a child's wishes. The fundamental reason is that a child being asked to explain his or her preferences should not be placed in the position of having [his or her] relationship with either parent further jeopardized by having to publicly relate [his or her] difficulties with them or be required to openly choose between them. (Matter of Lincoln v. Lincoln, 24 N.Y.2d 270, 272 [1969]) A true Lincoln hearing is conducted in confidence with the court, with only the attorney for the child in attendance. While the premise for this hearing was the father's request to present the child as a fact witness, calling a child to testify in a Family Ct Act article 6 proceeding is generally neither necessary nor appropriate. This format does not adequately protect the child's right to confidentiality or foster the primary purpose of a Lincoln hearing that allows a child to openly share his or her concerns with the court. The Court concluded: "Going forward, absent a defined reason for calling the child as a fact witness, we discourage this practice."

March 1, 2016

Appellate Division, First Department

Trial Court Must Follow Precise Requirements of CSSA in Determining Whether to Direct Payment For Cost of Private School Education, and Summer, Extracurricular and Weekend Activities

In *Michael J.D. v Carolina E.P.*, --- N.Y.S.3d ----, 2016 WL 634821, 2016 N.Y. Slip Op. 01252 (1st Dept.,2016) the Appellate Division held that because the trial court did not follow the precise requirements of the CSSA in determining that the plaintiff-father pay certain expenses over basic child support, consisting of private school education, and summer, extracurricular and weekend activities over and above basic child support and that because there otherwise was insufficient support in the record for their payment, the trial court decision on child support should be modified.

The Court observed that CSSA first requires a calculation of child support amount (Domestic Relations Laws 240[1-b][b][3]). It then allows for the payment of certain categories of enumerated add on expenses, prorated according to the parents' relative incomes. The add on expenses expressly addressed in the CSSA are: (1) child care; (2) health insurance and unreimbursed medical expenses; and (3) educational expenses. Not expressly delineated as add on expenses in the statute are summer, extra curricular and/or weekend activities. Basic child support, when calculated properly, is presumed to meet all the child's basic needs. Thus, the expenses of leisure, extracurricular and enrichment activities, such as after school clubs, sporting activities, etc., are usually not awarded separately, but are encompassed within the basic child support award. A court cannot order a parent to pay for these expenses over and above basic child support. If a court does so, however, it is a deviation from the basic statutory formula and requires an analysis under the commonly referred to paragraph "f" factors. Pursuant to Domestic Relations Law § 240[1-b][f] (Family Court Act § 413[1][f]) "[u]nless the court finds that the non-custodial parent[s] pro-rata share of the basic child support obligation is unjust or inappropriate, which finding shall be based upon

consideration of [certain] factors” enumerated in the CSSA, the child support calculation under the statute is presumptively correct. There are 10 enumerated factors to consider before deviating (Family Court Act § [1][f]; Domestic Relations Law § 240[1-b][f]). Although all the factors do not have to present, the court needs to articulate its reasons for making such a deviation from basic child support and relate those reasons to the statutory paragraph f factors.

At the support trial defendant testified that plaintiff had enrolled the child (then only a few months old), in swimming classes with a private instructor, as well as in a weekend music class and a song and stories class. According to defendant, plaintiff had told her he wanted the child to attend a private school, such as Trinity, which she believed cost \$22,000 per year. Once she and plaintiff separated, however, the lessons stopped. At the time of trial the child, then two years old, was not enrolled in any school program. Defendant testified that she intended to be a full time mother to their son.

The trial court determined that plaintiff's adjusted gross income for child support purposes was \$128,741.40., and that the parties' combined parental income was \$128,741.40 and that the basic child support obligation was \$21,886.04 per annum (\$1,823.84 per month). This obligation was prorated 100% to plaintiff and 0% to defendant. Add on costs, for health insurance, unreimbursed medical costs, education and extracurricular activities were awarded to be paid over and above basic child support and were allocated 100% to plaintiff and 0% to defendant.

The trial court ordered that commencing with the 2013–14 academic year until the child's graduation from high school, plaintiff was required to contribute 100% of private school tuition up to the cost of tuition for Trinity School in New York City. Education expenses are an expressly enumerated add on expense that may be awarded according to the specific statutory standard. Domestic Relations Law 240[1-b][c][7] (Family Court Act § 413[1][c][7]). The Appellate Division held that while a court may direct a parent to contribute to a child's educational expenses, “even in the absence of special circumstances or a voluntary agreement of the parties, in order to do so, the court must consider the circumstances of the case, the circumstances of the respective parties, the best interests of the children, and the requirements of justice (see Family Court Act § 413[1][c][7]; Domestic Relations Law § 240[1-b][f]; Manno v. Manno, 196 A.D.2d 488, 491 [2d Dept 1993]). The trial court articulated no reason for ordering plaintiff to pay for private school, other than the informal discussions the parties had about their son's future while they briefly lived together, when the child was only a few months old. At the time of trial, the child was not yet school age, he was not enrolled in any regular educational program, and there was no record that the child has any special needs or gifts. The Court held that the circumstances of these parties and their son did not present a justifiable basis to impose a private school obligation on plaintiff. Plaintiff's income, as it was determined by the trial court even after drawing adverse inferences to his claims, was not at a sufficiently high level that it alone provided a sufficient basis for requiring private school for the child.

The court also ordered that, commencing with the 2012–13 academic year until the child's graduation from high school, plaintiff was responsible for paying 100% of the child's extracurricular activities including after school, weekend and summer activities. No benchmark was provided on what these activities could include and there was no cap on how much they could cost. These expenses are not expressly enumerated add on expenses

in the CSSA and the trial court failed to articulate why a deviation requiring their separate payment was appropriate in this case. While under certain circumstances these expenses may appropriately be considered an add on for child care (Domestic Relations Law § 240[1-b][c][4]; Family Court Act § 413[1][c][4]), here no recovery of child care costs was requested or warranted because defendant did not work or go to school and it was not her intention to do so. Consequently, in order for these additional expenses to be properly added to basic child support, the trial court needed to articulate the basis for the deviation.. Given the parties' brief time living as a family, it could not be said that a standard of living was established for the child. The trial court primarily based its award on the conclusion that had the family remained intact, the child, as the son of a lawyer, would have probably enjoyed a certain standard of living. The consideration of this solitary factor, coupled with the court's own determination of the parties' financial resources, did not, however, support the addition of unlimited add on extracurricular expenses that deviate from basic child support.

Appellate Division, Second Department

Transfer of Residence to Qualified Personal Residence Trust During Marriage Insufficient to Change its Character as Marital Property

In *Yerushalmi v Yerushalmi*, --- N.Y.S.3d ----, 2016 WL 514225, 2016 N.Y. Slip Op. 00969 (2d Dept.,2016) during the parties marriage the plaintiff transferred title to the marital residence, which was bought during the marriage, to a qualified personal residence trust (QPRT). The parties continued to reside at the marital residence during the marriage. The QPRT provided that it would terminate upon the death of the plaintiff or after 23 years, whichever occurred first. If the plaintiff died prior to the expiration of the 23-year period, the property would be disposed of as part of the plaintiff's estate. If the QPRT terminated after 23 years, the property would revert to the beneficiaries. The parties were initially co-trustees of the QPRT, and the beneficiary of the QPRT is another trust, of which the defendant was the grantor. In June 2013, after the commencement of this action for divorce, before the parties were divorced, the defendant listed the marital residence for sale. The plaintiff moved to direct the defendant to remove the marital residence from the real estate market and enjoin him from selling or transferring the marital residence, and for an award of attorneys' fees. The Supreme Court, held that it was not a marital asset because it was owned by the QPRT, and not by the parties, denied the motion. The Appellate Division reversed. It pointed out that 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 ... commencement of a matrimonial action, regardless of the form in which title is held." Since the marital residence was purchased by the parties during their marriage, using marital funds, it was presumed to be marital property. The fact that title had been transferred to the QPRT, allegedly for estate planning purposes, while the parties continued to reside at the marital residence, was, under the circumstances here, insufficient to rebut the presumption.

Appellate Division Holds There Is No Statutory Authority Expressly Granting Jurisdiction to Family Court to Litigate Issue of Child Support Arrears after the Death of a Parent-obligor

In *Matter of Haber v Strax*, --- N.Y.S.3d ----, 2016 WL 618932, 2016 N.Y. Slip Op. 01179 (2d Dept.,2016) a Supreme Court order, which incorporated but did not merge with the parties stipulation of settlement, directed the father to pay 2/3 of the unreimbursed nonelective medical expenses of the parties' two children. It provided that the Supreme Court retained "jurisdiction of the matter concurrently with the Family Court for the purpose of specifically enforcing such of the provisions of the [stipulation of settlement] as are capable of specific enforcement to the extent permitted by law, and of making such further judgment with respect to support, custody, or visitation as it finds appropriate under the circumstances existing at the time application for that purpose is made to it." In 2011 the mother filed a cross petition in the Family Court, seeking to collect the father's 2/3 share of the unreimbursed medical expenses. The father died while the mother's cross petition was still pending. The Support Magistrate dismissed the cross petition on the ground that the Family Court no longer had subject matter jurisdiction to entertain it pursuant to Family Court Act § 451 since the mother was not seeking to enforce a Family Court order, but rather to enforce the March 30, 1998, Supreme Court order. The Appellate Division affirmed. It observed that Family Court Act § 451 gives the Family Court continuing jurisdiction over any order it issued relating to child support. Here, Family Court Act § 451 did not confer continuing jurisdiction on the Family Court because the mother's cross petition sought to enforce a Supreme Court order, not a Family Court order. In addition, while the 1998, Supreme Court order granted concurrent jurisdiction to the Family Court to enforce the provisions of the parties' stipulation of settlement, it expressly gave the Family Court jurisdiction, only "to the extent permitted by law," to enforce those provisions which were capable of specific enforcement. Because the Family Court is a court of limited jurisdiction, it may only exercise those powers specifically granted to it by statute (see *Matter of Silver v. Silver*, 36 N.Y.2d 324, 325). There is no statutory authority expressly granting jurisdiction to the Family Court to litigate the issue of child support arrears after the death of a parent-obligor. Thus, the mother failed to establish that, after the father's death, the Family Court was "permitted by law" to enforce the support provisions of the March 30, 1998, Supreme Court order.

Appellate Division, Fourth Department

Fourth Department Holds Wife Entitled to Recoupment of Child Support Payments

In *Weidner v Weidner*, 2016 WL 534002 (4th Dept.,2016) Supreme Court directed the plaintiff husband to pay the wife \$3,000 per month in maintenance for a period of three years, directed the wife to pay \$142.53 per week in child support, and awarded defendant wife \$5,000 in counsel fees. The Appellate Division held that the court "erred in including the amount of maintenance awarded to the wife in determining her income for the purpose of calculating the amount of child support that she was required to pay to plaintiff. When the amount of maintenance was omitted from the calculation of defendant's income, defendant's income fell below the poverty line, and thus the court erred in directing

defendant to pay plaintiff more than the sum of \$25 per month in child support (see Domestic Relations Law § 240[1-b][d]).

The Appellate Division held that the wife was entitled to recoupment of her child support overpayments, and remitted the matter to Supreme Court to determine the amount of recoupment that plaintiff owed to defendant. Although there is a strong public policy against recoupment of child support overpayments it concluded that recoupment was appropriate under the limited circumstances of this case. The defendant's income was below the poverty level, and that plaintiff held a high-income job. Requiring plaintiff to repay the child support erroneously ordered by the court would not detract from plaintiff fulfilling the needs of the children while they were in his care and, would restore needed funds to defendant that would assist her in maintaining a suitable household for the children and in meeting their reasonable needs during visitation.

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position with family law firm, or in the environmental, energy, real property, zoning, land use field. Salary negotiable. Contact Evan B. Brandes, telephone number 011 61 431 314 948 or email to:brandeslaw@gmail.com

Appellate Division, Second Department

Party Challenging Agreement as Manifestly Unfair Due to Husband's Overreaching must Show Overreaching in the Execution, Such Concealment of Facts, Misrepresentation, Cunning, Cheating, Sharp Practice, or Some Other Form of Deception; and That the Overreaching Resulted in Terms So Manifestly Unfair as to Warrant Equity's Intervention.

In *Gottlieb v Gottlieb*, 2016 WL 325517 (1st Dept.,2016) in anticipation of their planned marriage, plaintiff husband and defendant the wife entered into a prenuptial agreement, which was the product of months of negotiations among the parties and their attorneys. Prior to the agreement's execution, the wife's counsel, an experienced matrimonial practitioner, advised her not to sign it, but the wife ignored that advice.

The wife moved to set aside the agreement, claiming, inter alia, it was the product of overreaching resulting in manifestly unfair terms. The motion court dismissed the wife's claim that the entire agreement was unenforceable, but reserved for trial the issue of whether the agreement's maintenance provisions were fair and reasonable when entered into and whether they were unconscionable at present. The Appellate Division sustained the validity of the entire agreement, including the maintenance provisions.

The wife had not worked outside the home for several years. The husband, was the majority owner of a hedge fund. Prior to the engagement, the husband told the wife that he would not marry her unless there was a prenuptial agreement, and the parties began to discuss terms. In October 2005, while negotiations were ongoing, the wife learned that she was pregnant. In early 2007, the husband's counsel sent a draft agreement to the wife's counsel. In a letter dated March 2, 2007, the wife's attorney proposed changes to the draft, many of which were incorporated into the final agreement. The letter stated that the wife "understands all that she is potentially giving up by virtue of this Agreement." In April 2007, the wife learned that she was pregnant again, and told her counsel that she wanted to execute a prenuptial agreement as soon as possible. In a letter dated April 20, 2007, the husband's counsel sent the wife's counsel a list of revisions to the draft agreement, incorporating many of the changes that had been proposed by the wife's counsel. The husband's counsel also sent a statement outlining the husband's financial circumstances. On April 27, 2007, the wife went to her counsel's office and signed the agreement. The wife ignored her counsel's advice not to sign the agreement. Several days later, the husband executed the agreement. The parties were married in May 2007 and their second daughter was born in November 2007.

The prenuptial agreement contained all of the usual boilerplate clauses. Although each party waived any right to equitable distribution, the agreement provided that, for each year of the marriage (up to a maximum of 15 years), the husband agreed to deposit into an investment account the sum of \$300,000. In the event of divorce, the wife would receive these funds along with any accrued interest. The parties agreed to divide equally all wedding gifts, and real property and financial accounts registered in both parties' names. Any other marital property would be divided in proportion to each party's financial contribution to the asset. If there were minor children of the marriage at the time of divorce, the husband agreed to purchase, at his total cost and expense, an apartment for the use of the wife and the children. The apartment was required to be in a full-service doorman building located between 60th and 80th Streets and Third Avenue and Broadway, above the third floor and with one bedroom each for the wife and the children. The husband agreed to pay the maintenance charges, utilities, and other expenses of the apartment, until all of the children reached the age of majority, at which point the wife would vacate the apartment. The husband also was obligated to pay the wife's and children's moving expenses to the apartment. The agreement also provided that two specified Manhattan apartments, including the residence occupied by the parties during their relationship, shall remain the husband's separate property. With respect to spousal support, the parties each acknowledged that in light of his or her assets, education, employment history, and rights under the agreement, he or she is "self-supporting and has sufficient ability to maintain a reasonable and satisfactory standard of living." Nevertheless, in the event of divorce, the husband agreed to pay the wife, as taxable maintenance, the sum of \$12,500 per month, as long as there was a child of the marriage under the age of four. This amount was in addition to the husband's agreement to purchase, and pay all costs for, an apartment for the wife to live in. The husband also agreed to pay, as nontaxable maintenance, the wife's health insurance, until the parties' children were emancipated. Aside from these provisions, the parties waived any additional spousal maintenance and acknowledged that such waiver was fair and reasonable. In the spousal support section of the agreement, the wife waived any right to counsel fees, both interim and final. In the event of divorce, the husband agreed to leave, either outright or in trust, a specified percentage of his estate to the children of the marriage. Financial statements

annexed to the agreement listed each parties' assets, liabilities and net worth, although the parties' incomes were not included. The husband and the wife explicitly acknowledged that, upon being advised by counsel, each fully understood the financial information provided by the other, and recognized that their financial circumstances could be considerably different at the time of dissolution of the marriage.

The Appellate Division observed that a prenuptial agreement is presumed to be valid and controlling unless and until the party challenging it meets his or her very high burden to set it aside (*Anonymous v. Anonymous*, 123 A.D.3d 581, 582, 999 N.Y.S.2d 386 [1st Dept 2014]). Setting aside of a prenuptial agreement is "the exception rather than the rule," and the burden of establishing fraud, duress or overreaching is on the party seeking to set aside the agreement. The wife's only claim was that the agreement was manifestly unfair due to the husband's overreaching (see *Christian*, 42 N.Y.2d at 72). Although no actual fraud need be shown to set aside the agreement on this ground, the challenging party must show overreaching in the execution, such as the concealment of facts, misrepresentation, cunning, cheating, sharp practice, or some other form of deception. In addition, the challenging party must show that the overreaching resulted in terms so manifestly unfair as to warrant equity's intervention.

The Court held that judged by these standards, the wife failed to meet her heavy burden to set aside the prenuptial agreement. The wife complained that she was unaware of the husband's exact income at the time she executed the agreement. However, the mere fact that the husband did not include his income in his financial disclosure, standing alone, is not a basis to set the agreement aside (see *Strong*, 48 A.D.3d at 233, 851 N.Y.S.2d 428. There was no claim by the wife that the husband concealed or misrepresented his income. The wife lived with the husband and was aware of the luxurious lifestyle his income and assets afforded, even if the precise amount of the income was unknown to her. The substantial financial disparity between the parties was fully disclosed at the time the agreement was executed in a statement attached to the agreement. The wife, who has a degree in economics and had worked in the finance field, specifically acknowledged in the agreement that she fully understood the information provided.

There was no merit to the wife's contention that the husband's behavior during her two pregnancies warranted setting aside the agreement. According to the wife, the husband told her that he would not enter into a prenuptial agreement, and thus would not marry her, until after the birth of their first child. The wife alleged that the husband told her that he would end their relationship if she terminated her second pregnancy. The Court pointed out that it had held that similar behavior is insufficient to invalidate a prenuptial agreement. For example, it held that a threat to a pregnant woman to cancel the wedding if she refused to sign the agreement provided no basis to set the agreement aside. Likewise, it declined to invalidate a prenuptial agreement where the wife believed that there would be no wedding if she did not sign the agreement. The wife's argument that she had no meaningful choice due to the husband's actions was belied by the fact that she knowingly entered into the agreement against the advice of her counsel.

The Court noted that the wife failed to make the requisite showing that the agreement's terms were manifestly unfair. Viewing the parties' prenuptial agreement in its entirety, it could not be said that its terms were manifestly unfair. For the purpose of the decision, the Court

accepted as true the wife's description of the circumstances underlying the execution of the agreement, and conclude that her claims did not support a finding of overreaching.

The wife's description of herself as being in the "precarious position of negotiating as an unmarried mother," was at odds with the fact that she was represented by experienced matrimonial counsel who negotiated the agreement over an extended period of time. Likewise, the dissent all but ignored the fact that the wife, an educated college graduate, signed the agreement against the express advice of her own counsel. The Appellate Division held that contrary to the dissent's implication, the Court of Appeals' decision in *Christian* (42 N.Y.2d at 63) does not hold that a prenuptial agreement is manifestly unfair when it does not result in a continuation of the marital standard of living. It disagreed with the concurrence's view that because the parties were not married at the time the agreement was executed, the manifest unfairness standard set forth in *Christian* (42 N.Y.2d at 63) had no applicability here.

The Court found that the maintenance provisions here were neither unfair nor unreasonable at the time the agreement was entered into. Nor were the maintenance provisions unconscionable as applied to the present circumstances. An agreement will be viewed as unconscionable only if the inequality is so strong and manifest as to shock the conscience and confound the judgment of any person of common sense. An unconscionable agreement is one which no person in his or her senses and not under delusion would make on the one hand, and which no honest and fair person would accept on the other. Judged by these standards, no unconscionability existed.

The motion court granted the wife interim counsel fees in the amount of \$50,000. The Appellate Division rejected the husband's contention that the wife's waiver in the prenuptial agreement of interim and final counsel fees barred any fee award. Because the prenuptial agreement did not cover child-related matters, the waiver did not preclude an award of counsel fees connected to litigating the child support issues raised in the motion (see *Vinik v. Lee*, 96 A.D.3d 522, 523, 947 N.Y.S.2d 424 [1st Dept 2012]). Likewise, legal fees related to the exclusive occupancy aspect of the motion were recoverable because the heart of that dispute was the children's best interests, and the place where the children will be living, which are child-related matters. However, because it was not clear what portion of the \$50,000 sought is connected to child-related issues, the matter was remanded for further development of the record as to how much of the fee request involved those issues.

Offensive Remarks on Memo Portion of Check Violates Order of Protection Which Prohibited Any Form of Communication

In *Matter of Clovis v Clovis*, --- N.Y.S.3d ----, 2016 WL 400156 (Mem), 2016 N.Y. Slip Op. 00682 (2d Dept.,2016) the mother testified that the father violated the terms of an order of protection dated January 3, 2013, by communicating with her by mail. Specifically, instead of making his child support payments through alternate means, she alleged that the father knowingly and intentionally mailed to her seven checks for child support and that, on three of the checks, he had written offensive remarks in the memo portion. After a hearing, the Family Court stated that the memos on three checks "may be offensive" but dismissed the petition.

The Appellate Division reversed. It held that the mother established by a fair preponderance of the evidence that the father, by mailing the child support checks, three of which contained offensive comments to the mother, willfully violated the order of protection, which expressly prohibited any form of communication by the father with the mother, including the use of mail. The father admitted at the hearing that he had communicated with the mother by mail, despite being aware that the order of protection prohibited such communication.

Appellate Division, Fourth Department

Email Attached to Post-hearing Submission Is Not Competent Proof

In *Wagner v Wagner*, N.Y.S.3d ---, 2016 WL 444677, 2016 N.Y. Slip Op. 00847(4th Dept, 2016) the Appellate Division restated the general rule that expenses incurred prior to the commencement of a divorce action constitute marital debt and should be equally shared by the parties. Where, however, the indebtedness is incurred by one party for his or her exclusive benefit or in pursuit of his or her separate interests, the obligation should remain that party's separate liability. It held that the court erred in considering an email, from plaintiff to his counsel, calculating the amount of accrued interest incurred on defendant's share of the marital debt, as sufficient proof of the offset amount which resulted in defendant owing plaintiff money. Such an "unauthenticated document appended to plaintiff's post-hearing submission and not received in evidence at trial was not competent proof and, therefore, should not have been relied upon by the court.

February 1, 2016

Appellate Division, Second Department

Second Department Opinion Construes the terms "good cause" for an extension of an Order of Protection for a "reasonable period of time" in Family Court Act §842

In *Molloy v Molloy*, --- N.Y.S.3d ----, 2016 WL 229641, 2016 N.Y. Slip Op. 00366 (2d Dept.,2016) family Court found that the respondent committed family offenses and issued a two-year order of protection in favor of the petitioner and the parties' child.. As the expiration date of the order of protection approached, the petitioner moved to extend it for five years, arguing that there was "good cause" for the extension, citing Family Court Act § 842. In her supporting affidavit, the petitioner alleged that the respondent had violated the order of protection by, for example, showing up at her apartment and banging on the door, and driving his vehicle too closely to the petitioner, a wheelchair user, while she was on her way to a police station for a custody exchange. Fearing for her safety, she reported some of these incidents to the police. She alleged that he had recently been arrested for violating the

order of protection, and that the case was pending in the Criminal Court. The petitioner also claimed that the respondent's girlfriend warned her that the respondent said that when the petitioner's order of protection expired he would return to her residence, and he threatened to kill her. The petitioner also noted that because she and the respondent had a child in common they had to frequently interact regarding the child's visitation. The petitioner claimed that the respondent's conduct during the course of their interactions over the past several years had so terrified her that she carried a panic alarm whenever she left her home. She feared that once the order of protection expired the respondent would begin harassing her again and might harm or kill her. Family Court denied the petitioner's motion to extend the Family Court order of protection, holding that because the petitioner had by then already been granted a two-year order of protection in Criminal Court, the goal behind Family Court Act § 842 was accomplished and, thus, the petitioner had not demonstrated good cause to extend the order of protection.

The Appellate Division reversed. It held that the Criminal Court's issuance of an order of protection did not negate or otherwise render superfluous the petitioner's request for an extension of her Family Court order of protection. Each court has the authority to issue temporary or final orders of protection.

The Appellate Division observed that Family Court Act §842 provides, in pertinent part, that a court "may ..., upon motion, extend [an] order of protection for a reasonable period of time upon a showing of good cause or consent of the parties." The Appellate Division held that in determining whether good cause has been established, courts should consider, but are not limited by, the following factors: the nature of the relationship between the parties, taking into account their former relationship, the circumstances leading up to the entry of the initial order of protection, and the state of the relationship at the time of the request for an extension; the frequency of interaction between the parties; any subsequent instances of domestic violence or violations of the existing order of protection; and whether the current circumstances are such that concern for the safety and well-being of the petitioner is reasonable.

Here, the petitioner stated that, because they had a child in common, and the parties continued to interact. They come into contact during litigation over custody and visitation issues and when they exchange the child at the drop-off location at the police station. The respondent also had a history of assaulting the petitioner, and their on-going discord continued. There was no evidence in the record to suggest that the petitioner's more serious allegations were contrived. Since the entry of the order of protection, the respondent had pleaded guilty in the Criminal Court to disorderly conduct, and the Criminal Court has issued a two-year order of protection in favor of the petitioner. Therefore, it was clear from the record that the petitioner's fear that the respondent may stalk, harass, or attack her was well-founded, and that the unavoidable interactions between the parties may subject her to a reoccurrence of violence. Accordingly, it found that there was good cause to extend the order of protection.

The Appellate Division noted that Family Court Act § 842 grants a court the discretion to extend the order of protection for a "reasonable period of time." It was evident from the Legislature's use of the term "reasonable" that it wanted to give the courts flexibility to fashion an appropriate time period for the order of protection based on the particular

circumstances of the parties. The court held that the length of an extension should be viewed in the context of the facts of the case. Here there was a prior finding that the respondent committed family offenses against the petitioner that led to the initial order of protection. While the request for an extension of that order of protection was pending, the respondent pleaded guilty to disorderly conduct and a two-year order of protection was issued in Criminal Court in favor of the petitioner. The parties will continue to interact when exchanging the child so that the respondent may visit with him, and when litigating over custody and visitation issues. Considering these circumstances, the Appellate Division concluded that five years was a reasonable period of time to extend the order of protection.

Second Department Holds That Unacknowledged Mahr Agreement Signed by the Parties and Two Witnesses and Incorporated into Foreign Judgment of Divorce Properly Recognized under Principles of Comity, as No Strong Public Policy of New York Was Violated

In *Badawi v Badawi*, --- N.Y.S.3d ----, 2016 WL 230400, 2016 N.Y. Slip Op. (2d Dept.,2016) the parties were married in New York in a civil ceremony, and, thereafter, were married in New York in a religious ceremony under Islamic law. As part of the religious ceremony, the parties signed a mahr agreement requiring the defendant to make an advanced payment to the plaintiff in the amount of \$5,000 and, in the event of divorce, a deferred payment in the amount of \$250,000. While the parties were living in Abu Dhabi, the plaintiff sought and obtained a judgment of divorce against the defendant in the Abu Dhabi courts, which awarded the plaintiff custody of the parties' children and financial relief, including an award of \$250,000 pursuant to the mahr agreement. The plaintiff commenced an action, inter alia, for a judgment declaring that the foreign judgment of divorce was valid and enforceable in New York. Her motion to enforce the judgment of divorce and for an attorney's fee with respect to the prosecution of the motion was granted and the Appellate Division affirmed.

The Appellate Division held that although not required to do so, the courts of this State generally will accord recognition to the judgments rendered in a foreign country under the doctrine of comity which is the equivalent of full faith and credit given by the courts to judgments of our sister States". Comity should be extended to uphold the validity of a foreign divorce decree absent a showing of fraud in its procurement or that recognition of the judgment would do violence to a strong public policy of New York. In extending comity to uphold the validity of a foreign divorce decree, New York courts will generally recognize all the provisions of such decrees, including any agreement which may have been incorporated therein, unless modification is required by reason of some compelling public policy. Here, the mahr agreement, although not acknowledged in accordance with Domestic Relations Law § 236(B)(3), was signed by the parties and two witnesses, as well as the Imam of the Islamic Cultural Center of New York. It held that under the circumstances presented, Supreme Court properly recognized so much of the foreign judgment of divorce as incorporated the mahr agreement under the principles of comity, as no strong public policy of New York was violated thereby (see *Greschler v. Greschler*, 51 N.Y.2d 368; *Rabbani v. Rabbani*, 178 A.D.2d 637).

Pro Se Litigant Not entitled to Greater Rights than Litigant Represented by Counsel

In *Matter of Chana J.A. v Barry S.*, 2016 WL 143508 (2d Dept.,2016) the Appellate Division, in rejecting the fathers contentions that he was denied a fair hearing due to his status as a pro se litigant, held that a litigant does not, by appearing pro se, have any greater right than any other litigant. Moreover, a litigant may not use his or her pro se status as an excuse for depriving opposing parties of their own procedural rights (see *Mirzoeff v. Nagar*, 52 AD3d 789).

Family Court

Family Court Holds that Party is Entitled to Bill of Particulars in Family Offense Case

In *Carlos L v Sandy C.*, --- N.Y.S.3d ----, 2016 WL 300817, 2016 N.Y. Slip Op. 26019 Fam. Ct., 2016), a family offense proceeding , the Family Court granted the respondents, motion for an order compelling the petitioner, to serve a bill of particulars in response to respondent's demand. It rejected petitioner's argument that Civil Practice Law and Rules § 408 requires that leave of court be obtained prior to seeking disclosure in a family offense proceeding. Respondent served a demand for a bill of particulars concerning the family offense petition. The purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial. Under such circumstances, leave of court is unnecessary to serve a demand for a bill of particulars, regardless of whether a family offense proceeding constitutes a "special proceeding".

January 16, 2016

Appellate Division, Second Department

Petition By Non-biological Father to Vacate Acknowledgment of Attorney Dismissed Where Best Interest of Child Warrants Petitioner Be Equitably Estopped from Denying Paternity

In *Matter of Luis Hugo O. v. Paola O.*, 129 A.D.3d 976, 12 N.Y.S.3d 183, 2015 N.Y. Slip Op. 05195 (2d Dept., 2015) the Appellate Division affirmed an order which, after a hearing, dismissed the petition to vacate an acknowledgment of paternity which was executed by the

petitioner based upon a mistake of fact. It pointed out that a party seeking to challenge an acknowledgment of paternity more than 60 days after its execution must prove that it was signed by reason of fraud, duress, or material mistake of fact (Family Ct. Act § 516-a[b][ii]). If the petitioner meets this burden, the court is required to conduct a further inquiry to determine whether the petitioner should be estopped, in accordance with the child's best interests, from challenging paternity (Matter of Derrick H. v. Martha J., 82 A.D.3d 1236, 1237, 922 N.Y.S.2d 83). Family Court correctly determined, after a hearing, that the petitioner established that he executed the acknowledgment of paternity based upon a material mistake of fact. However, Family Court did not err in determining, based upon the evidence presented at the same hearing, that the best interests of the child necessitated that the petitioner be equitably estopped from denying paternity. The hearing evidence demonstrated that the petitioner lived with the child from the time of her birth in March 2005, until 2011. After the parties separated in 2011, the petitioner continued to visit with the child approximately one to two times per week. According to the petitioner, the child is free to visit with him whenever she wants. Although the child knew that the petitioner was not her biological father, she did not refer to or think of anyone else as her father. The child had a strong relationship with the petitioner and wanted to spend more time with him and his son, whom she regarded as her brother. The evidence established that, up to the time of the hearing, there had been a recognized and operative parent-child relationship between the petitioner and the child in existence all of the child's life. Therefore, the Family Court properly dismissed the petition to vacate the acknowledgment of paternity.

Appellate Division Sustains Damage Award for Breach of Stipulation Holding That When a Contract Does Not Specify Time of Performance, the Law Implies a Reasonable Time.

In *Klein v Klein*, --- N.Y.S.3d ----, 2015 WL 9486302, 2015 N.Y. Slip Op. 09652 (2d Dept., 2015) the parties' stipulations of settlement, which were incorporated into the judgment of divorce, provided that three of their timeshares would be transferred to the plaintiff after the plaintiff paid the defendant the balance of a distributive award in the amount of \$191,000. The Stipulation provided that the defendant would cooperate and sign any documents required to effectuate the transfers. The plaintiff tendered payment of the \$191,000 on July 1, 2013, and the defendant deposited it on July 2, 2013. Although the defendant had been in possession of the transfer documents since May 3, 2013, she had a dispute with the plaintiff on another issue and improperly exercised self-help by holding onto the transfer documents until that issue was resolved. As such, she did not return the transfer documents until October 2013. Since the window of opportunity for the plaintiff to sell back the timeshares to the vacation club had expired, he was forced to pay additional maintenance charges. The Appellate Division pointed out that when a contract does not specify time of performance, the law implies a reasonable time. (*Savasta v. 470 Newport Assoc.*, 82 N.Y.2d 763, 765; see *Erazo v. Cabeza*, 35 AD3d 651, 652). What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case (*Savasta v. 470 Newport Assoc.*, 82 N.Y.2d at 765). Here, in the stipulation, the parties clearly agreed that once the plaintiff paid \$191,000 as the balance of a distributive award, the obligation to effectuate the transfer of the timeshares was triggered. Under such circumstances, the Supreme Court properly awarded damages to the plaintiff as a result of the defendant's unreasonable delay in providing the executed transfer documents to the plaintiff's counsel.

To Warrant Downward Modification of Child Support Parent must Use Best Efforts to Obtain Employment Commensurate with Qualifications and Experience, or Demonstrate That Current Income Is Commensurate with Earning Capacity

In *Matter of Fanau v Fantau*, --- N.Y.S.3d ----, 2015 WL 9486095, 2015 N.Y. Slip Op. 09682 (2d Dept., 2015) the Appellate Division affirmed an order which denied the fathers application for a downward modification of child support. It pointed out that a reduction in income is not considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience. The record supported the Family Court's determination that the father "failed to establish that he used his best efforts to obtain employment which was commensurate with his qualifications and experience, or that his current income was commensurate with his earning capacity so as to warrant a downward modification of his child support obligation." It noted that the father failed to submit evidence such as résumés that he had sent to potential employers, or proof that he had been on any interviews in search of employment commensurate with his education, ability, and experience.

Appellate Division, Third Department

Third Department Holds That That "Nondisclosure Is Not the Equivalent of Fraud" in Upholding Stipulation of Settlement

In *Fermon v Fermon*, 2016 WL 71243 (3d Dept.,2016) the judgment of divorce which incorporated the stipulation of settlement that not merged with the judgment provided, inter alia, for no payments of basic child support and directed the husband to transfer a portion of his individual retirement account to the wife.

The Appellate Division found that the terms of the stipulation regarding basic child support were unfair when they were entered into, as they were premised upon the husbands fraudulent misrepresentation that his annual income was \$136,106 when, as the wife belatedly discovered, he had accepted a position that paid \$170,000 a year plus bonuses. Supreme Court therefore acted appropriately in modifying the award of child support.

The Appellate Division agreed with the husband that Supreme Court erred in modifying the agreed-upon division of assets in his individual retirement account. The parties agreed to distribute the husband's individual retirement account based upon its December 2011 value, the point at which the most recent account statement had been issued. The account had grown considerably by the time the stipulation was executed in March 2012, but the husband admittedly made no effort to learn the value of the account at that time and did not know that the appreciation had occurred. It is well settled "that nondisclosure is not the equivalent of fraud" and, given that the wife acknowledged in the stipulation that she did not require further information from the husband in order to knowingly proceed, Supreme Court erred in setting aside that part of the stipulation dealing with equitable distribution of the husband's individual retirement account.

January 1, 2016

Recent Legislation

Laws of 2015, Chapter 567 (effective June 18, 2016)

Domestic Relations Law§ 240, subdivision 1 (a) was amended and subdivision (c-1) was added to Family Court Act § 651 (c-1). The purpose of the legislation was to underscore that custody standards apply in cases where custody and visitation petitions brought under these sections are heard jointly with child protective dispositional or permanency hearings in Family Court under Article 10 or 10-A of the Family Court Act.

The following provision was inserted into Domestic Relations Law§ 240 subdivision 1 (a):

Where a proceeding filed pursuant to article ten or ten-A of the family court act is pending at the same time as a proceeding brought in the supreme court involving the custody of, or right to visitation with, any child of a marriage, the court presiding over the proceeding under article ten or ten-A of the family court act may jointly hear the dispositional hearing on the petition under article ten or the permanency hearing under article ten-A of the family court act and, upon referral from the supreme court, the hearing to resolve the matter of custody or visitation in the proceeding pending in the supreme court; provided however, the court must determine custody or visitation in accordance with the terms of this section.

The following provision was added to Family Court Act §651:

(c-1) Where a proceeding filed pursuant to article ten or ten-A of this act is pending at the same time as a proceeding brought in the family court pursuant to this article, the court presiding over the proceeding under article ten or ten-A of this act may jointly hear the hearing on the custody and visitation petition under this article and the dispositional hearing on the petition under article ten or the permanency hearing under article ten-A of this act; provided, however, the court must determine the custody and visitation petition in accordance with the terms of this article.

Laws of 2015, Ch 447

Laws of 2015, Ch 447 amended Domestic Relations Law §237 (a) effective November 20, 2015, and applicable to all actions whenever commenced, to provide that an unrepresented litigant shall not be required to file an affidavit detailing fee arrangements when making an application for an award of counsel fees and expenses. However, as a condition precedent to not being required to file such affidavit the unrepresented litigant must have

submitted an affidavit that he or she is unable to afford counsel with supporting proof, including a statement of net worth, and, if available, W-2 statements and income tax returns for himself or herself.

According to the New York Assembly Memorandum in Support of the Legislation the purpose of the amendment was "to make clear that indigent pro se litigants may make an application for an award of fees necessary to obtain counsel without the formal requirement of an affidavit detailing fee arrangements with counsel, provided proof has been submitted of an inability to afford counsel."

Laws of 2015, Ch 387, approved October 26, 2015, effective January 24, 2016.

The statutory provisions for child support have been amended to reflect the fact that spousal maintenance is money no longer available as income to the payor, but constitutes income to the payee, so long as the order or agreement for such maintenance lasts.

Domestic Relations Law § 240(1-b)(5)(iii) and Family Court Act § 413(1)(b)(5)(iii) were amended to add a new subclause (l) to each that requires that alimony or spousal maintenance actually paid to a spouse who is a party to the action must be added to the recipient spouse's income, provided that the order contains an automatic adjustment to take effect upon the termination of the maintenance award. According to the New York Assembly Memorandum in Support of Legislation this addition would be based upon an amount already paid, e.g., an amount reported on the recipient spouse's last income tax return, and would not simply be an estimate of future payments.

Domestic Relations Law § 240(1-b)(5)(vii)(C) and Family Court Act § 413(1)(b)(5)(vii)(C) were amended to clarify that, where spousal maintenance payments are deducted from the payor's income, the order must contain a specific provision adjusting the child support amount automatically upon the termination of the spousal maintenance award. According to the New York Assembly Memorandum in Support of Legislation this relieves the custodial parent of the burden of moving for a modification of the child support order upon the termination of maintenance but leaves open the possibility for either or both parties to seek a modification of the automatic adjustment if, at the point where maintenance terminates, the income of either of the parties has changed in an amount that would qualify for modification under Family Court Act § 451(3)(b)(ii) or Domestic Relations Law § 236B(9)(b)(2)(ii), e.g., in excess of 15% or a lapse of three years or more. The specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with Family Court Act § 451(3) or Domestic Relations Law § 236B(9)(b)(2) with the proviso that in a subsequent action for modification, the inclusion of the specific adjustment shall not by itself constitute a "substantial change of circumstances."

Laws of 2015, Ch 347, § 1 amended Social Services Law § 111-i to align the timing of the adjustment of the Combined Parental Income Adjustment with the adjustment of the poverty income guidelines amount for a single person and the self-support reserve.

Court of Appeals

Court of Appeals, in Opinion by Judge Leslie Stein, Explains Meaning of Extended Disruption of Custody in Domestic Relations Law § 72 (2)

In *Suarez v Williams*, --- N.E.3d ----, 2015 WL 8788195 (N.Y.), 2015 N.Y. Slip Op. 09231, the Court of Appeals, in an opinion by Judge Leslie Stein, held that grandparents may demonstrate standing to seek custody, pursuant to Domestic Relations Law § 72 (2) and the Court's decision in *Matter of Bennett v Jeffreys* (40 NY2d 543 [1976]) based on extraordinary circumstances where the child has lived with the grandparents for a prolonged period of time, even if the child had contact with, and spent time with, a parent while the child lived with the grandparents. In addition, a parent need not relinquish all care and control of the child. Even if the parent exercises some control over the child, for example during visitation, a parent may still, as a general matter, have voluntarily relinquished care and control of the child to the grandparent to the extent that the grandparent is, in essence, acting as a parent with primary physical custody.

The child (born 2002) lived with his paternal grandparents, beginning when he was less than 10 days old and continuing until he was almost 10 years old. The child's father moved out of state in 2004 and has had visitation since then. The child's mother lived approximately 12 miles from the grandparents for the child's first few years, until the grandparents moved the mother into a trailer they purchased, in a trailer park across the street from their residence. In 2006 proceeding the child's parents obtained a consent order awarding the parents joint legal custody, with primary physical custody to the mother, but the child continued to reside with the grandparents. In 2006, the grandparents moved to an adjoining county and in 2008 the grandparents again helped her move closer to them. The grandparents kept the mother informed of the child's activities almost daily. The mother saw the child regularly including, at times, weekly overnight visits and vacations. In 2012 she refused to return the child to the grandparents after a visit, relying on the 2006 custody order granting her primary physical custody. At that time, the mother told the grandparents that they had the child for many years, it was her "turn now," and they could no longer see him. As a result, the grandparents commenced a proceeding seeking primary physical custody of the child. Following a 10-day hearing, Family Court found that there had been an extended disruption of custody between the mother and the child, and that the mother voluntarily relinquished care and control of him to the grandparents -- through three written documents and through her behavior -- and concluded that this amounted to extraordinary circumstances. The court then considered the child's best interest and granted joint custody to the grandparents and the father, with primary physical custody to the grandparents and visitation to each parent. The Appellate Division reversed and dismissed the grandparents' petition (128 AD3d 20 [4th Dept 2015]). The Court held that the grandparents failed to demonstrate extraordinary circumstances, in light of the mother's presence in the child's life, even though he was primarily living with the grandparents. The Court concluded that the grandparents lacked standing to seek custody and dismissed their petition.

Judge Stein observed that in *Matter of Bennett v Jeffreys*, the Court created a two-prong inquiry for determining whether a nonparent may obtain custody as against a parent (see 40 NY2d at 546-548). First, the nonparent must prove the existence of "extraordinary circumstances" such as "surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time, "or other like extraordinary circumstances". Second, if extraordinary circumstances are established such that the nonparent has standing to seek custody, the court must make an award of

custody based on the best interest of the child. Consistent with that case, Domestic Relations Law § 72 (2) contains a specific example of extraordinary circumstances. That subdivision provides that “[w]here a grandparent . . . of a minor child . . . can demonstrate to the satisfaction of the court the existence of extraordinary circumstances, such grandparent . . . may apply to family court [for custody],” and the court “may make such directions as the best interests of the child may require, for custody rights for such grandparent . . . in respect to such child. An extended disruption of custody, as such term is defined in this section, shall constitute an extraordinary circumstance”. The statute then defines “extended disruption of custody” to “include, but not be limited to, a prolonged separation of the respondent parent and the child for at least [24] 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, provided, however, that the court may find that extraordinary circumstances exist should the prolonged separation have lasted for less than [24] months”.

Judge Stein noted that Domestic Relations Law § 72 (2) sets forth three “elements” required to demonstrate the extraordinary circumstance of an “extended disruption of custody,” specifically: (1) a 24-month separation of the parent and child, which is identified as “prolonged,” (2) the parent’s voluntary relinquishment of care and control of the child during such period, and (3) the residence of the child in the grandparents’ household. Only the first two elements were seriously in dispute here. She rejected the mothers argument that the separation of the parent and child must be nearly complete and that the parent must relinquish all care and control, with little or no contact between the parent and child, in order for the first two elements to be established. The Court found that a lack of contact is not a separate element under the statute. The quality and quantity of contact between the parent and child are simply factors to be considered in the context of the totality of the circumstances when determining whether the parent voluntarily relinquished care and control of the child, and whether the child actually resided with the grandparents for the required “prolonged” period of time. It would be illogical to construe the statute to mean that, in order to establish an extended disruption of custody, the grandparent must demonstrate that the parent had no contact with the child for 24 months. If that were the case, the statute would be superfluous or redundant of the extraordinary circumstances specifically enumerated in Matter of Bennett v Jeffreys. The Court held that to give meaning to the separate statutory avenue of establishing standing, Domestic Relations Law § 72 (2) must be available for a grandparent even if the parent has had some contact with the child during the requisite 24-month period. While courts must determine on a case-by-case basis whether the level of contact between the parent and child precludes a finding of extraordinary circumstances, it is sufficient to show that the parent has permitted an “extended disruption of custody” (Domestic Relations Law § 72 [2] [a]).

The Court held that for essentially the same reasons, a parent need not relinquish all care and control of the child. Even if the parent exercises some control over the child, for example during visitation, a parent may still, as a general matter, have voluntarily relinquished care and control of the child to the grandparent to the extent that the grandparent is, in essence, acting as a parent with primary physical custody. The key is whether the parent makes important decisions affecting the child’s life, as opposed to merely providing routine care on visits.

Here, the evidence comported with Family Court’s finding that the mother voluntarily relinquished care and control of the child for more than 24 months, even though she had regular contact and visitation with him . The mother allowed the

grandparents to assume control over, and responsibility for the care of, the child while he resided with them for a prolonged period of years, during which she assumed the role of a noncustodial parent in virtually every way. The grandparents established their standing to seek custody of the child by demonstrating extraordinary circumstances, namely an extended disruption of the mother's custody. The Appellate Division order was reversed and the matter remitted to that court for further proceedings.

Appellate Division, Second Department

Where Attorney's Services Do Not Create Any Proceeds, but Consist Solely of Defending a Title or Interest Already Held by the Client, There Is No Lien on That Title or Interest

In *Charnow v Charnow*, --- N.Y.S.3d ----, 2015 WL 8828877, 2015 N.Y. Slip Op. 09241 (2d Dept., 2015) the nonparty McCarthy Fingar LLP represented the plaintiff during divorce proceedings that were eventually resolved by a stipulation of settlement and subsequent judgment of divorce. Pursuant to the terms of the settlement and the judgment, the defendant was to pay \$150,000 directly to McCarthy Fingar to cover the plaintiff's legal fees. When the defendant failed to make the payments, McCarthy Fingar moved to enforce a charging lien against the plaintiff's one-half share of the net proceeds from the future sale of the marital residence. The Supreme Court denied the motion on the ground that under the terms of the settlement agreement, McCarthy Fingar's sole recourse was to look to the defendant for payment. The Appellate Division affirmed for a different reason. It observed that in a matrimonial action, a charging lien will be available to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interests already held by the client (*Moody v. Sorokina*, 50 AD3d 1522, 1523). However, where the attorney's services do not create any proceeds, but consist solely of defending a title or interest already held by the client, there is no lien on that title or interest. (*Theroux v. Theroux*, 145 A.D.2d 625, 627-628). The plaintiff and the defendant already owned the marital residence jointly as tenants by the entirety. Thus, the parties' settlement agreement merely permitted the plaintiff to retain her existing interest in the marital residence. Although the nature of the property was converted from realty into dollars, her interest remained the same. Thus, no equitable distribution fund to which a charging lien could attach was created by the efforts of the plaintiff's attorney.

Supreme Court

Supreme Court Holds That There Should Be a Presumption in Favor of Release of Entire Contents of the Court-appointed Forensic Evaluator's File

In *K. C. v. J. C.*, --- N.Y.S.3d ----, 2015 WL 9261184, 2015 N.Y. Slip Op. 25421 (Sup. Ct., 2015) the Plaintiff moved, inter alia, for the release to her counsel and retained expert of the entire contents of the Court-appointed forensic evaluator's file, including the notes, test results and raw data used to prepare his report. Defendant objected to the release of the file, contending that Plaintiff had not demonstrated any special circumstances that warrant its release. Supreme Court noted that the Appellate Division had yet to examine this particular issue. It surveyed the case law in this area, including *Feuerman v. Feuerman*, 112 Misc.2d 961 [Sup Ct, Nassau County 1982]; *Ochs v. Ochs*, 193 Misc.2d 502 [Sup Ct, Westchester County 2002]; *CP v. AP*, 32 Misc.3d 1210(A) [Sup Ct, New York

County 2011]; *R.L. v. L.T.*, 3406–12, NYLJ 1202672096267 [Sup Ct, Westchester County 2014]; *S.C. v. H.B.*, 9 Misc.3d 1110(A) [Family Ct, Rockland County 2005] all of which denied such request and *J.F.D. v. J.D.*, 45 Misc.3d 1212(A) [Sup Ct, Nassau County 2014], which adopted the recommendation of Bill A8342–2013,5 which proposed amending Domestic Relations Law §§ 70 and 240 to allow disclosure, pursuant to a demand made under CPLR § 3120, of a forensic evaluator’s entire file, including raw data, notes, tests and test results. The Court found no reasonable justification to withhold such critical information from counsel and the parties. It adopted the rebuttable presumption standard in favor of full disclosure of the neutral forensic evaluator’s entire file. The Court held that the neutral forensic evaluator’s file would be made available to the parties and counsel in the same manner in which they are provided access to a forensic report. It directed the forensic evaluator to provide the Court with a copy of the entire contents of his file and copies for all counsel, and required all counsel to execute a confidentiality affidavit that they could only show it to their clients (only in counsel’s office), allow the client to take notes, but not pictures or copies of any kind, for purposes of assisting with trial preparation. It directed that Counsel may provide a copy of the file to an expert privately retained by them to review and assess the forensic evaluator’s report, who shall execute a confidentiality affidavit similar to the one executed by counsel, prior to receipt of the forensic evaluator’s file.

Family Court

Family Court Holds Cplr 3126 Remedies Not Available in a Child Support Proceeding for Failure to Comply with Family Court Act §424-a

In *Matter of Yemi O. v Amanda Q.*, 2015 WL 9241477 (Fam. Ct., 2015) the Support Magistrate denied the mother’s request for yet another adjournment of the hearing and dismissed the mother’s application for child support for failure to comply with Family Court Act §424-a which required her, as the custodial parent to submit her most recently filed income tax returns and her W-2 wage and tax statements for 2014. The Court observed that § 424–a (a) requires the filing of such documents and that subdivision (c) provides that when a petitioner other than a social services official fails, without good cause, to file a sworn statement of net worth, a current and representative paycheck stub and the most recently filed state and federal income tax returns, as provided in subdivision (a), the court may on its own motion or on application of any party adjourn the proceeding until such time as the petitioner files with the court such statements and tax returns. The Court held that the remedies in Civil Practice Law and Rules § 3126 are not available in a child support proceeding where the petitioner or custodial parent seeking support fails to comply with the statutory directive that there be compulsory financial disclosure by both parties. The only remedy afforded for the custodial parent’s failure to comply with the disclosure requirements of Family Court Act § 424–a, is the adjournment of the proceeding until such time as that parent has complied with that section or with court orders which direct disclosure (Fam. Ct. Act § 424–a [c]). Dismissal of the application for child support is not authorized by Family Court Act § 424–a (*Matter of Malcolm v. Trupiano*, 94 AD3d 1380, 1381 [2012]). It held that the Support Magistrate’s dismissal of the custodial parent’s application for child support was erroneous.

December 31, 2015

New Legislation Amending Domestic Relations Law and Family Court Act

Laws of 2015, Chapter 567 (effective June 18, 2016)

Domestic Relations Law § 240, subdivision 1 (a) was amended and subdivision (c-1) was added to Family Court Act § 651 (c-1). The purpose of the legislation was to underscore that custody standards apply in cases where custody and visitation petitions brought under these sections are heard jointly with child protective dispositional or permanency hearings in Family Court under Article 10 or 10-A of the Family Court Act.

The following provision was inserted into Domestic Relations Law § 240 subdivision 1 (a):

Where a proceeding filed pursuant to article ten or ten-A of the family court act is pending at the same time as a proceeding brought in the supreme court involving the custody of, or right to visitation with, any child of a marriage, the court presiding over the proceeding under article ten or ten-A of the family court act may jointly hear the dispositional hearing on the petition under article ten or the permanency hearing under article ten-A of the family court act and, upon referral from the supreme court, the hearing to resolve the matter of custody or visitation in the proceeding pending in the supreme court; provided however, the court must determine custody or visitation in accordance with the terms of this section.

The following provision was added to Family Court Act §651:

(c-1) Where a proceeding filed pursuant to article ten or ten-A of this act is pending at the same time as a proceeding brought in the family court pursuant to this article, the court presiding over the proceeding under article ten or ten-A of this act may jointly hear the hearing on the custody and visitation petition under this article and the dispositional hearing on the petition under article ten or the permanency hearing under article ten-A of this act; provided, however, the court must determine the custody and visitation petition in accordance with the terms of this article.

Laws of 2015, Ch 447

Laws of 2015, Ch 447 amended Domestic Relations Law §237 (a) effective November 20, 2015, and applicable to all actions whenever commenced, to provide that an unrepresented litigant shall not be required to file an affidavit detailing fee arrangements when making an application for an award of counsel fees and expenses. However, as a condition precedent to not being required to file such affidavit the unrepresented litigant must have submitted an affidavit that he or she is unable to afford counsel with supporting proof, including a statement of net worth, and, if available, W-2 statements and income tax returns for himself or herself.

According to the New York Assembly Memorandum in Support of the Legislation the purpose of the amendment was “to make clear that indigent pro se litigants may make an

application for an award of fees necessary to obtain counsel without the formal requirement of an affidavit detailing fee arrangements with counsel, provided proof has been submitted of an inability to afford counsel.”

Laws of 2015, Ch 387, approved October 26, 2015, effective January 24, 2016.

The statutory provisions for child support have been amended to reflect the fact that spousal maintenance is money no longer available as income to the payor, but constitutes income to the payee, so long as the order or agreement for such maintenance lasts.

Domestic Relations Law § 240(1-b)(5)(iii) and Family Court Act § 413(1)(b)(5)(iii) were amended to add a new subclause (l) to each that requires that alimony or spousal maintenance actually paid to a spouse who is a party to the action must be added to the recipient spouse's income, provided that the order contains an automatic adjustment to take effect upon the termination of the maintenance award. According to the New York Assembly Memorandum in Support of Legislation this addition would be based upon an amount already paid, e.g., an amount reported on the recipient spouse's last income tax return, and would not simply be an estimate of future payments.

Domestic Relations Law § 240(1-b)(5)(vii)(C) and Family Court Act § 413(1)(b)(5)(vii)(C) were amended to clarify that, where spousal maintenance payments are deducted from the payor's income, the order must contain a specific provision adjusting the child support amount automatically upon the termination of the spousal maintenance award. According to the New York Assembly Memorandum in Support of Legislation this relieves the custodial parent of the burden of moving for a modification of the child support order upon the termination of maintenance but leaves open the possibility for either or both parties to seek a modification of the automatic adjustment if, at the point where maintenance terminates, the income of either of the parties has changed in an amount that would qualify for modification under Family Court Act § 451(3)(b)(ii) or Domestic Relations Law § 236B(9)(b)(2)(ii), e.g., in excess of 15% or a lapse of three years or more. The specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with Family Court Act § 451(3) or Domestic Relations Law § 236B(9)(b)(2) with the proviso that in a subsequent action for modification, the inclusion of the specific adjustment shall not by itself constitute a "substantial change of circumstances."

Laws of 2015, Ch 347, § 1 amended Social Services Law § 111-i to align the timing of the adjustment of the Combined Parental Income Adjustment with the adjustment of the poverty income guidelines amount for a single person and the self-support reserve.

Laws of 2015, Ch 369

Laws of 2015, Ch 369, § 2 repealed Article 5-B of the Family Court Act and enacted the 2008 version of the Uniform Interstate Family Support Act (UIFSA) as a new Article 5-B of the Family Court Act. Chapter 369 was signed into law on September 25, 2015. Section 1 is effective on December 24, 2015. New Article 5-B to the Family Court Act applies to any action or proceeding filed or order issued on or before the effective date of new Article 5-B, consistent with new section 580-903 of the Family Court Act which shall be effective on January 1, 2016.

Laws of 2015, Ch 269

Laws of 2015, Ch 269 amended Domestic Relations Law §236 [B][1][a], Domestic Relations Law §236 [B][5][d][7], Domestic Relations Law §236 [B][6], Domestic Relations Law § 248, Domestic Relations Law §236 [B][9][1], Family Court Act § 412, effective January 23, 2016, and amended Domestic Relations Law § 236 [B][5-a], effective October 25, 2015.

December 16, 2015

Appellate Division, First Department

Not Abuse of Discretion to Allow Counsel Fee to Attorney for Children Who Sent One Bill to Parents after 14 Months of Representation . He Was Entitled to Compensation “even in the Absence of Perfect Compliance with 22 NYCRR 1400.2.”

In *Matter of Donna Marie C. v Kuni C.*, --- N.Y.S.3d ----, 2015 WL 7766799, 2015 N.Y. Slip Op. 08907 (1st Dept., 2015) the the mother filed a petition in Family Court seeking custody of the parties’ children and the Family Court referee appointed an attorney for the children. In its October 4, 2012 order of appointment, the court directed that each parent pay attorney O’Hern an initial sum of \$3,750, against which his hourly fee of \$300 would be deducted. The court also ordered, based upon the parties’ initial financial disclosures, that the children’s legal fees would be paid equally, 50% by the father and 50% by the mother. Although the order of appointment directed the initial sum be paid within 10 days, it did not direct periodic billing. After the parties settled their custody dispute O’Hern sent the parties an itemized invoice for the 14 month period that he had represented the children. The bill was for a total of 54 hours, at his court-set hourly rate of \$300. Applying credits for the payments that each parent had already made, the father’s share of the bill was \$9,840.00. He refused to pay and O’Hern moved to enforce payment. After conducting a testimonial hearing, Family Court held that O’Hern was entitled to collect the full amount he billed the father for legal services on the children’s behalf. The Appellate Division affirmed rejecting the claim that no legal fees are warranted because the attorney for the children was biased against him and otherwise did not comply with billing and other requirements of the Court Rules (22 NYCRR 1400.2). It did not believe it was an abuse of discretion for the Family Court to conclude that O’Hern was entitled to compensation for the reasonable value of his services, even in the absence of perfect compliance with 22 NYCRR 1400.2 (see *Moyal v. Moyal*, 85 A.D.3d 614, 927 N.Y.S.2d 19 [1st Dept 2011]). Although there was only one itemized bill, and not one bill sent every 60 days, the court not only set the hourly amount that could be charged, it also conducted a testimonial hearing concerning the reasonableness of the fees. The same referee presided over the matter for its duration, thereby giving the fees that were ultimately awarded the high level of scrutiny required. It declined to disturb that award. The Court noted in a footnote that it was not argued and not decided “whether, and if so, how and to what extent 22 NYCRR 1400.2 applies to a privately paid Attorney for the Child appointed pursuant to court order.”

In a footnote the Court pointed out that the form order utilized by the Unified Court System for privately paid “law guardians” (Order Appointing Law Guardian–UCS 880), contains the following decretal language: “ORDERED that no less often than every 60 days from the date of this order of appointment the Law Guardian shall send to counsel for the parties bills for compensation and the reimbursement of disbursements.” Family Court used an abbreviated version of this order which did not contain this particular language. It also pointed out in another footnote:

Authors Comment: This decision appears to apply a different standard for compliance with 22 NYCRR 1400.2 by the attorney for the children, than that applicable to other attorneys, permitting him to recover legal fees, although he did not send the parties one bill during the course of his 14 month representation of the children. The Appellate Division describe this as ‘the absence of perfect compliance.

Family Court Lacks Authority to Invalidate a Stipulation

In re *Georgette D. v. Gary N. R.*, --- N.Y.S.3d ----, 2015 WL 7726357, 2015 N.Y. Slip Op. (1st Dept.,2015) the Support Magistrate denied respondent’s objections to an order denying his motion to dismiss the petition for upward modification of his child support obligation, and directing a de novo hearing on the issue of child support. Although Respondent’s objections to the order were untimely (Family Court Act § 439[e]), and he failed to proffer a reasonable excuse for the delay, the Appellate Division exercised its discretion to entertain the appeal (see Family Court Act § 1112), since it concerned Family Court’s subject matter jurisdiction.

The Appellate Division held that although the Support Magistrate stated that she was not “invalidating” the child support provision of the parties’ stipulation, which was incorporated but not merged into the judgment of divorce, her sua sponte determination that the stipulation’s noncompliance with the requirements of the Child Support Standards Act provided a basis for a de novo hearing on child support was tantamount to invalidating the stipulation, which is beyond the power of Family Court. (Family Court Act § 461). It vacated the direction for a hearing.

Appellate Division affirms order Denying Mothers Application to Relocate from East Hampton to West Hampton Beach, a Distance of about 32 miles.

In *Quinn v Quinn*, --- N.Y.S.3d ----, 2015 WL 7739666, 2015 N.Y. Slip Op. 08818 (2d Dept.,2015) the Appellate Division affirmed an order which granted the father’s motion to enjoin the mother from relocating with the parties’ children from the former marital residence in East Hampton to Westhampton Beach, New York. The parties agreement which was incorporated into the judgment of divorce provided for joint custody, with the mother to have residential custody of the children, subject to a schedule of joint parenting. That schedule gave the father visitation from 4:00 p.m. to 6:00 p.m. on Mondays, Tuesdays, and Thursdays, from 4:00 p.m. to 7:30 p.m. on Wednesdays, and on alternate weekends.

The father testified at the hearing on his motion that he normally worked from 8:00 a.m. until 4:00 p.m. on weekdays. He testified that it usually took him about five minutes after finishing work to drive to the former marital residence in East Hampton to pick up the children for visitation. He further testified that, on the night of August 24, 2013, he received an email from the mother stating that she and the children had moved from East Hampton to Westhampton Beach—a distance of about 32 miles. He testified that it takes him 50 minutes to drive from his home in East Hampton to the mother's new home in Westhampton Beach. The mother testified that she moved because she had voluntarily changed jobs from a bank located in Bridgehampton to a bank located in Medford, and that the move cut 30 minutes off her new commute in each direction. She testified that her total compensation at the new job was comparable to her total compensation at her old job. She further testified that she moved to be closer to her parents in Riverhead. She testified that the children saw her parents about twice a month when they lived in the former marital residence in East Hampton, and about once a week after the move to Westhampton Beach. The Appellate Division found that the mother's move from East Hampton to Westhampton Beach significantly limited the father's contact with the children. By lengthening the father's commute from a few minutes to almost an hour, the move effectively cut the father's weekday visitation in half. The mother also failed to demonstrate, by a preponderance of the evidence, that the children's lives would be enhanced economically, emotionally, or educationally by the move. Thus, the Supreme Court properly granted the father's motion.

Appellate Division, Third Department

Third Department Holds That While it Has Not Proscribed Averaging Competing Appraisals in Valuing a Marital Asset, it Is Improper to Mechanically Average Values Set Forth in Competing Appraisals Without Articulating a Reason for Doing So.

In *Robinson v Robinson*, 2015 WL 7460002 (3d Dept.,2015) the Appellate Division held that Supreme Court erred in determining the amount of the marital home's appreciation. The parties submitted competing appraisals valuing the property both on the date of the marriage and the date of commencement of this action. In determining the appreciation, Supreme Court averaged the values set forth in the parties' respective date of marriage appraisals, averaged the values set forth in their date of commencement appraisals, and then subtracted the former figure from the latter. While the Court had declined to impose an absolute proscription against the procedure of averaging competing appraisals in valuing a marital asset (see *Hoyt v. Hoyt*, 166 A.D.2d 800, 802 [1990]), blindly employing such a technique without articulating a reason for doing so cannot be condoned. Mechanically averaging values set forth in competing appraisals may well result in a speculative valuation that is not founded in economic reality. Supreme Court failed to set forth any reason for rejecting the valuations advanced by the parties' appraisers. Indeed, the court's decision to average the appraisals was particularly problematic given the circumstances present here. The wife's date of marriage appraisal valued the marital home at \$36,000 based on her representations that the substantial improvements at issue were performed during the marriage, while the husband's appraisal valued it at \$140,000 based upon his representations that such improvements were performed prior to the marriage.¹

Thus, the determination as to the value of the marital home on the date of the marriage necessarily hinged upon the resolution of factual disputes and issues of credibility, which could not be accomplished by simply averaging the parties' wildly divergent appraisals.

Third Department Holds That Generally, the Custodial Parent for Purposes of Child Support Is the Parent Who Has Physical Custody of a Child for the Majority of the Time "Based upon the Reality of the Situation."

In *Matter of Mitchell v Mitchell*, 2015 WL 7762137 (3d Dept, 2015) the parties' agreement which was incorporated but not merged into the December 2005 judgment of divorce provided that the parties shared legal and physical custody and virtually equal parenting time. In May 2007, the parties agreed to an order that provided that the child would be with the father, who worked for the school district, during scheduled school holidays, provided that the mother did not also have the day off. In September 2013, the father commenced a proceeding seeking a modification of child support claiming that because his parenting time had increased, he had become the child's primary physical custodian. The Appellate Division rejected his argument that the mother should be directed to pay child support to him because he was the custodial parent or that his child support obligation should be reduced based on the expenses resulting from the increased parenting time. Generally, the custodial parent for purposes of child support is the parent who has physical custody of a child for the majority of the time "based upon the reality of the situation." If the parenting time is shared equally, then the parent with greater income is deemed to be the noncustodial parent for purposes of calculating child support. During the school year, the child spent an equal number of overnights at each party's home and, during the summer months, the child was with the mother eight nights and the father six nights. Consequently, Family Court properly determined that because the parents' have "close to equally shared physical custody," the father, as the more monied spouse, was the noncustodial parent. It rejected the father's argument that he had physical custody of the child a majority of the time because, pursuant to the 2007 order, the child was with him eight full days, six nights and two half days during any 14-day period in the summer months. The flaw in this argument is that "shared" custody need not be "equal". With the exception of the days during the summer weeks when the mother was unavailable and the father was available to exercise parenting time, the custodial schedule was unchanged, and the Court declined to accord greater weight to the custodial days as compared to the overnight custodial period. Based on the "reality of the situation" (*Riemersma v. Riemersma*, 84 AD3d at 1476), there was no error in Family Court's determination that the parties shared "close to equally shared physical custody of the child."

The Appellate Division rejected the father's argument that because he had "significant expenses during his extensive visitation" with the child, the strict application of the CSSA leads to an unjust or inappropriate result. The father claimed that his grocery bill was higher, that he purchased clothes for the child, that he had to transport the child to more social activities and that he paid for two camps for the child. The Appellate Division pointed out that it had consistently held that "[t]he costs of providing suitable housing, clothing and food for [a child] during custodial periods do not qualify as extraordinary expenses so as to justify a deviation from the presumptive amount."

December 1, 2015

Domestic Relations Law §237 (a) Amended effective November 20, 2015

Laws of 2015, Ch 447 amended Domestic Relations Law §237 (a) effective November 20, 2015, and applicable to all actions whenever commenced. The amendment added the following sentence to subdivision (a): “An unrepresented litigant shall not be required to file such an affidavit detailing fee arrangements when making an application for an award of counsel fees and expenses; provided he or she has submitted an affidavit that he or she is unable to afford counsel with supporting proof, including a statement of net worth, and, if available, W-2 statements and income tax returns for himself or herself.” In order for the unrepresented litigant to avoid the requirement that he or she file an affidavit detailing his or her fee arrangements with his or her attorney, the unrepresented individual must serve and file an affidavit that he or she is unable to afford counsel with supporting proof, including a statement of net worth, and, if available, W-2 statements and income tax returns for himself or herself.

According to the New York Assembly Memorandum in Support of the Legislation the purpose of the amendment was “to make clear that indigent pro se litigants may make an application for an award of fees necessary to obtain counsel without the formal requirement of an affidavit detailing fee arrangements with counsel, provided proof has been submitted of an inability to afford counsel.”

Prior to the amendment, if a litigant did not have an attorney he was not required to file an affidavit with the court “detailing the financial agreement between the party and the attorney”, as provided in the previous sentence of Domestic Relations Law §237 (a). Both before and after the amendment the unrepresented litigant, seeking a counsel fee award to hire an attorney, was and still is required to comply with 22 NYCRR 202.16 (k). It requires an applicant for counsel fees to file a statement of net worth, and if available, W-2 statements and income tax returns for himself or herself. For that reason this amendment to Domestic Relations Law §237 (a) makes no sense.

No corresponding amendment was made to Domestic Relations Law §237 (b) which applies to any application to enforce, annul or modify an order or judgment for alimony, maintenance, distributive award, distribution of marital property or for custody, visitation, or maintenance of a child, made, or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child.

Appellate Division, First Department

Wife Properly Denied Maintenance Award Where She Was Guilty of Egregious Economic Fault in Claiming to Have Given Away and Jewelry Property Worth over \$10 Million
In *Stewart v Stewart*, --- N.Y.S.3d ----, 2015 WL 7202221, 2015 N.Y. Slip Op. 08348 (1st Dept., 2015) the Appellate Division observed the plaintiff was guilty of egregious economic fault in claiming to have given away jewelry and property worth over \$10 million, failing to disclose her offshore and foreign accounts, and secreting millions more in

assets. If found no error in the award to plaintiff of \$4,207,775 in Agravina stock because the shares' value was established when the parties agreed to adopt their son-in-law's valuation of the shares. The award to plaintiff of jewelry valued at \$8,520,000 was properly based on a jewelry appraisal based on a "hypothetical fair market valuation." It held that Plaintiff could not complain about this valuation method, since she secreted the very jewelry she complained was missing from the valuation.

The Appellate Division held that the court's denial of a maintenance award to plaintiff was supported by the record and was a provident exercise of its discretion as the court considered the relevant factors in Domestic Relations Law § 236[B][6][a], including the marital standard of living, the length of the marriage and age of the parties, that plaintiff would continue to receive substantial income from her ownership interest in Agravina and from the parties' Income Trust, that she was to receive millions of dollars of assets in equitable distribution, and that she had secreted millions more in marital assets.

Appellate Division, Second Department

Exclusive Occupancy Pendente Lite affirmed on appeal where Husband Established Alternative Residence

In *Amato v Amato*, --- N.Y.S.3d ----, 2015 WL 7270773, 2015 N.Y. Slip Op. 08372 (2d Dept.,2015) the Appellate Division observed that courts are statutorily empowered to award one spouse temporary exclusive use and occupancy of the marital residence during the pendency of divorce proceedings (see Domestic Relations Law § 234). Such an order is appropriate only upon a showing that the relief is necessary to protect the safety of persons or property, or one spouse has voluntarily established an alternative residence and a return would cause domestic strife (see e.g. *Taub v. Taub*, 33 AD3d 612). It held that in light of the plaintiff's voluntary establishment of an alternative residence for himself, the existence of an acrimonious relationship between the parties, and the potential turmoil which might result from the plaintiff's return to the marital home, the Supreme Court properly granted the defendant's motion for exclusive use and occupancy of the marital residence and use of its contents for herself and the parties' children during the pendency of this matrimonial action (see *Preston v. Preston*, 147 A.D.2d 464, 465; *Kristiansen v. Kristiansen*, 144 A.D.2d 441, 442; *Wolfe v. Wolfe*, 111 A.D.2d 809, 810).

Party Seeking Modification of Unallocated Child Support Based upon Emancipation of One Child must Prove That Remaining Amount Excessive Based upon Needs of Children.

In *Matter of Pettit v Goodman*, --- N.Y.S.3d ----, 2015 WL 6994422, 2015 N.Y. Slip Op. 08144 (2d Dept.,2015) the Appellate Division held that a party seeking a downward modification of an unallocated order of child support based on the emancipation of one of the children has the burden of proving that the amount of unallocated child support is excessive based on the needs of the remaining children (*Lamassa v. Lamassa*, 106 AD3d at 959).

Family Court Lacks Authority to Enter Finding of Neglect Without a Hearing Based upon a Certificate of Disposition

In Matter of Vincent M., --- N.Y.S.3d ----, 2015 WL 6989635, 2015 N.Y. Slip Op. 08170 (2d Dept.,2015) at a conference held on January 15, 2013, the Family Court received a copy of a certificate of disposition from the Dobbs Ferry Village Court which stated that on April 12, 2012, the mother was convicted of two crimes relating to an arrest that took place on July 1, 2011. One of the crimes the mother was convicted of was criminal possession of a controlled substance in the seventh degree. Without proceeding to a hearing, the Family Court took judicial notice of the certificate of disposition and entered a finding of neglect against the mother, finding that the date of arrest and the conviction of criminal possession of a controlled substance in the seventh degree matched the date of arrest and one of the crimes alleged in the petition. The Appellate Division reversed. It observed that Family Court Act § 1051(a) provides that the Family Court may enter an order finding that a child is an abused child or a neglected child on the consent of all parties and the attorney for the child, or following the completion of a fact-finding hearing at which the petitioning agency establishes the allegations of abuse or neglect by a preponderance of the evidence (see Family Ct Act §§ 1044, 1046[b][l]). Further, in appropriate cases, the Family Court may also enter an order finding that a child is an abused child or a neglected child on a motion for summary judgment in lieu of holding a fact-finding hearing, upon the petitioning agency's prima facie showing of neglect or abuse as a matter of law, and the respondent's failure to raise a triable issue of fact in opposition to the motion. Here, the Family Court did not enter the finding of neglect on the consent of all parties and the attorney for the child, or following the completion of a fact-finding hearing (see Family Ct Act § 1051[a]), nor did Family Court enter the finding of neglect upon a motion by the DSS for summary judgment. Thus, the Family Court, which simply took judicial notice at a conference of a certificate of disposition, lacked the authority to enter a finding of neglect.

Failure to Raise Counsel Fee Issue in Main Brief Precludes Attempt to Raise it In Reply Brief
In Matter of Keyes v Watson, --- N.Y.S.3d ----, 2015 WL 7268585, 2015 N.Y. Slip Op. 08415 (2d Dept.,2015) the Appellate Division held that by failing to contest it in her main brief on the appeal, the mother had abandoned her challenge to the Court's award of attorneys' fees to the father, despite her attempt to raise the issue in her reply brief (citing Shaw v. Bluepers Family Billiards, 94 AD3d 858, 860; Kane v. Triborough Bridge & Tunnel Auth., 8 AD3d 239, 242; Khalona v. New York City Tr. Auth., 215 A.D.2d 630, 631)

Appellate Division, Fourth Department

Severance Payment Received after Employment Terminated after Judgment of Divorce Is Separate Property. Hearing Ordered on Modification of Maintenance Even Though Husband Failed to Provide Papers Required by 22 NYCRR 202.16(k)
In Harold v Harold, --- N.Y.S.3d ----, 2015 WL 7305835, 2015 N.Y. Slip Op. 08596 2015 WL 7305835 (4th Dept.,2015) approximately one year after the entry of the judgment of divorce, defendant lost his job and received a severance payment from his employer. The Appellate Division concluded that the severance payments were defendant's separate property inasmuch as his 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 Appellate Division rejected Plaintiffs argument that the court should have denied defendant's cross motion to modify maintenance. Although defendant failed to include a sworn statement of net worth with his cross-moving papers as required by 22 NYCRR 202.16(k)(2), the court did not abuse its discretion in ordering a hearing on the issue of maintenance inasmuch as the court would have the opportunity to consider the parties' relative financial circumstances at the hearing.

November 16, 2015

Court of Appeals

Civil Contempt Determination Does Not Require Finding Wilful Violation of Underlying Order. Court Could Draw a Negative Inference from Defendant's Invocation of Fifth Amendment at Contempt Hearing, Where There Was a Joint Hearing on the Issues of Both Criminal and Civil Contempt.

In *El-Dehdan v El-Dehdan*, --- N.E.3d ----, 2015 WL 6128760, 2015 N.Y. Slip Op. 07579 (2015) the Court of Appeals affirmed a determination holding the defendant in civil contempt failure to comply with a January 2010 order issued in the course of the parties' matrimonial proceeding, that required him to deposit in escrow the proceeds of the sale of properties which were the subject of a prior equitable distribution determination in favor of plaintiff. It held that a civil contempt determination does not require a finding of a contemnor's wilful violation of the underlying order, and that Supreme Court could draw a negative inference from defendant's invocation of his Fifth Amendment right against self-incrimination at the contempt hearing, where there was a joint hearing on the issues of both criminal and civil contempt, where the defendant did nothing to seek bifurcation of the issues before the contempt hearing.

After plaintiff's attorney learned defendant had transferred certain properties which were awarded to the defendant in a judgment of divorce, she filed an order to show cause in January 2010 seeking, inter alia, that defendant be held in civil contempt for violation of an October 2008 order, (which the parties mistakenly believed restrained the transfer of those properties. and that he be required to deposit the proceeds from the transfers with plaintiff's attorney.) The order to show cause, in addition to scheduling a hearing on plaintiff's contempt motion, directed defendant to immediately deposit with plaintiff's counsel the net proceeds of the transfers, reduced by broker's fees, taxes and mortgage payments. Defendant was personally served with this order to show cause. In August 2010, plaintiff filed a motion to hold defendant in civil and criminal contempt for his failure to deposit the proceeds with plaintiff's attorney as required by the January 2010 order. Defendant cross moved to vacate that order, arguing that it was void because it was obtained by plaintiff's fraud upon the court, namely her misrepresentations that the October 2008 order prohibited defendant's transfer of the properties.

At the contempt hearing Plaintiff testified on her own behalf that she received none of the proceeds from the transfer of the Brooklyn property and submitted into evidence proof of the transfer, including defendant's contract of sale and closing. Plaintiff further submitted into evidence an affidavit of personal service for the January 2010 order. Plaintiff also called defendant as a witness. During his testimony he refused to answer any questions related to the proceeds from the transfer, and invoked his Fifth Amendment right against self-incrimination. Specifically, he refused to explain what he did with the proceeds from the transfer and whether he was currently in possession of the money.

In the Court of Appeals defendant challenged the Appellate Division's decision on three grounds: plaintiff failed to establish the necessary elements of civil contempt, including defendant's wilful violation of a lawful court order; he was denied the opportunity to collaterally attack the January 2010 order; and in the context of a hearing on a joint civil and criminal contempt motion, Supreme Court may not draw a negative inference from defendant's invocation of his Fifth Amendment right to remain silent.

The Court of Appeals rejected each of these arguments. It observed that in *Matter of McCormick v. Axelrod* (59 N.Y.2d 574 [1983]), it described the elements necessary to support a finding of civil contempt. First, "it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect". Second, "[i]t must appear, with reasonable certainty, that the order has been disobeyed" Third, "the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party" Fourth, "prejudice to the right of a party to the litigation must be demonstrated". In order to carry her burden, plaintiff had to establish by clear and convincing evidence defendant's violation of the January 2010 order. The Court found that "a lawful order of the court, clearly expressing an unequivocal mandate, was in effect." The signed January 2010 order explicitly stated that the defendant "shall deposit immediately with the Plaintiff's attorney the sum of nine hundred fifty thousand (\$950,000.00) dollars which is the sum of money he purportedly received from the transfer of [the property] 171 Ainslie Street, Brooklyn, New York and 64-17 60th Road, Maspeth, New York, minus the money paid for [the] real estate broker, transfer taxes and payment of the underlying mortgage." The Court held that this unambiguous directive, constituted "a lawful order of the court, clearly expressing an unequivocal mandate, [that] was in effect").

The Court held that to the extent defendant complained that the January 2010 order is invalid because it was issued *ex parte*, the law is clear that a court is authorized to issue an order to preserve marital property, both in advance of, and upon, a determination of equitable distribution. Referring to Domestic Relations Law § 234, the court held that the January 2010 order to deposit the proceeds from the transfer was well within the court's authority. Inasmuch as the court awarded plaintiff the Brooklyn and Maspeth properties in its equitable distribution determination it was perfectly lawful for the court to require defendant to deposit the proceeds of his transfer of those properties with plaintiff's counsel, regardless of whether the initial transfer of the properties violated any court order.

The Court rejected defendant's argument that the finding of contempt was not supported by the record because the evidence failed to establish that he wilfully disobeyed the January 2010 order. Nowhere in Judiciary Law § 753 [A][3] is wilfulness explicitly set forth as an element of civil contempt. It held that wilfulness is not an element of civil contempt. It agreed with the Appellate Division that civil contempt is established, regardless of the contemnor's motive, when disobedience of the court's order "defeats, impairs, impedes, or prejudices the rights or remedies of a party".

Once plaintiff met her burden and established that defendant violated the order to deposit the proceeds from the transfer, it was incumbent upon defendant to proffer evidence of his inability to pay. Nonetheless, defendant failed to submit evidence that he could not pay due to a lack of sufficient funds, economic distress or financial hardship, or some other obstacle to his compliance with the January 2010 order to deposit the proceeds. Instead, he submitted an affidavit containing bald face statements that by January 29, 2010, he "was no longer in possession of the proceeds of the March, 2009 sale, and that he received nothing from the transfer of the Maspeth property as he was merely holding it in his name for friends. The Court held that such vague and conclusory allegations of ... inability to pay or perform are not acceptable. Rather, courts have required a more specific showing of the contemnor's economic status

The Court rejected defendant's argument that Supreme Court improperly drew a negative inference from his invocation of his Fifth Amendment right against self-incrimination during the contempt hearing. He maintained that by holding one hearing on plaintiff's joint motion for civil and criminal contempt he was forced to choose between protecting himself against civil liability by testifying as to his lack of funds, and exercising his rights under the Fifth Amendment to remain silent so as to avoid criminal contempt. The Court found this argument unpersuasive and concluded that under the circumstances of this case, where defendant failed to take steps to avoid the alleged dilemma complained of here, Supreme Court acted within its authority to draw a negative inference, and in so doing did not violate defendant's constitutional rights. The Court observed that, the right against self incrimination does not automatically insulate a party to a civil action from potential liability. Both the United States Supreme Court, in *Baxter v. Palmigiano* (425 U.S. 308, 318 [1976]), and the Court of Appeals , in *Marine Midland Bank v. Russo Produce* (50 N.Y.2d 31, 42 [1980]), have held that a negative inference may be drawn in the civil context when a party invokes the right against self incrimination. Defendant could invoke the privilege, but that did not relieve him of his burden to present adequate evidence of his financial inability to comply with the January 2010 order so as to avoid civil contempt liability. Defendant relied on his conclusory statements that he no longer had the proceeds of the transfers and that he has no funds to deposit with the respondent's attorney. He could not seek to avoid the consequences of this failure to proffer sufficient evidence by invoking his Fifth Amendment right. The Court pointed out that it might have viewed this case differently if defendant had sought relief from Supreme Court to avoid the prejudice he claimed was the result of a joint civil and criminal contempt hearing. If defendant was concerned about the spill-over effect of invoking his Fifth Amendment right, he could have sought to bifurcate the hearing so that the court would first consider plaintiff's criminal contempt allegations. He chose not to do so. Because he failed to seek this relief

before Supreme Court, in the first instance, he could not complain that Supreme Court erred in drawing negative inferences specifically allowed by law.

Appellate Division, Second Department

Error to Grant Relief Not Requested by the Parties Where Relief Granted Is Unlike Relief Sought and There Is Prejudice to a Party

In *Calderon v Esenova*, --- N.Y.S.3d ----, 2015 WL 5945348, 2015 N.Y. Slip Op. 07462 (2d Dept.,2015) shortly after serving an answer demanding maintenance, equitable distribution of the marital property, and counsel fees, the defendant moved, inter alia, for an award of temporary maintenance and interim counsel fees. Following a hearing, in an order dated December 16, 2013, the Supreme Court denied those branches of the defendant's motion and determined that the defendant was not entitled to a final award of maintenance or counsel fees and that there was no marital property subject to equitable distribution. After the defendant consented to the grounds for divorce, a judgment was entered granting the plaintiff a divorce, which incorporated by reference the order dated December 16, 2013. The Appellate Division held that the court erred in granting relief that was not requested by the parties. 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. As the defendant only requested pendente lite relief and was not given notice that the hearing would resolve the case, she was not afforded an opportunity to address the ultimate issues regarding equitable distribution, maintenance, and counsel fees.

The Appellate Division held that a new determination was required on the motion for temporary maintenance. Although the court may deviate from the presumptive award if it is "unjust or inappropriate, the court must set forth in a written order the amount of the presumptive award of temporary maintenance, the factors it considered, and the reasons that it adjusted the presumptive award of temporary maintenance (Domestic Relations Law § 236[B][5-a][e][2]). Supreme Court failed to comply with the requirements of Domestic Relations Law § 236(B)(5-a) when it denied that branch of the defendant's motion which was for temporary maintenance.

Denial of Right to Counsel Warrants Reversal. Family Court must Conduct a 'Searching Inquiry' to Ensure That a Waiver Is Unequivocal, Voluntary, and Intelligent

In *Matter of Tarnai v Buchbinder*, --- N.Y.S.3d ----, 2015 WL 6160756, 2015 N.Y. Slip Op. 07671 (2d Dept.,2015) the mother was found to be indigent and entitled to assigned counsel by the family court. An attorney was appointed to represent her. Less than six months later, the

Family Court granted counsels application to be relieved, and assigned the mother a new attorney to represent her. Less than one year later, Family Court granted the application of the mother's second attorney to be relieved, and made a third assignment of counsel. During the course of the hearings her third attorney was relieved of the assignment to represent her. The mother did not join in that application. The Family Court then refused to assign the mother a new attorney, and told the mother that she was required to either hire a new attorney at her own expense, or represent herself in the proceedings. On the next hearing date, the mother indicated that she was unable to find an attorney to represent her. When asked if she was "representing herself at this point," she replied that she was "in search of an attorney but for the time being [she would] fill in." The mother represented herself for the remainder of the hearing. The Appellate Division reversed the order awarding the father custody and remitted to determine if she waived her right to counsel. It observed that a parent in a custody proceeding (Family Ct Act § 262[a]) has the right to counsel and that an indigent party has a right to assigned counsel. Where an indigent party has a right to assigned counsel, this entitlement does not encompass the right to counsel of one's own choosing. An application by an indigent person for the assignment of new counsel may be granted only "upon [a] showing [of] good cause for a substitution. The fact that the mother's three attorneys successfully sought to be relieved of their assignment did not serve to extinguish the mother's right to have an attorney assigned to represent her. A party to a Family Court proceeding who has the right to be represented by counsel may only proceed without counsel if that party has validly waived his or her right to representation. To determine whether a party is validly waiving the statutory right to counsel, the Family Court must conduct a 'searching inquiry' to ensure that the waiver is unequivocal, voluntary, and intelligent. 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 record did not demonstrate that the mother waived her right to counsel. Family Court never determined, in the first instance, whether the mother wanted to waive her right to have an attorney assigned to represent her. It conducted no inquiry to determine whether the mother was waiving her right to counsel and the record demonstrated that the mother "did not wish to proceed pro se, but was forced to do so" even though she was entitled to have an attorney assigned to represent her. Since the mother did not knowingly, intelligently, and voluntarily waive her right to counsel, the Family Court's order had to be reversed.

Appellate Division, Third Department

Lack of Previous Sexual Relationship with an Alleged Offender Not Dispositive in Determining If There Is "Intimate Relationship" Subject Matter Jurisdiction in Family Court Within the Meaning of Family Ct Act § 812(1)(e)

In Matter of Arita v Goodman, --- N.Y.S.3d ----, 2015 WL 6181499, 2015 N.Y. Slip Op. 07719 (3d Dept., 2015) Petitioner and respondent lived together as roommates in an apartment from August 2013 until April 2014, at which time petitioner left the residence as result of alleged incidents of domestic violence perpetrated upon her by respondent. Petitioner then

commenced a family offense proceeding. Upon learning that petitioner identified as a heterosexual female and that respondent identified as a homosexual male, Family Court granted respondent's oral motion to dismiss the petition, finding on that basis that the parties did not have an intimate relationship within the meaning of Family Ct Act § 812(1)(e), and upon the additional conclusion that petitioner had failed to allege any family offense. The Appellate Division reversed and remitted for further proceedings. It observed that petitioner's pleadings unambiguously alleged that respondent committed family offenses. It agreed with petitioner that her implicit acknowledgment that she had not had a sexual relationship with respondent did not justify Family Court ruling, as a matter of law, that the two did not have an intimate relationship within the meaning of Family Ct Act § 812(1)(e). Factors relevant to determining the existence of 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" (Family Ct Act § 812[1][e]). The Legislature unambiguously established that the phrase "intimate relationship" is not limited to relationships that include sexual intimacy. Family Court's determination that the lack of a previous sexual relationship with an alleged offender was dispositive in establishing a lack of subject matter jurisdiction was inconsistent with the plain meaning of Family Ct Act § 812(1)(e). Given Family Court's summary ruling, the record was not sufficiently developed to permit it to determine whether the parties have an intimate relationship within the meaning of Family Court Act § 812(1)(e).

November 1, 2015

Appellate Division, First Department

Attorney Held in Contempt of Court For Interrupting Court Entitled to reasonable opportunity to make a statement in defense or in extenuation of conduct.

In *Matter of Davidson v Visitacion-Lewis*, 131 A.D.3d 888 131 A.D.3d 888, 16 N.Y.S.3d 552, 2015 N.Y. Slip Op. 06974(1st Dept.,2015) during a one-day hearing respondent ordered petitioner to be quiet, and warned petitioner that if she continued interrupting the court, she would be found in contempt. Later in the hearing, respondent issued the two contempt citations when petitioner spoke before the court had completed its statements. These summary contempt findings were not supported by sufficient evidence; counsel's perceived misconduct can be best described as petty transgressions, in which counsel prematurely sought to explain her client's position or dispute a factual assertion by the court. Counsel's conduct did not rise to the level contemplated by 22 NYCRR § 604.2(a)(1). The Court noted that even if the nature of counsel's conduct had justified a contempt finding under 22 NYCRR § 604.2(a)(1), respondent failed to comply with 22 NYCRR § 604.2(a)(3), which requires that a person accused of contempt be afforded "a reasonable opportunity to make a statement in his

defense or in extenuation of his conduct.” “The record was devoid of the essential proffer in open court’ to the accused prior to imposition of the sanction. It also agreed with petitioner’s assertion that she was deprived of her constitutional right to due process by the lack of an opportunity to be heard on this matter affecting her reputation (see *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 27 L.Ed.2d 515 [1971]).

Matrimonial Lawyer Who Represented Himself in Divorce Act Sanctioned for Frivolous Conduct

In *Borstein v Henneberry*, --- N.Y.S.3d ----, 2015 WL 5928262, 2015 N.Y. Slip Op. 07425 (1st Dept.,2015) the parties were divorced in December 2009. Plaintiff husband, an experienced matrimonial lawyer, who represented himself in the divorce proceeding was sanctioned twice during that action. In the parties post-trial memoranda, the husband claimed that he loaned the wife “\$27,000 during the years after the filing for divorce” to allow her to finance a business venture. The courts decision did not specifically address the \$27,000 loan, but stated that “[a]ny arguments raised by the parties which have not been expressly addressed in this decision are rejected.” The husband then commenced an action against the wife seeking recovery of the same \$27,000. The wife’s counsel sent the husband a letter asking him to discontinue the action voluntarily because the divorce action had determined his rights regarding the loan in light of the court’s ruling on the husband’s request for credits. Supreme Court granted the wife’s motion and dismissed the complaint, concluding that the loan was “fully and actively litigated by [the husband]” in the divorce action. The wife’s subsequent motion for attorneys fees and sanctions due to the husband’s “frivolous and improperly motivated” lawsuit was denied. The Appellate Division reversed and imposed sanctions of \$5000 and defendant awarded reasonable costs and attorneys’ fees associated with defending the action and with the appeal, in an amount to be determined on remand. It found that after the husband made a claim in the divorce action for repayment of the \$27,000 “loan,” and Supreme Court rejected it, he then failed to challenge that finding on direct appeal. It is well settled that “res judicata bars a subsequent plenary action concerning an issue of marital property which could have been, but was not, raised in the prior matrimonial action”. The Appellate Division observed that it was required to consider “the circumstances under which the conduct took place” when reviewing a sanctions motion (22 NYCRR 130-1.1[c]). Here, the circumstances were that the husband, an experienced divorce lawyer, ignored a long-standing principle of matrimonial jurisprudence. Thus, his decision to commence an action that he knew, or should have known, was futile from its inception, weighed heavily in favor of a finding that his conduct was intended solely to harass the wife. The Appellate Division held that aside from the blatant lack of merit to the complaint, other factors justifying sanctions and attorneys’ fees were present. First, the wife expressly informed the husband that she considered the action barred by res judicata and urged him to discontinue it, but he pressed on, forcing her to expend unnecessary resources. Such unreasonable persistence in a position that has been demonstrated to be frivolous warrants the imposition of sanctions. Further, this was not the first instance in which the husband has taken a position that was not legally tenable. Coupled with these earlier incidents, the commencement of this action exhibited a “broad pattern ... of delay, harassment and obfuscation” that warranted the imposition of sanctions and attorneys’ fees.

Appellate Division, Second Department

Family Court Lacks Jurisdiction to Invalidate and Vacate a Stipulation of Settlement Incorporated into a Judgment of Divorce

In *Matter of Castaneda v Castaneda*, --- N.Y.S.3d ----, 2015 WL 5827259, 2015 N.Y. Slip Op. 07265 (2d Dept., 2015) a support enforcement and modification proceeding, the Appellate Division held that Family Court lacks jurisdiction to invalidate and vacate a stipulation of settlement incorporated into a judgment of divorce. (Citing N.Y. Const, art 6, § 13[c]; Family Ct Act § 466[c]; *Matter of Perrego v. Perrego*, 63 A.D.3d 1072, 1073, 884 N.Y.S.2d 70; *Matter of Savini v. Burgaleta*, 34 A.D.3d 686, 689, 825 N.Y.S.2d 493; *Matter of Huddleston v. Huddleston*, 14 A.D.3d 511, 512, 788 N.Y.S.2d 411).

Appellate Division, Fourth Department

Parties Entitled to Notice of Filing of Referees Report and Opportunity to Object

In *Matter of Witzigman v Witzigman*, 2015 WL 5893746 (4th Dept., 2015) the Appellate Division held that Family Court erred in adopting the Referee's report without providing the parties with notice of the filing of the report and affording them an opportunity to object to it (see 22 NYCRR 202.44[a]). The record established that the Referee was authorized only to hear the matter and issue a report inasmuch as the mother did not consent to the referral to the Referee for a final determination on the father's petition. It reversed the order, and remitted the matter to Family Court for compliance with 22 NYCRR 202.44.

Family Court Act § 454(3) Allows Court a Choice of Probation or Jail upon Finding of a Willful Violation of a Support Order, but it Does Not Authorize Both Probation and a Jail Term

In *Matter of Heffner v. Jaskowiak*, --- N.Y.S.3d ----, 2015 WL 5894021, 2015 N.Y. Slip Op. 07413 (4th Dept., 2015) the Appellate Division affirmed an order finding that the father willfully violated an order of child support. Although the father did not challenge the legality of his sentence, it noted that the sentence imposed sentence of three months in jail and three years' probation was illegal. Family Court Act § 454(3) explicitly allows the court a choice of probation or jail upon a finding of a willful violation of a support order, but it does not authorize both probation and a jail term. The Appellate Division observed that it has inherent authority to correct an illegal sentence and may consider the legality of the sentence despite the father's failure to raise the issue in Family Court "because it involves a court's 'essential' authority to

incarcerate, as legally prescribed” (Matter of Walker v. Walker, 86 N.Y.2d 624, 627). The record established that the father had completed his three-month jail term, and it vacated the additional sentence of probation.

October 16, 2015

Laws of 2015, Ch 269 - Temporary Maintenance Guidelines Apply to Matrimonial Actions Commenced on or after October 25, 2015.

Laws of 2015, Ch 269 amended Domestic Relations Law § 236 [B][5-a], effective October 25, 2015.

The new temporary maintenance guidelines apply in matrimonial actions commenced on or after October 25, 2015. Go to the following links for the New temporary maintenance calculator worksheet (<https://www.nycourts.gov/divorce/TMG-Worksheet.PDF>) and calculator (<https://www.nycourts.gov/divorce/calculator.pdf>) both of which appear on the New York Court System website.

See Laws of 2015, Ch 269, which provides that section three of the act, which amended Domestic Relations Law 235[B][5-a] dealing with Temporary Maintenance Awards, “ shall take effect on the thirtieth day after it shall have become a law and shall apply to matrimonial actions commenced on or after such effective date.” The other sections of the Act are effective January 23, 2015.

Go to <http://www.nysdivorce.com> for the Temporary Maintenance Calculator Worksheet for Use in Actions Commenced before October 25, 2015

Laws of 2015, Ch 347

Laws of 2015, Ch 347, § 1 amended Social Services Law § 111-i to align the timing of the adjustment of the Combined Parental Income Adjustment with the adjustment of the poverty income guidelines amount for a single person and the self-support reserve.

Laws of 2015, Ch 369

Laws of 2105, Ch 369, § 2 repealed Article 5-B of the Family Court Act and enacted the 2008 version of the Uniform Interstate Family Support Act (UIFSA) as a new Article 5-B of the Family Court Act. Chapter 369 was signed into law on September 25, 2015. Section 1 is effective on December 24, 2015. New Article 5-B to the Family Court Act applies to any action or proceeding filed or order issued on or before the effective date of new Article 5-B,

consistent with new section 580-903 of the Family Court Act which shall be effective on January 1, 2016.

Court of Appeals Reaffirms Holding That Contempt of Court Does Not Require a Finding of Wilfulness

In *El-Dehdan v El-Dehdan*, --- N.E.3d ----, 2015 WL 6128760, 2015 N.Y. Slip Op. 07579 (2015) the Court of Appeals affirmed a determination holding the defendant in civil contempt failure to comply with a January 2010 order issued in the course of the parties' matrimonial proceeding, that required him to deposit in escrow the proceeds of the sale of properties which were the subject of a prior equitable distribution determination in favor of plaintiff. It held that a civil contempt determination does not require a finding of a contemnor's wilful violation of the underlying order, and that Supreme Court could draw a negative inference from defendant's invocation of his Fifth Amendment right against self-incrimination at the contempt hearing, where there was a joint hearing on the issues of both criminal and civil contempt, where the defendant did nothing to seek bifurcation of the issues before the contempt hearing.

After plaintiff's attorney learned defendant had transferred certain properties which were awarded to the defendant in a judgment of divorce, she filed an order to show cause in January 2010 seeking, inter alia, that defendant be held in civil contempt for violation of an October 2008 order,(which the parties mistakenly believed restrained the transfer of those properties. and that he be required to deposit the proceeds from the transfers with plaintiff's attorney.) The order to show cause, in addition to scheduling a hearing on plaintiff's contempt motion, directed defendant to immediately deposit with plaintiff's counsel the net proceeds of the transfers, reduced by broker's fees, taxes and mortgage payments. Defendant was personally served with this order to show cause. In August 2010, plaintiff filed a motion to hold defendant in civil and criminal contempt for his failure to deposit the proceeds with plaintiff's attorney as required by the January 2010 order. Defendant cross moved to vacate that order, arguing that it was void because it was obtained by plaintiff's fraud upon the court, namely her misrepresentations that the October 2008 order prohibited defendant's transfer of the properties.

At the contempt hearing Plaintiff testified on her own behalf that she received none of the proceeds from the transfer of the Brooklyn property and submitted into evidence proof of the transfer, including defendant's contract of sale and closing. Plaintiff further submitted into evidence an affidavit of personal service for the January 2010 order. Plaintiff also called defendant as a witness. During his testimony he refused to answer any questions related to the proceeds from the transfer, and invoked his Fifth Amendment right against self-incrimination. Specifically, he refused to explain what he did with the proceeds from the transfer and whether he was currently in possession of the money.

In the Court of Appeals defendant challenged the Appellate Division's decision on three grounds: plaintiff failed to establish the necessary elements of civil contempt, including

defendant's wilful violation of a lawful court order; he was denied the opportunity to collaterally attack the January 2010 order; and in the context of a hearing on a joint civil and criminal contempt motion, Supreme Court may not draw a negative inference from defendant's invocation of his Fifth Amendment right to remain silent.

The Court of Appeals rejected each of these arguments. It observed that in *Matter of McCormick v. Axelrod* (59 N.Y.2d 574 [1983]), it described the elements necessary to support a finding of civil contempt. First, "it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect" . Second, "[i]t must appear, with reasonable certainty, that the order has been disobeyed" Third, "the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party" Fourth, "prejudice to the right of a party to the litigation must be demonstrated". In order to carry her burden, plaintiff had to establish by clear and convincing evidence defendant's violation of the January 2010 order. The Court found that "a lawful order of the court, clearly expressing an unequivocal mandate, was in effect." The signed January 2010 order explicitly stated that the defendant "shall deposit immediately with the Plaintiff's attorney the sum of nine hundred fifty thousand (\$950,000.00) dollars which is the sum of money he purportedly received from the transfer of [the property] 171 Ainslie Street, Brooklyn, New York and 64-17 60th Road, Maspeth, New York, minus the money paid for [the] real estate broker, transfer taxes and payment of the underlying mortgage." The Court held that this unambiguous directive, constituted "a lawful order of the court, clearly expressing an unequivocal mandate, [that] was in effect").

The Court held that to the extent defendant complained that the January 2010 order is invalid because it was issued ex parte, the law is clear that a court is authorized to issue an order to preserve marital property, both in advance of, and upon, a determination of equitable distribution. Referring to Domestic Relations Law § 234, the court held that the January 2010 order to deposit the proceeds from the transfer was well within the court's authority. Inasmuch as the court awarded plaintiff the Brooklyn and Maspeth properties in its equitable distribution determination it was perfectly lawful for the court to require defendant to deposit the proceeds of his transfer of those properties with plaintiff's counsel, regardless of whether the initial transfer of the properties violated any court order.

The Court rejected defendant's argument that the finding of contempt was not supported by the record because the evidence failed to establish that he wilfully disobeyed the January 2010 order.. Nowhere in Judiciary Law § 753 [A][3] is wilfulness explicitly set forth as an element of civil contempt It held that wilfulness is not an element of civil contempt. It agreed with the Appellate Division that civil contempt is established, regardless of the contemnor's motive, when disobedience of the court's order "defeats, impairs, impedes, or prejudices the rights or remedies of a party".

Once plaintiff met her burden and established that defendant violated the order to deposit the proceeds from the transfer, it was incumbent upon defendant to proffer evidence of his inability to pay. Nonetheless, defendant failed to submit evidence that he could not pay due to a lack of sufficient funds, economic distress or financial hardship, or some other obstacle to

his compliance with the January 2010 order to deposit the proceeds. Instead, he submitted an affidavit containing bald face statements that by January 29, 2010, he “was no longer in possession of the proceeds of the March, 2009 sale, and that he received nothing from the transfer of the Maspeth property as he was merely holding it in his name for friends. The Court held that such vague and conclusory allegations of ... inability to pay or perform are not acceptable. Rather, courts have required a more specific showing of the contemnor’s economic status

The Court rejected defendants argument that Supreme Court improperly drew a negative inference from his invocation of his Fifth Amendment right against self-incrimination during the contempt hearing. He maintained that by holding one hearing on plaintiff’s joint motion for civil and criminal contempt he was forced to choose between protecting himself against civil liability by testifying as to his lack of funds, and exercising his rights under the Fifth Amendment to remain silent so as to avoid criminal contempt. The Court found this argument unpersuasive and concluded that under the circumstances of this case, where defendant failed to take steps to avoid the alleged dilemma complained of here, Supreme Court acted within its authority to draw a negative inference, and in so doing did not violate defendant’s constitutional rights. The Court observed that, the right against self incrimination does not automatically insulate a party to a civil action from potential liability. Both the United States Supreme Court, in *Baxter v. Palmigiano* (425 U.S. 308, 318 [1976]), and the Court of Appeals , in *Marine Midland Bank v. Russo Produce* (50 N.Y.2d 31, 42 [1980]), have held that a negative inference may be drawn in the civil context when a party invokes the right against self incrimination. Defendant could invoke the privilege, but that did not relieve him of his burden to present adequate evidence of his financial inability to comply with the January 2010 order so as to avoid civil contempt liability. Defendant relied on his conclusory statements that he no longer had the proceeds of the transfers and that he has no funds to deposit with the respondent’s attorney. He could not seek to avoid the consequences of this failure to proffer sufficient evidence by invoking his Fifth Amendment right. The Court pointed out that it might have viewed this case differently if defendant had sought relief from Supreme Court to avoid the prejudice he claimed was the result of a joint civil and criminal contempt hearing. If defendant was concerned about the spill-over effect of invoking his Fifth Amendment right, he could have sought to bifurcate the hearing so that the court would first consider plaintiff’s criminal contempt allegations. He chose not to do so. Because he failed to seek this relief before Supreme Court, in the first instance, he could not complain that Supreme Court erred in drawing negative inferences specifically allowed by law.

October 1, 2015

Laws of 2015, Ch 369

Laws of 2015, Ch 347, § 1 amended Social Services Law § 111-i to align the timing of the adjustment of the Combined Parental Income Adjustment with the adjustment of the poverty income guidelines amount for a single person and the self-support reserve. Laws of 2105, Ch 369, § 2 repealed Article 5-B of the Family Court Act and enacted the 2008 version of the Uniform Interstate Family Support Act (UIFSA) as a new Article 5-B of the Family Court Act. Chapter 369 was signed into law on September 25, 2015. Section 1 is effective on December 24, 2015. New Article 5-B to the Family Court Act applies to any action or proceeding filed or order issued on or before the effective date of new Article 5-B, consistent with new section 580-903 of the Family Court Act which shall be effective on January 1, 2016.

Laws of 2015, Ch 269

Laws of 2015, Ch 269 amended Domestic Relations Law §236 [B][1][a], Domestic Relations Law §236 [B][5][d][7], Domestic Relations Law §236 [B][6], Domestic Relations Law § 248, Domestic Relations Law §236 [B][9][1], Family Court Act § 412, effective January 25, 2016, and amended Domestic Relations Law § 236 [B][5-a], effective October 25, 2015.

The Commentary which follows the Summary of Amendments is a portion of the text that has been written (with footnotes) for next years update to Law and the Family New York, 2d Edition revised, and Law and the Family New York Forms. No part of the following Commentary may be reproduced without the written consent of Joel R. Brandes Consulting Services, Inc. Copyright © 2015, Joel R. Brandes Consulting Services, Inc., All Rights Reserved.

Summary of the Amendments

The amendments eliminated “enhanced earning capacity as a marital asset” for purposes of equitable distribution (Domestic Relations Law §236 [B] [5] [d] [7]) but did not eliminate as a factor the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse. They adopted mandatory guidelines with formulas for the calculation of maintenance and spousal support awards, (Domestic Relations Law §236 [B] [6] and Family Court Act § 412), added actual or partial retirement as a ground for modification of post-divorce maintenance where it results in a substantial diminution of income. (Domestic Relations Law §236 [B] [9] [1]) and made Domestic Relations Law § 248 gender neutral.

Income Cap Lowered

The amendments lowered the income cap for the formula portion of temporary maintenance awards, (Domestic Relations Law § 236 [B] [5-a]) from the current \$543,000 to \$175,000 of the payor's income.

An income cap of \$175,000 cap applies to post-divorce maintenance awards and spousal support awards.

Temporary Maintenance

There is a new formula for determining temporary maintenance.

In determining temporary maintenance, the court can allocate the responsibility for payment of specific family expenses between the parties.

The temporary maintenance award must terminate no later than the issuance of a judgment of divorce or the death of either party. This amendment is intended to clarify that the Supreme Court has the power to limit the duration of temporary maintenance.

New Formulas for Calculating Temporary Maintenance, Post-Divorce Maintenance and Spousal Support

There now mandatory formulas for the calculation of maintenance and spousal support awards.

There are two formulas to be used in calculating maintenance and spousal support: one where child support will be paid and where the temporary maintenance payor, post-divorce maintenance payor or spousal support payor is also the non-custodial parent for child support purposes; and one where child support will not be paid, or where it will be paid but the temporary maintenance payor, post-divorce maintenance payor or spousal support payor is the custodial parent for child support purposes.

Those formulas are as follows:

a. With child support where the temporary maintenance payor, post-divorce maintenance payor or spousal support payor is also the non-custodial parent for child support purposes: (i) subtract 25% of the maintenance payee's income from 20% of the maintenance payor's income; (ii) multiply the sum of the maintenance payor's income and the maintenance payee's income by 40% and subtract the maintenance payee's income from the result; (iii) the lower of the two amounts will be the guideline amount of maintenance;

b. Without child support, or with child support but where the temporary maintenance payor, post-divorce maintenance payor or spousal support payor is the custodial parent for child support purposes: (i) subtract 20% of the maintenance payee's income from 30% of the maintenance payor's income; (ii) multiply the sum of the maintenance payor's income and the

maintenance payee's income by 40% and subtract the maintenance payee's income from the result; (iii) the lower of the two amounts will be the guideline amount of maintenance.

C

Post-Divorce Maintenance Guidelines

The definition of income for post-divorce maintenance includes income from income-producing property that is being equitably distributed.

Factors the court may consider in post-divorce maintenance now include termination of child support, and income or imputed income on assets being equitably distributed. c

There is an "advisory" durational formula for determining the duration of post-divorce maintenance awards. However, nothing prevents the court from awarding non-durational, post-divorce maintenance in an appropriate case. In determining the duration of maintenance, the court is required to consider anticipated retirement assets, benefits and retirement eligibility age.

Modification of Post-Divorce Maintenance

cActual or partial retirement is a ground for modification of post-divorce maintenance assuming it results in a substantial diminution of income.

Spousal Support Guidelines for Family Court

cSpousal support guidelines are established for Family Court using the same two formulas set forth for maintenance guidelines, as follows: one where child support will be paid and where the spousal support payor is also the non-custodial parent for child support purposes; and one where child support will not be paid, or where child support will be paid but the spousal support payor is the custodial parent for child support purposes. The \$175,000 income cap applies.

The court may adjust the guideline amount of spousal support up to the income cap where it finds that the guideline amount of spousal support is unjust or inappropriate after consideration of one or more factors, which shall be set forth in the court's written or on the record decision.

Where there is income over the cap, additional spousal support may be awarded after consideration of one or more factors, which shall be set forth in the court's written or on the record decision.

A new factor for the court to consider in spousal support awards as well as maintenance awards is termination of a child support award.

The Family Court may modify an order of spousal support upon a showing of a substantial change in circumstances. Unless so modified, spousal support orders set pursuant to the guidelines shall continue until the earliest to occur of a written or oral stipulation/agreement on the record, issuance of a judgment of divorce or other order in a matrimonial proceeding, or the death of either party. This is not intended to change current

law with respect to Family Court's ability to terminate spousal support. (See NY Legis. Memo 237 (2015)).

Effective Date

The amendments become effective January 25, 2015 and apply to all matrimonial and Family Court actions for spousal support commenced on or after such effective date, including the provisions regarding post-divorce maintenance and spousal support awards. However, the provisions regarding temporary maintenance take effect October 25, 2015.

Commentary

Laws of 2015, Ch 269, effective January 23, 2016, amended Domestic Relations Law §236[B][5][d][7] - The Demise of O'Brien

In *O'Brien v O'Brien*, (1985) 66 NY2d 576, 498 NYS2d 743, 489 NE2d 712, on remand (2d Dept) 120 App Div 2d 656, 502 NYS2d 250 the Court of Appeals charted the future course of the Equitable Distribution Law. In doing so it mandated that the statute be given a liberal interpretation in order to achieve its objective of an equitable division of family assets upon divorce. In *O'Brien* the husband's medical degree or license was classified as "marital property" because at the time of divorce he was still in residency and had no medical practice. The timing of the commencement of the divorce action in *O'Brien* precluded any distributive award based upon a medical practice, which had not yet been established. Dr. O'Brien had acquired a medical degree and license during his 9-year marriage, but he had no medical practice. The court did not award Mrs. O'Brien any interest in the husband's future medical practice nor did it mortgage his professional future.

The Court of Appeals expanded the *O'Brien* rule when it decided *McSparron v McSparron* (1995) 87 NY2d 275, 639 NYS2d 265, 662 NE2d 745. In a resounding reaffirmation of *O'Brien* the court concluded that even after a license has been exploited by the licensee to establish and maintain a career, it does not "merge" with the career or ever lose its character as a separate, distributable asset.

The Court of Appeals revisited, reaffirmed and refined its *McSparron* holding in *Grunfeld v. Grunfeld* 94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000). The Court of Appeals held that, to comply with *McSparron*, 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. 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. It stated that where license income is considered in setting maintenance, a court can avoid double counting by reducing the distributive award based on that same income.

Domestic Relations Law §236[B] [5] [d] [7] was amended, thirty years after the O'Brien decision to eliminate enhanced earning capacity as a marital asset. The amendment added the following paragraph to factor 7 for property distribution: The court shall not consider as marital property subject to distribution the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement. However, in arriving at an equitable division of marital property, the court shall consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse.

The amendment was intended to eliminate enhanced earning capacity as a marital asset, thus, legislatively overruling McSparron and Grunfeld too. However, vestiges of O'Brien remain. In arriving at an equitable division of marital property, the court may consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse. This requires the spouse requesting the court to consider his or her contributions to the development of the enhanced earning capacity of the other spouse to establish: (1) that the other spouse has an enhanced earning capacity attributable to a license, degree, celebrity goodwill, or career enhancement and (2) the value of such enhanced earning capacity, before the court can consider his or her contributions to the development of such enhanced earning capacity.

Laws of 2015, Ch 269, amended Domestic Relations Law § 236 [B] [6] effective January 23, 2016. – Post-Divorce Maintenance

Domestic Relations Law § 236 [B][6] was amended by establishing post-divorce maintenance guidelines and a statutory formula for determining the guideline amount of post-divorce maintenance awards, with factors for deviation, where the award is unjust or inappropriate.

The application of the post-divorce maintenance guidelines is mandatory. In any matrimonial action the court must make its award for post-divorce maintenance pursuant to the provisions of Domestic Relations Law § 236[B][6], except where the parties have entered into an agreement pursuant to Domestic Relations Law § 236 [B][3] providing for maintenance.

Under the guidelines "Payor" means the spouse with the higher income. " Payee" means the spouse with the lower income.

"Length of marriage" means the period from the date of marriage until the date of commencement of action.

"Income cap" means up to and including \$175,000 of the payor's annual income. However, beginning January 31, 2016 and every two years thereafter, the income cap amount will increase by the sum 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 prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration is required to determine and publish the income cap.

The court must first determine the income of the parties before determining the guideline amount of post-divorce maintenance.

"Income" means: (a) income as defined in Domestic Relations Law § 240 and Family Court Act § 413 without subtracting alimony or maintenance actually paid or to be paid to a spouse that is a party to the action pursuant to Domestic Relations Law § 240 [1-b] [b][5][vii][c] and Family Court Act § 413[b][5][vii][c] and without subtracting spousal support paid pursuant to Family Court Act § 412; and (b) income from income-producing property distributed or to be distributed pursuant to Domestic Relations Law § 236[B][5].

To determine the post-divorce maintenance guideline amount, the court must compare two calculations of the spouses' annual incomes, up to an income cap of \$175,000 on the payor's income.

A. Where the Payor's income is lower than or equal to the income cap

I. Where child support is paid and where the maintenance payor is also the non-custodial parent for child support purposes the following calculation is done:

- (a) subtract 25% of the payee's income from 20% of the payor's income;
- (b) multiply the sum of the payor's income and the payee's income by 40%;
- (c) subtract the payee's income from the result;
- (d) determine the lower of these two amounts.

The guideline amount of post-divorce maintenance is the amount determined by Domestic Relations Law § 236[B][6][c][1][d]. However, if the amount determined by Domestic Relations Law § 236[B][6][c][1][d] is less than or equal to zero, the guideline amount of post-divorce maintenance is zero dollars.

If child support will be paid for children of the marriage but the payor is the custodial parent, post-divorce maintenance must be calculated prior to child support because the amount of post-divorce maintenance must be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

II. Where the payor's income exceeds the income cap, the court must determine the guideline amount of post-divorce maintenance as follows.

The court must perform the calculations set forth in Domestic Relations Law § 236[B][6][c] for the income of the payor up to and including the income cap;

For income exceeding the cap, the amount of additional maintenance awarded, if any, is within the discretion of the court which must take into consideration any one or more of the factors set forth in Domestic Relations Law § 236[B] [6][e][1].

The factors in Domestic Relations Law § 236[B] [6][e][1] are:

- (a) the age and health of the parties;
- (b) the present or future earning capacity of the parties, including a history of limited participation in the workforce;
- (c) the need of one party to incur education or training expenses;
- (d) the termination of a child support award before the termination of the maintenance award when the calculation of maintenance was based upon child support being awarded which resulted in a maintenance award lower than it would have been had child support not been awarded;
- (e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;
- (f) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (g) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
- (h) the availability and cost of medical insurance for the parties;
- (i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;
- (j) the tax consequences to each party;
- (k) the standard of living of the parties established during the marriage;
- (l) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage;
- (m) the equitable distribution of marital property and the income or imputed income on the assets so distributed;
- (n) the contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and
- (o) any other factor which the court shall expressly find to be just and proper.

Unjust or Inappropriate

The court must order the post-divorce maintenance guideline obligation up to the income cap in accordance with Domestic Relations Law § 236[B] [6][c], unless the court finds that the guideline amount of post-divorce maintenance is unjust or inappropriate based upon consideration of any one or more of the factors in Domestic Relations Law § 236[B] [6][e][1], and the court adjusts the guideline amount of post-divorce maintenance accordingly based upon such considerations.

The factors in Domestic Relations Law § 236[B] [6][e][1] are set forth above.

Where the court finds that the guideline amount of post-divorce maintenance is unjust or inappropriate based upon consideration of any one or more of the factors in Domestic Relations Law § 236[B] [6][e][1], and the court adjusts the guideline amount of post-divorce maintenance accordingly the court must set forth, in a written decision or on the record, the guideline amount of post-divorce maintenance, the factors it considered, and the reasons that the court adjusted the guideline amount of post-divorce maintenance. The decision, whether in writing or on the record, may not be waived by either party or counsel.

The "Self-support reserve" means the self-support reserve as defined in the child support standards act and codified in Domestic Relations Law § 240 and Family Court Act § 413.

Where the guideline amount of post-divorce maintenance would reduce the payor's income below the self-support reserve for a single person, the guideline amount of the post-divorce maintenance is the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no post-divorce maintenance is to be awarded.

Duration of Post-Divorce Maintenance

The court may, but is not required to determine the duration of post-divorce maintenance in accordance with the following advisory schedule:

Length of the marriage	percent of the length of the marriage for which maintenance will be payable
0 up to and including 15 years	15% - 30%
More than 15 up to and including 20 years	30% - 40%
More than 20 years	35% - 50%

In determining the duration of post-divorce maintenance, whether or not the court utilizes the advisory schedule, it must consider the factors listed in Domestic Relations Law §236[B][6][e][1] and must set forth, in a written decision or on the record, the factors it considered. The decision may not be waived by either party or counsel. Nothing shall prevent the court from awarding non-durational maintenance in an appropriate case.

The factors in Domestic Relations Law § 236[B] [6][f][2] are set forth above.

Post-divorce maintenance terminates upon the death of either party or upon the payee's valid or invalid marriage, or upon modification pursuant to Domestic Relations Law § 236[B][9][b] or Domestic Relations Law § 248.

When determining the duration of post-divorce maintenance, the court must take into consideration anticipated retirement assets, benefits, and retirement eligibility age of both parties if ascertainable at the time of decision. If not ascertainable at the time of decision, the actual full or partial retirement of the payor with substantial diminution of income is a basis for a modification of the award.

Opting Out of Domestic Relations Law § 236[B][6]

The parties have the right to voluntarily enter into validly executed agreements or stipulations which deviate from the post-divorce maintenance guideline obligation.

Laws of 2015, Ch 269 amended Family Court Act § 412 effective January 23, 2016 – Spousal support

Family Court Act § 412 was amended by establishing spousal support guidelines and a statutory formula for determining the guideline amount of spousal support awards, with factors for deviation, where the award is unjust or inappropriate.

The application of the spousal support guidelines is mandatory. A married person is chargeable with the support of his or her spouse and, except where the parties have entered into an agreement pursuant to Family Court Act §425 providing for support, the court, upon application by a party, must make its award for spousal support pursuant to the provisions of Part 1 of Article 4 of the Family Court Act.

Under the guidelines "Payor" means the spouse with the higher income. "Payee" means the spouse with the lower income. "

"Income cap" means up to and including \$175,000 of the payor's annual income.

The court must first determine the income of the parties before determining the guideline amount of spousal support.

"Income" means income as defined in Domestic Relations Law § 240 and Family Court Act § 413 without subtracting alimony or maintenance actually paid or to be paid to a spouse that is a party to the action pursuant to Domestic Relations Law § 240 [1-b] [b][5][vii][c] and Family Court Act § 413[b][5][vii][c].

To determine the spousal support guideline amount, the court must compare two calculations of the spouses' annual incomes, up to an income cap of \$175,000 on the payor's income.

A. Where the payor's income is lower than or equal to the income cap

I. Where child support is paid and where the maintenance payor is also the non-custodial parent for child support purposes the following calculation is done:

- (a) subtract 25% of the payee's income from 20% of the payor's income;**
- (b) multiply the sum of the payor's income and the payee's income by 40%;**
- (c) subtract the payee's income from the result;**
- (d) determine the lower of these two amounts.**

The guideline amount of spousal support is the amount determined by Family Court Act §412 [3][a] [4]. However, if the amount determined by Family Court Act §412 [3][a] [4] is less than or equal to zero, the guideline amount of spousal support is zero dollars.

Spousal support must be calculated prior to child support because the amount of spousal support shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

II. Where child support is not paid or where child support is paid but the maintenance payor is the custodial parent for child support purposes the following calculation is done:

- (a) subtract 20% of the payee's income from 30% of the payor's income;**
- (b) multiply the sum of the payor's income and the payee's income by 40%;**
- (c) subtract the payee's income from the result;**
- (d) the lower of the two amounts will be the guideline amount of spousal support.**

The guideline amount of spousal support is the amount determined by Family Court Act §412 [3][b][4]. However, if the amount determined by Family Court Act §412 [3][b] [4] is less than or equal to zero, the guideline amount of spousal support is zero dollars.

If child support will be paid for children of the marriage but the payor is the custodial parent pursuant to the child support standards act, spousal support must be calculated prior to child support because the amount of spousal support must be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

B. Where the payor's income exceeds the income cap, the court must determine the guideline amount of spousal support as follows:

- (a) The court must perform the calculations set forth in Family Court Act §412 [3] for the income of the payor up to and including the income cap; and**

(b)For income exceeding the cap, the amount of additional spousal support awarded, if any, shall be within the discretion of the court which must take into consideration any one or more of the factors set forth in Family Court Act §412[6][a]; and

The factors in in Family Court Act §412[6][a] are:

- (1)the age and health of the parties;**
- (2)the present or future earning capacity of the parties, including a history of limited participation in the workforce;**
- (3)the need of one party to incur education or training expenses;**
- (4)the termination of a child support award during the pendency of the spousal support award when the calculation of spousal support was based upon child support being awarded which resulted in a spousal support award lower than it would have been had child support not been awarded;**
- (5)the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a support proceeding without fair consideration;**
- (6)the existence and duration of a pre-marital joint household or a pre-support proceedings separate household;**
- (7)acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;**
- (8)the availability and cost of medical insurance for the parties;**
- (9)the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;**
- (10)the tax consequences to each party;**
- (11)the standard of living of the parties established during the marriage;**
- (12)the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage;**
- (13)the contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party;**
- (14)any other factor which the court shall expressly find to be just and proper.**

The court must set forth the factors it considered and the reasons for its decision in writing or on the record. Such decision, whether in writing or on the record, may not be waived by either party or counsel.

Unjust or Inappropriate

The court must order the guideline amount of spousal support up to the cap in accordance with Family Court Act § 412 [3], unless the court finds that the guideline amount of spousal support is unjust or inappropriate, which finding must be based upon consideration of any one or more of the factors in Family Court Act § 412 [6][a], and adjusts the guideline

amount of spousal support accordingly based upon consideration of the factors in Family Court Act § 412 [6][a], set forth above.

Where the court finds that the guideline amount of spousal support is unjust or inappropriate and the court adjusts the guideline amount of spousal support pursuant to Family Court Act §412 [6][a] the court must set forth, in a written decision or on the record, the guideline amount of spousal support, the factors it considered, and the reasons that the court adjusted the guideline amount of spousal support. The decision, whether in writing or on the record, may not be waived by either party or counsel.

Self-Support Reserve - Rebuttable presumption that no temporary maintenance is awarded.

The "Self-support reserve" means the self-support reserve as defined in the child support standards act and codified in Domestic Relations Law § 240 and Family Court Act § 413.

Where the guideline amount of spousal support would reduce the payor's income below the self-support reserve for a single person, the guideline amount of spousal support is the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no spousal support is to be awarded.

Modification of Spousal Support Order

The court may modify an order of spousal support upon a showing of a substantial change in circumstances. Unless so modified, any order for spousal support issued pursuant to Family Court Act § 412 section shall continue until the earliest to occur of the following:

- (a) a written stipulation or agreement between the parties;
- (b) an oral stipulation or agreement between the parties entered into on the record in open court;
- (c) issuance of a judgment of divorce or other order in a matrimonial proceeding;
- (d) the death of either party.

Laws of 2015, Ch 269 amended Domestic Relations Law § 236 [B] [5-a], effective October 25, 2015 – Temporary Maintenance

Domestic Relations Law § 236 [B] [5-a] was amended by establishing a new formula for determining the guideline amount of temporary maintenance awards, with factors for deviation, where the award is unjust or inappropriate.

The application of the temporary maintenance guidelines is mandatory. In any matrimonial action the court must make its award for temporary maintenance pursuant to the provisions of Domestic Relations Law § 236[B] [5-a], except where the parties have entered into an agreement pursuant to Domestic Relations Law § 236 [B] [3] providing for maintenance.

Under the guidelines "Payor" means the spouse with the higher income." Payee" means the spouse with the lower income.

"Length of marriage" means the period from the date of marriage until the date of commencement of action.

"Income cap" means up to and including \$175,000 of the payor's annual income. However, beginning January 31, 2016 and every two years thereafter, the income cap amount will increase by the sum 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 prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration is required to determine and publish the income cap.

Determine the Income of the Parties

The court must first determine the income of the parties before determining the guideline amount of temporary maintenance.

"Income" means income as defined in Domestic Relations Law § 240 and Family Court Act § 413 without subtracting alimony or maintenance actually paid or to be paid to a spouse that is a party to the action pursuant to Domestic Relations Law § 240 [1-b] [b][5][vii][c] and Family Court Act § 413[b][5][vii][c] and without subtracting spousal support paid pursuant to Family Court Act § 412.

To determine the temporary maintenance guideline amount, the court must compare two calculations of the spouses' annual incomes, up to an income cap of \$175,000 on the payor's income.

A. Where the payor's income is lower than or equal to the Income Cap

I. Where child support is paid and where the payor is also the non-custodial parent pursuant to the Child Support Standards Act the following calculation is done:

- (a) subtract 25% of the payee's income from 20% of the payor's income;
- (b) multiply the sum of the payor's income and the payee's income by 40%;
- (c) subtract the maintenance payee's income from the result;
- (d) The lower of these two amounts is the temporary maintenance guideline amount.

The guideline amount of temporary maintenance is the amount determined by Domestic Relations Law § 236[B][5-a][c][1][d]. However, if the amount determined by Domestic Relations Law § 236[B][5-a][c][1][d] is less than or equal to zero, the guideline amount of temporary maintenance is zero dollars.

Temporary maintenance must be calculated prior to child support because the amount of temporary maintenance must be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

II. Where child support will not be paid for children of the marriage or where child support will be paid for children of the marriage but the payor is the custodial parent pursuant to the Child Support Standards Act the following calculation is done:

- (a) subtract 20% of the payee's income from 30% of the payor's income;
- (b) multiply the sum of the payor's income and the payee's income by 40%;
- (c) subtract the payee's income from the result;
- (d) determine the lower of the two amounts.

The court must select the lower of these two amounts as the temporary maintenance guideline amount.

The guideline amount of temporary maintenance is the amount determined by Domestic Relations Law § 236[B][5-a][c][2][d]. However, if the amount determined by Domestic Relations Law § 236[B][5-a][c][2][d] is less than or equal to zero, the guideline amount of temporary maintenance is zero dollars.

If child support will be paid for children of the marriage but the payor is the custodial parent pursuant to the child support standards act, temporary maintenance must be calculated prior to child support because the amount of temporary maintenance must be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

B. Where Payor's Income Exceeds the Income Cap

Where the payor's income exceeds the income cap, the court must determine the guideline amount of temporary maintenance as follows.

- (a) Perform the calculations set forth in Domestic Relations Law § 236[B][5-a][c] for the income of the payor up to and including the income cap.
- (b) For income exceeding the cap, the amount of additional maintenance awarded, if any, is within the discretion of the court. In exercising its discretion the court must take into consideration any one or more of the factors set forth in Domestic Relations Law § 236[B][5-a][h][1].

The factors in Domestic Relations Law § 236[B] [5-a][h][1] are:

- (a) the age and health of the parties;
- (b) the present or future earning capacity of the parties, including a history of limited participation in the workforce;
- (c) the need of one party to incur education or training expenses;
- (d) the termination of a child support award during the pendency of the temporary maintenance award when the calculation of temporary maintenance was based upon child support being awarded and which resulted in a maintenance award lower than it would have been had child support not been awarded;
- (e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;
- (f) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (g) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
- (h) the availability and cost of medical insurance for the parties;
- (i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;
- (j) the tax consequences to each party;
- (k) the standard of living of the parties established during the marriage;
- (l) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage; and
- (m) any other factor which the court shall expressly find to be just and proper.

The court must set forth the factors it considered and the reasons for its decision in writing or on the record. The decision, whether in writing or on the record, may not be waived by either party or counsel.

Unjust and Inappropriate

The court must order the guideline amount of temporary maintenance up to the income cap in accordance with Domestic Relations Law § 236[B][5-a][c], unless the court finds that the guideline amount of temporary maintenance is unjust or inappropriate, based upon consideration of one or more of the factors in Domestic Relations Law § 236[B] [5-a][h]1, and adjusts the guideline amount of temporary maintenance accordingly based upon such consideration.

The factors in Domestic Relations Law § 236[B] [5-a][h]1 are set forth above.

Where the court finds that the guideline amount of temporary maintenance is unjust or inappropriate and the court adjusts the guideline amount of temporary maintenance

pursuant to Domestic Relations Law § 236[B] [5-a][h]1, the court must set forth, in a written decision or on the record, the guideline amount of temporary maintenance, the factors it considered, and the reasons that the court adjusted the guideline amount of temporary maintenance. The decision, whether in writing or on the record, may not be waived by either party or counsel.

Self-Support Reserve - Rebuttable presumption that no temporary maintenance is awarded.

The "Self-support reserve" means the self-support reserve as defined in the child support standards act and codified in Domestic Relations Law § 240 and Family Court Act § 413.

Where the guideline amount of temporary maintenance would reduce the payor's income below the self-support reserve for a single person, the presumptive amount of the guideline amount of temporary maintenance is the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no temporary maintenance is to be awarded.

Duration of Temporary Maintenance

The court must determine the duration of temporary maintenance by considering the length of the marriage. "Length of marriage" means the period from the date of marriage until the date of commencement of action. Historically, temporary awards were made during the entire pendency of the action. This language indicates that it was the intention of the legislature to give the court discretion to award temporary maintenance for a limited period of time, rather than for the entire pendency of the action.

Temporary maintenance must terminate no later than the issuance of the judgment of divorce or the death of either party, whichever occurs first.

Opting Out of Domestic Relations Law § 236 [B][5-a]

The parties have the right to voluntarily enter into agreements or stipulations as defined in Domestic Relations Law § 236 [B][3] which deviate from the presumptive award of temporary maintenance.

Allocation of Family Expenses

In determining temporary maintenance, the court must consider and allocate, where appropriate, the responsibilities of the respective spouses for the family's expenses during the pendency of the proceeding.

Effect Upon Post-Divorce Maintenance Award

The temporary maintenance order may not prejudice the rights of either party regarding a post-divorce maintenance award.

Laws of 2015, Ch 269, amended Domestic Relations Law § 248 effective January 24, 2016.

Domestic Relations Law § 248 was amended to make the section gender neutral and substitute the terms spouse, payor, payee and personal for the terms husband, wife and man.

Laws of 2015, Ch 269 - Modification of Maintenance Awards - Domestic Relations Law §236 [B][9][b][1]

Domestic Relations Law §236 [B][9][b][1] as amended added an additional basis for the court to annul or modify any prior order or judgment for maintenance made after trial upon a showing of a substantial change in circumstance: "actual full or partial retirement of the payor if the retirement results in a substantial change in financial circumstances."

Upon application by either party, the court may annul or modify any prior order or judgment made after trial as to maintenance, upon a showing of the payee's inability to be self-supporting or upon a showing of a substantial change in circumstance, including financial hardship or upon actual full or partial retirement of the payor if the retirement results in a substantial change in financial circumstances.

Where, after the effective date of this part, an agreement remains in force, no modification of an order or judgment incorporating the terms of the agreement may be made as to maintenance without a showing of extreme hardship on either party, in which event the judgment or order as modified shall supersede the terms of the prior agreement and judgment for such period of time and under such circumstances as the court determines.

The court may shall not reduce or annul any arrears of maintenance which have been reduced to final judgment pursuant to Domestic Relations Law §244. No other arrears of maintenance which have accrued prior to the making of the application shall be subject to modification or annulment unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the

accrual of such arrears and the facts and circumstances constituting good cause are set forth in a written memorandum of decision.

The modification may increase maintenance nunc pro tunc as of the date of application based on newly discovered evidence.

Any retroactive amount of maintenance due shall, except as provided for herein, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made.

The provisions of Domestic Relations Law § 236 [B][9][b][1] do not apply to a separation agreement made prior to its effective date.

September 16, 2015

Appellate Division, Second Department

Improper to Base Significant Portion of Custody Decision on off the Record Conferences.

In *Minjin Lee v Jianchuang Xu*, --- N.Y.S.3d ----, 2015 WL 5437333, 2015 N.Y. Slip Op. 06784 (2d Dept.,2015) the Appellate Division observed that as a general rule, it is error to make an order respecting custody based upon controverted allegations without the benefit of a full hearing. Supreme Court, after holding “extensive” in camera discussions with counsel on the issues of excessive corporal punishment and parental alienation, refused to allow testimony on these controverted issues, stating that they were “sporadic and inconsequential.” Instead, the Supreme Court directed that only “positive” aspects of the parties’ parenting be presented on the record. The Appellate Division held that this was error, requiring a new trial, since the court cannot base a significant portion of its decision on off-the-record conferences.

Supreme Court

Counsel Fees Denied Wife for Failure to Comply with Uniform Rules. Presumptive Child Support Award Reduced Where Husband Established That Income on Tax Returns Not Reflective of Typical Annual Income

In *AG v LG*, 2015 WL 5294817 (Table), 2015 N.Y. Slip Op. 51310(U) (Sup.Ct.,2015) the parties were married on April 26, 2008 and had one child. Defendant vacated the marital residence in June 2015 and plaintiff then commenced an action for a no-fault divorce on July 16, 2015, simultaneously filing a motion for pendente lite relief. Plaintiff was employed at Elizabethtown Community Hospital and defendant operated a dairy farm in Essex County. According to the parties’ 2014 tax return, plaintiff earned \$20,887.00 per year and defendant earned \$113,305.00 per year. Based upon these figures, plaintiff calculated the presumptively correct amount of temporary child support to be \$254.00 per week (DRL § 240[1-b][c]). Defendant opposed plaintiff’s request for temporary child support in this amount, contending that the income on

his tax returns was not reflective of his typical annual income: “My income is produced solely from the sale of milk generated on the farm. I sell milk exclusively to AgriMark, Inc., who pays me bi-weekly. “My income is not consistent. It depends exclusively upon milk production and the price that AgriMark, Inc., will pay for milk. My income as it appears on my 2014 state and federal tax returns is not reflective of my typical annual income. It also is not reflective of my anticipated earnings for 2015. In 2014, milk prices were significantly higher than they are for 2015.” In support of these contentions, defendant submitted two monthly statements from AgriMark, Inc., one dated July 18, 2014 and the other dated July 20, 2015, which demonstrated a reduction in the price of milk from \$24.7519 per hundred pounds in 2014 to \$17.5105 per hundred pounds in 2015. Defendant submitted copies of the parties’ 2012 and 2013 tax returns which listed his annual income as \$17,802.00 and \$54,653.00, respectively. He also submitted a detailed list of his income and expenses to date for 2015, projecting that his income for the year would be approximately \$22,480.00. Defendant requested that the Court calculate temporary child support using plaintiff’s annual salary of \$20,887.00 and his projected annual salary of \$22,480.00. In view of the evidence submitted by defendant the Court found that an income of \$22,480.00 should be used in calculating temporary child support and held that the presumptively correct amount of temporary child support from defendant to plaintiff was \$63.69 per week

Plaintiff sought interim counsel fees in the amount of \$3,000.00, which amount she paid to her attorneys as an initial retainer. In support of this request, plaintiff submitted a copy of the retainer agreement and an affidavit in which she stated that “[b]ecause of the complexity of the issues in this case, including the necessity [of] valu[ing] a farm business, [she] is requesting an interim award of counsel fees in the amount of \$3,000[.00].” Counsel for plaintiff did not submit an affirmation of services in support of the request, nor did plaintiff submit a statement of net worth. Supreme Court observed that Uniform Rules for Trial Courts 22 NYCRR) § 202.5(k)(2) provides that no motion for counsel fees pendente lite “shall be heard unless the moving papers include a statement of net worth....” Uniform Rules for Trial Courts (22 NYCRR) § 202.5(k)(3) further provides that no such motion “shall be heard unless the moving papers also include the affidavit of the movant’s attorney stating the moneys, if any, received on account of such attorney’s fee from the movant or any other person on behalf of the movant, the hourly amount charged by the attorney, the amounts paid, or to be paid, to counsel and any experts, and any additional costs, disbursements or expenses, and the moneys such attorney has been promised by, or the agreement made with, the movant or other persons on behalf of the movant, concerning or in payment of the fee. Based upon the foregoing, the Court found that plaintiff was not entitled to the requested award of interim counsel fees.

[Authors note: We believe the court was referring to Uniform Rules for Trial Courts (22 NYCRR) § 202.16, not §202.5]]

September 1, 2015

Appellate Division, Second Department

Where No Actual Damages Shown Fine for a Civil Contempt Can't Exceed \$250

In *Weissman v Weissman*, 2015 WL 4743845 (2d Dept, 2015) the Appellate Division held that the Supreme Court properly held the plaintiff in contempt, for violating the confidentiality provision of a stipulation of settlement that was incorporated into the judgment of divorce which prohibited either party from disclosing to third parties, other than medical or other professionals who were treating or assisting that party in their professional capacity, any of the allegations of misconduct by the parties which had been litigated in the action. However, Supreme Court exceeded its statutory authority by suspending the defendant's obligation to make his maintenance payments of \$10,000 per month to the plaintiff for a period of eight months, and by imposing a fine upon the plaintiff in the sum of \$7,500. Pursuant to Judiciary Law § 753, a court punishing a party for contempt can impose a fine or imprisonment, or both. Where no actual damages are shown, the amount of a fine for a civil contempt cannot exceed \$250 (Judiciary Law § 773). The Supreme Court exceeds its authority when it fashions a remedy not contemplated by the statute. The defendant failed to make any showing of actual damages. Since the plaintiff sent copies of a the letter violating the confidentiality provision to eleven third parties, this was a case in which separate fines may be imposed for multiple acts of disobedience. The amount of the fine imposed was reduced to the statutory maximum of \$250 per third party, for a total of \$2,750. Supreme Court properly awarded the defendant an attorney's fee pursuant to Judiciary Law § 773.

Threat to Cancel Wedding If Prenuptial Agreement Not Signed Did Not Establish Duress

In *Hof v Hof*, --- N.Y.S.3d ----, 2015 WL 4923395, 2015 N.Y. Slip Op. 06573 (2d Dept.,2015) the Appellate Division held that the husband's threat to cancel their wedding if the prenuptial agreement was not signed did not establish duress (see *Weinstein v. Weinstein*, 36 A.D.3d 797, 799, 830 N.Y.S.2d 179). The order, which after a hearing, denied the wife's application to invalidate the prenuptial agreement, was affirmed.

The Appellate Division observed that a court may deviate from the presumptive award of temporary maintenance if that presumptive award is 'unjust or inappropriate. (Domestic Relations Law § 236[B][5-a][e][2]).Supreme Court downwardly deviated from the presumptive award by awarding the wife the sum of only \$1,500 per month in pendente lite maintenance. Contrary to the conclusion of the court, the fact that the husband was maintaining the marital residence where he was living after the wife vacated the marital residence with the children, and the fact that the wife stayed home during a portion of the marriage to take care of the children, did not render the presumptive award of pendente lite maintenance unjust or inappropriate. It modified the award of pendente lite maintenance to provide the wife with the presumptive award of \$2,549.70 per month based upon the husband's representation that he

had an annual income of \$110,020, and the court's deduction of \$8,032 for federal insurance contributions act (FICA) taxes.

Family Court

Former Foster Parent of a Child Does Not Have Standing to File an Adoption Petition or Seek Guardianship Without Agency's Consent

In *Matter of Davon D.*, Slip Copy, 2015 WL 4997885 (Table), 2015 N.Y. Slip Op. 51264(U) (Fam Ct 2015), a neglect proceeding, the child's former foster parents filed a petition for Guardianship of the child, and in the interim, they sought expanded, overnight visitation with the child. The Family Court held that it could not cannot pursue an eventual return of the child to the foster parents without the consent of the foster care agency. A former foster parent of a child does not have standing to either (1) file an adoption petition for the child or (2) seek guardianship of the child. The Court of Appeals and First Department specifically prohibits both options without the agency's consent. See *Matter of Yari*, 100 AD3d 200, 206 (1st Dept.2012) ("[T]he agency is the only entity having lawful care and custody of the child, and there is no individual in the position of parent or guardian who has the right to consent, or withhold consent, to an adoption of the child. Consequently, we conclude that adoption of the child in this instance must satisfy the provisions of sections 112 through 114 [of the Domestic Relations Law], covering authorized agency adoptions, and that the framework for private placements adoptions is not applicable here." Likewise, the courts have held that foster parents may not file a custody or guardianship petition under these circumstances, because even if a child's best interests might warrant it, custody and/or guardianship are not proper permanency outcomes at this stage of a case.") *Mary Liza J. v. Orange County Dep't of Social Servs.*, 198 A.D.2d 350 (2nd Dept.1993); *In re Michael B.*, 80 N.Y.2d 299 (1992). The Guardianship petition was dismissed, and the application for overnight visitation was denied.

Supreme Court

Supreme Court Permits Discovery of Discovery of Social Media Relevant to the Issue of Custody

In *A.D. v C.A.* --- N.Y.S.3d ----, 2015 WL 4946422, 2015 N.Y. Slip Op. 25283 (Sup. Ct., 2015) the defendant moved, inter alia, for an order directing defendant to turn over printouts of all pictures, posts and information posted on her Facebook pages over the past four (4) years or, in the alternative, should defendant not voluntarily produce said records, that defendant be directed to turn over all computer hard drives, data storage systems, flash drive/memory sticks and CD/DVDs created by defendant to plaintiff's retained expert; directing defendant to turn over a copy of the SD card of defendant's smartphone or iPhone. In this action the

parties challenged the amount of time the other has spent with the child since his birth and until the commencement of this action. During this time frame, plaintiff worked locally as a social worker counselor. Defendant worked as a medical doctor and psychiatrist. She had been required to travel frequently outside of New York for work. Supreme Court observed that a party demanding access to social networking accounts must demonstrate that the request will lead to “the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.” *Abrams v. Pecile*, 83 AD3d 527, 528 [1st Dept 2011]. A person’s use of privacy settings on social media, such as Facebook, restricting the general public’s access to private postings does not, in and of itself, shield the information from disclosure if portions of the material are material and relevant to the issues of the action. See *Patterson v. Turner Construction Company*, 88 AD3d 617 [1st Dept 2011]; *Richards v. Hertz Corp.*, 100 AD3d 728, 730 [2d Dept 728], citing *Patterson*, supra. Courts will not, however, condone what amounts to a fishing expedition. Supreme Court found that the time spent by the parties with the child may be relevant and material to its ultimate determination of custody, and therefore found that the discovery sought herein was properly before the court. *S.R.E.B. v. E.K.E.B.*, 2015 N.Y. Slip Op 51158(U) [Sup.Ct., Kings Co. August 6, 2015]. Defendant denied that her Facebook postings were preserved on her computer’s hard drive, flash drive/memory sticks, CD/DVDs, or other data systems. She denied that her iPhone had an SD card. She also urges the necessity of protecting her privacy and the confidentiality of her patients. The Court directed that defendant take steps to produce printouts of her Facebook postings depicting or describing her whereabouts, outside the New York City area, from the time of the child’s birth through the commencement of the proceeding, whether of her alone, or together with the parties’ child. These postings were to be delivered to the court, for in camera review. Defendant was also directed to submit an authorization permitting the court to have access to her Facebook postings during the applicable time frame. The court sua sponte directed that plaintiff produce any of defendant’s postings he possessed or has access to with an affidavit stating they represented all such Facebook postings possessed by or available to defendant in their entirety during the above time period.

August 16, 2015

Supreme Court

Supreme Court Permits Discovery of Discovery of Travel Records and Audio and Video Files Relevant to the Issue of Custody

In *S.R.E.B. v. E.K.E.B.*, 48 Misc.3d 1217(A), 2015 WL 4726491 (Table), 2015 N.Y. Slip Op. 51158(U) (Sup.Ct., Kings Co. 2015) prior to the trial of a contested custody proceeding the wife’s attorney served the husband’s attorney with a Notice for Discovery and Inspection, requesting, inter alia, frequent flyer applications, copies of frequent flyer cards and

statements, and other travel loyalty accounts, domestic or foreign, in which the husband participated, from January 2008 to October 2014 (Item 30), and any and all records showing flight, train, bus, car rental and accommodation bookings, including frequent flyer trips made by the husband for domestic or foreign work, or vacation travel during the six (6) years preceding the date of notice (Item 32). The husband's Response to Defendant's Notice for Discovery and Inspection, responded to Item 30 with printouts of homepages to frequent flyer and travel loyalty accounts. The pages reflected only introductory information without any details. The husband's response to Item 32 indicated that the documents were provided on October 15, 2014 to the extent that they were in the husband's possession or control, in compliance with the Preliminary Conference Order. The wife, through her counsel, served a second request for copies of the husband's current and most recently canceled Australian and Irish passports, American Airline frequent flyer records from 2003 to date, copies of all itineraries for employment and/or recreational related travel from 2003 to January 1, 2015. The wife also requested all audio and video tape recordings made by the husband in the marital residence. After the husband's attorney filed the Note of Issue the wife's attorney requested that the Court sign a "So Ordered" Trial Subpoena, again demanding copies of the husband's current and most recently canceled Australian and Irish passports, copies of all of the husband's travel itineraries for the period from 2003 through January 1, 2015, and all audio and video recordings made by the plaintiff in the marital residence. The Court "So Ordered" the Trial Subpoena, and required that the documents be provided by April 1, 2015. The wife moved for an order pursuant to CPLR 3126(1) and 3126(2) (1) to draw a negative inference against the husband for failing to produce his personal and business travel records (2) and/or to accept as true all testimony given by the wife regarding the husband's travel during the marriage, and (3) to accept as true all the wife's testimony regarding video and audio recorded events at the marital residence during the marriage.

Supreme Court granted the motion. It observed that is established policy in the First and Second Judicial Department that generally, pretrial discovery is not allowed absent court permission. The rule has been predicated upon the theory that the potential for abuse of discovery is so great in matrimonial actions that the Court is given broad discretionary power to grant a protective order " to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (*Wegman v. Wegman*, 37 NY 940, 941, 380 N.Y.S.2d 649 [1975], quoting CPLR 3103). It noted that in *Burgel v. Burgel*, the Second Department permitted discovery in the form of drug testing where the mental and physical condition of the parent was at issue and where there was no increased potential of abusing the discovery process (*Burgel v. Burgel*, 141 AD2d 215 [2 Dept, 1988]). In *Johnson v. Johnson*, the First Department found that the trial court properly denied the "defendant's motion for a protective order as to those tapes that were not submitted to the court, and directed that defendant turn them over to plaintiff, finding that discovery of this material was appropriate in the circumstances of the custody dispute between the parties" (*Johnson v. Johnson*, 235 AD2d 217, 652 N.Y.S.2d 504, 505 [1 Dept., 1997]) [The court found that the tapes were appropriate discovery material in the context of a custody dispute. The court also found that in maintaining the children's best interest as the dominant consideration and considering the potential of undermining the trust and confidence that should exist between parent and child, the trial court should use its discretion in determining whether and how the material should be

used]. Moreover, in *Kosovsky v. Zahl*, the Court granted the defendant's motion for the films, videotapes, audiotapes, transcripts and memoranda to be turned over immediately and found that there was a need for the materials that were in the plaintiff's possession where the defendant could not acquire the equivalent himself (*Kosovsky v. Zahl*, 165 Misc 2d 164 [Sup. Ct., 1995]). Under the limited facts and circumstances presented here, the Court found that the discovery of travel records and audio and video files were relevant to the issue of custody and necessary to the Court's final determination on the issue of custody. The wife was unable to acquire these documents on her own and her discovery request did not raise the concerns that the rule against discovery in custody trials seeks to prevent. If the husband were allowed to make allegations and insulate evidence that is relevant to the wife's defense, applying the rule would compromise the integrity of the adversarial process. In an exercise of discretion, the Court allowed the discovery of travel records, audio files, and video files because the disclosure was material to the husband's claim and wife's defense, there were reasonable grounds for the disclosure, and the disclosure was minimally intrusive. The Court held that once the husband received notice that discovery of the audio and video recordings were needed for litigation, he had an obligation to preserve the materials and prevent the lapse of these files. The Court directed the husband to produce the documents and recordings, and indicated that his failure to do so could result in the requested orders.

August 1, 2015

Court of Appeals Holds That There Is No Exception to Physician Patient Privilege for Abuse Admitted to Psychiatrist Even If a Patient Is Cognizant of Psychiatrist's Reporting Obligations under Child Protection Statutes,

In *People v. David Rivera*, No. 20, NYLJ 1202725546913, at *1 (Ct. of App., Decided May 5, 2015) defendant, while seeking treatment from a psychiatrist, admitted to sexually abusing an 11 year old relative. The psychiatrist notified the Administration for Children's Services (ACS) of defendant's admission. Following an in camera review of the records, Supreme Court held that the admissions defendant made to his psychiatrist were privileged because they were made in the course of diagnosis and treatment of his condition. However, the court, while refusing to allow "the full extent of defendant's admissions" to be used, held that, because the psychiatrist had disclosed the reported abuse to ACS, the fact that defendant had admitted to the abuse was admissible. The Court of Appeals held that the trial court's ruling ran afoul of the physician patient privilege (see CPLR 4504 [a]). It rejected the People's claim that, because defendant's admission related to the sexual abuse of a child, it was not privileged since defendant had no reason to believe that it would remain confidential. The Court of Appeals held that regardless of whether a physician is required or permitted by law to report instances of abuse or threatened future harm to

authorities, which may involve the disclosure of confidential information, it does not follow that

such disclosure necessarily constitutes an abrogation of the evidentiary privilege a criminal defendant enjoys under CPLR 4504 (a). CPLR 4504 contains the exceptions to the privilege.

The

Court of Appeals observed that when the Legislature has sought to either limit or abrogate the privilege beyond the confines of section 4504, it has been clear in its intent. Although the physician patient privilege is in derogation of the common law, it should be afforded a broad and

liberal construction to carry out its policy of encouraging full disclosure by patients so that they

may secure treatment. Conversely, exceptions that limit the privilege are afforded a narrow construction. The Legislature has not created an express exception permitting a psychiatrist to

testify concerning an admission made by a criminal defendant during the course of a professional

relationship where the admission was made for purposes of diagnosis and treatment. Even if a

patient is cognizant of his psychiatrist's reporting obligations under child protection statutes, that

does not mean that he should have any expectation that statements made during treatment will be

used against him in a criminal matter. Defendant, who was admitted to CPH based upon the diagnoses of depression and suicidal ideation, allegedly made admissions to his psychiatrist for

the purpose of treatment. Thus, defendant's admission was subject to the physician patient privilege and, absent any waiver or exception (neither of which was present here), its admission in

evidence through the testimony of defendant's psychiatrist violated section 4504 (a).

Appellate Division, Second Department

Credit Against the Distributive Award in the Amount of Difference Between Excessive Pendente

Lite Award and the Final Child Support Award May Be Granted But Is Not Mandatory

In *Walker v Walker*, --- N.Y.S.3d ----, 2015 WL 4254048 (N.Y.A.D. 2 Dept.), the Appellate Division rejected defendant's contention, that he was entitled to a credit against the distributive

award in the amount of the difference between the pendente lite award and the final child support

award. 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. (Johnson v. Chapin, 12 NY3d 461, 466). Although such a credit may be granted, it is not mandatory. Here, there was no evidence presented warranting the defendant's recoupment of any portion of the unallocated pendente lite award. The defendant was not entitled to a credit for his payment, during the pendency of the action, of amounts owed in connection with the parties' home equity line of credit. In general, expenses incurred prior to the commencement of a divorce action constitute marital debt and should be equally shared by the parties. Supreme Court directed the defendant to make the home equity line of credit payments and the plaintiff to make the mortgage payments in connection with the marital residence. Since the amounts that the defendant paid in connection with the home equity line of credit were less than the mortgage payments made by the plaintiff, he was not entitled to a credit for such payments.

The Appellate Division held that Supreme Court did not err in declining to impose a SUNY cap on the defendant's obligation to contribute to the costs of the children's college education.

Whether to impose a SUNY cap is determined on a case-by-case basis, considering the parties' means and the children's educational needs. Under the circumstances of this case, where the children had always attended private school, the parties each attended private colleges and graduate school, and the parties had the financial ability to pay, it was not an improvident exercise of discretion for the court to decline to impose a SUNY cap.

Default Does Not Diminish Court's Primary Responsibility to Ensure That Custody Award Is Predicated on Child's Best Interests, upon Consideration of Totality of Circumstances, after Full and Comprehensive Hearing and Careful Analysis of All Relevant Factors

In Matter of Sims v Boykin, --- N.Y.S.3d ----, 2015 WL 4254562 (N.Y.A.D. 2 Dept.), the Appellate Division observed that where, as here, a parent repeatedly fails to appear at scheduled hearings and to comply with the court's directives, the court has the authority to proceed by default. However, this authority in no way diminishes the court's primary responsibility to ensure that an award of custody is predicated on the child's best interests, upon consideration of the totality of the circumstances, after a full and comprehensive hearing and a careful analysis of all

relevant factors. Here, upon the mother's failure to appear at a hearing on the father's petition for custody of the child, the Family Court made a custody determination after a brief inquest at which the evidence was insufficient to make an informed best interests determination. No specific findings of fact were made by the court, the attorney for the child was not afforded an opportunity to meet with her client before custody was decided, and the court failed to award the mother any visitation. The Appellate Division observed that the parents did not live in the same state, yet the record did not indicate whether the Family Court fully considered the impact of moving the child away from his mother, who had been the child's primary caregiver since birth, his siblings, and his maternal grandmother, to live with the father and paternal grandparents in Pennsylvania. The fact that the child would be required to relocate to Pennsylvania upon an award of final custody to the father should have been considered as one of many factors in determining what is in the child's best interests. The child had special medical needs, yet there was scant evidence in the record to show that this important factor was adequately considered. While the record indicated that the father's custody petition was prompted by a pending investigation of medical neglect against the mother, the record did not indicate what, if anything, transpired from that investigation. The record did not reveal whether the father was capable of providing an acceptable course of treatment for the child's special medical needs in light of all the surrounding circumstances, nor whether the mother had deprived the child of adequate medical care. While the Family Court's concern that the mother was actively seeking to alienate the child from the father was very serious this factor alone could not justify the court's custody determination. It held that under the circumstances presented, the mother's motion to vacate the final order of custody should have been granted in the interest of justice as the final custody order lacked a sound and substantial basis in the record.

July 16, 2015

Appellate Division - First Department

Counsel Fees - Award - Appeal - Right to Seek Counsel Fees Includes Right to Appeal Denial of Such Fees - Court's Analysis of Who Is Monied Spouse Unduly Relied on Current Incomes of the Parties and Did Not Sufficiently Consider the Value of Their and Earning History and Earning Potential of Both Parties.

In *Saunders v Guberman*, --- N.Y.S.3d ----, 2015 WL 4208594 (N.Y.A.D. 1 Dept.), the Appellate Division held that the nonparty appellant law firm had standing to appeal the denial of a motion for counsel fees pendente lite. The right to seek counsel fees under DRL § 237(a) includes the right to appeal the denial of such fees. Following the order denying the motion, the firm timely served and filed a notice of appeal on defendant's behalf and may, on this basis, maintain the appeal even after having been granted leave to withdraw from representation for nonpayment of counsel fees. The firm was not required to file a separate notice of appeal to establish and maintain standing to appeal the order, and defendant may not cause the firm, which timely served and filed a notice of appeal on its own behalf from a second order denying counsel fees, to lose standing by withdrawing his separately filed notice of cross appeal of that order.

The Appellate Division held that the applications for interim counsel fees were improperly denied. DRL § 237(a) contains a rebuttable presumption that "counsel fees shall be awarded to the less monied spouse". The court erred by failing to designate defendant as the less monied spouse, and therefore presumptively entitled to counsel fees. The court's analysis unduly relied on the current incomes of the parties and did not sufficiently consider the value of their assets. Instead of focusing simply on their current incomes, the court should have also weighed the earning history and earning potential of both parties. Although plaintiff was unemployed at the time the motions were made, she earned considerably more than defendant during the course of their relationship, and according to the court's own finding, expected to earn more than defendant upon finding new employment. While the court recognized that plaintiff had more assets than defendant, it reasoned that the assets were "unlikely to produce an income that is equal to [defendant's]" and mistakenly exempted them from its analysis. As it did here, excluding assets merely because they do not generate income can severely distort the financial positions of the parties. Plaintiff had vastly outspent defendant over the course of this action, incurring twice as many counsel fees as defendant, and paying five times more to her attorneys than defendant has paid to his. It reversed the orders and granted interim counsel fees of \$125,000.

Appellate Division, Second Department

Instructive Opinion From Second Department Holds That Submission of Proposed QDRO May Be Utilized to Obtain Pension Arrears - Application or Motion for Issuance of a

QDRO Not Barred by Statute of Limitations - No Requirement under 22 NYCRR 202.48 That Proposed QDRO Be Submitted Within 60 Days - Plaintiff's Majauskas Share May Not Be Reduced by Virtue of Loan Secured Defendant Against His Pension, Which Was Not Repaid at the Time of Retirement, and Which Reduced Amount of Monthly Payments to Both Parties -

In *Kraus v Kraus*, --- N.Y.S.3d ----, 2015 WL 4097055 (N.Y.A.D. 2 Dept.) the Appellate Division, Second Department, in an opinion by Justice Dillon, held that the submission for judicial approval of a proposed qualified domestic relations order (QDRO), instead of a motion made on notice, may be employed by a party to a matrimonial action to obtain pension arrears.

In 1995, the parties settled their matrimonial action,, pursuant to which each spouse was entitled to a marital share of the other spouse's pension in accordance with the formula set forth in *Majauskas v. Majauskas* (61 N.Y.2d 481). The stipulation of settlement expressly provided that "[a] Qualified Domestic Relations Order shall be prepared in the course of any divorce and forwarded to the Court for signature and filed with the Husband's employer." A judgment of divorce was signed by the Supreme Court in 1996, which incorporated, but did not merge, the stipulation. Less than a year after entry of the judgment, the defendant submitted a proposed Qualified Domestic Relations Order (QDRO) to the court in order to effectuate payment of his share of the plaintiff's pension and it was signed by the court on January 24, 1997. The defendant remarried and continued to work for the Fire Department in New York until his retirement on March 1, 2008. After the divorce was finalized, but prior to his retirement, the defendant took out a loan against his pension, which had an outstanding balance of \$8,503.24 at the time of his retirement. To repay the loan, the defendant's overall retirement pension was therefore reduced by the plan administrator of the New York Fire Department Pension Fund (FDNY pension plan) by the sum of \$848.58 per year. The maximum possible pension was further reduced by the defendant's election of a survivorship benefit in favor of his second wife. The loan repayment and survivorship deductions reduced the annual pension benefits received by the defendant from a maximum amount of \$65,926.56 to \$58,887.03. The reduction concomitantly reduced the plaintiff's share of the defendant's overall pension, which was calculated, according to the terms of the parties' stipulation, as 22.3% of the total.

On August 29, 2012, approximately 6 ½ years after the Supreme Court signed the judgment of divorce and 4 ½ years after the defendant's retirement, the plaintiff learned of the defendant's retirement, and submitted a proposed QDRO to the Supreme Court for settlement and signature. During the time between the defendant's retirement and the plaintiff's submission of the proposed QDRO, the defendant had been receiving his pension without any deduction for the plaintiff's share under the *Majauskas* formula, as contemplated by the stipulation and final judgment of divorce. The plaintiff's proposed QDRO called for two mathematical calculations, to account for the loan and pension arrears, which the defendant objected. The defendant opposed the plaintiff's proposed

QDRO and submitted his own proposed QDRO, with cross notice of settlement. The defendant's proposed QDRO directed payment to the plaintiff of her Majauskas share of the actual, reduced retirement benefit, necessarily reflecting the deductions for the pension loan repayments and election of the survivorship option.

Supreme Court signed the defendant's proposed QDRO, and that QDRO was entered on April 19, 2013. The plaintiff began receiving her Majauskas share of the defendant's pension, as reduced by the loan repayment and by the defendant's election to take his pension benefits subject to his second wife's right of survivorship. However, the Supreme Court did not direct the defendant to pay any arrears to the plaintiff.

The Appellate Division modified the QDRO to the extent of awarding the plaintiff pension arrears accumulated between the defendant's retirement on March 1, 2008, and March 26, 2013, the date that the QDRO appealed from was signed. It also directed that the plaintiff's share of the defendant's pension benefits be calculated as if there were no reduction in monthly benefits arising from the loan made to the defendant.

The Appellate Division observed that 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. If 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. Thus, a court cannot issue a QDRO "encompassing rights not provided in the underlying stipulation, or one that is more expansive than the stipulation. Although the stipulation in this matter failed to identify the party who would be responsible for submitting the proposed QDROs to the Supreme Court, it is generally the responsibility of the party seeking approval of the QDRO to submit it to the court with notice of settlement. A logical reading of the relevant language lead to the conclusion that plaintiff was to prepare and submit, to the Supreme Court, a proposed QDRO with respect to the defendant's pension.

Despite the plaintiff's delay in submitting a proposed QDRO to the Supreme Court, the Appellate Division rejected the defendant's contention that the plaintiff was not entitled to the arrears in pension benefits that accumulated between March 1, 2008, the date that the defendant retired from the FDNY, to March 26, 2013, the date that the Supreme Court signed the plaintiff's proposed QDRO. An action to enforce a distributive award in a matrimonial action is governed by a six-year statute of limitations (CPLR 213[1], [2]). However, the precedent established by the court held that since a QDRO is derived from the bargain struck by the parties, there is no need to commence a separate, plenary action to formalize the agreement, and that "an application or motion for the issuance of a QDRO is not barred by the statute of limitations" (Denaro v. Denaro, 84 AD3d at 1149; see Bayen v. Bayen, 81 AD3d at 866; Duhamel v. Duhamel, 4 AD3d 739, 741). It adopted the rule of the Appellate Division, Third Department, in Boylan v. Dodge (42 AD3d 632), which expressly stated that a request for judicial approval of "a QDRO is the proper method for plaintiff to collect the pension arrears in this case".

The Third Department relied upon its own earlier precedent in *Peek v. Peek* (301 A.D.2d 201), in which it rejected a defendant's contention that the plaintiff was not entitled to receive arrears because she failed to submit a proposed QDRO to the court, as directed by the separation agreement. The Third Department determined that the plaintiff did not waive her right to receive "her property interest in defendant's pension beginning in March 1998" merely by failing to file a proposed QDRO immediately after the judgment of divorce was finalized, and that the submission of a proposed QDRO to the court with the final divorce papers "is not a condition precedent to plaintiff receiving her property interest in defendant's pension". The Court rejected the holding of the Appellate Division, Fourth Department, in *Bielecki v. Bielecki* (106 AD3d 1454), which reached a different conclusion on the issue of whether the statute of limitations applied to a plaintiff's postjudgment motion seeking arrears for her share of the defendant's pension benefits. The Fourth Department expressly concluded that the six-year statute of limitations applied, and began to run when defendant began receiving his pension in March 1991. However, because the defendant had an ongoing obligation to the plaintiff, the statute began to run anew with each missed payment. Thus, the Fourth Department determined that the plaintiff's claim was timely to the extent that it sought payments missed within six years prior to her October 2010 motion. The Appellate Division adhered to its precedent in *Bayen*, and agreed with the Third Department's reasoning in *Boylan v. Dodge* and *Peek v. Peek*, which warranted its conclusion that the QDRO here in dispute be modified to reflect the plaintiff's entitlement to her distributive share of the defendant's pension, pursuant to the *Majauskas* formula, from March 1, 2008, until March 26, 2013. The parties' stipulation expressly provided that the plaintiff would receive her proportionate marital share of the defendant's pension at the time the defendant retired. Thus, like the plaintiff in *Peek*, the plaintiff here acquired a property interest in the defendant's pension at the time he retired and started receiving benefits. By receiving payments referable to that period of time, the plaintiff would not be enjoying a windfall, but will simply be receiving the property that she was entitled to receive from March 2008 forward, pursuant to the clear language of the stipulation. It further noted that even if the six-year statute of limitations applied to a postjudgment motion in a matrimonial action, the plaintiff's claim would not be time-barred because she submitted her proposed QDRO to the Supreme Court in July 2012, just four years after the defendant retired in March 2008.

The Appellate Division pointed out that there is also no requirement under 22 NYCRR 202.48 or otherwise that proposed QDROs be submitted within 60 days of the execution of a stipulation of settlement of a matrimonial action or the issuance of a judgment of divorce, as QDROs are merely procedural mechanisms for effectuating payment of a spouse's share of the other spouse's pension (see *Denaro v. Denaro*, 84 AD3d at 1149; *Lawton v. Lawton*, 239 A.D.2d 866). The Appellate Division agreed with the plaintiff that her share should be calculated without reference to the reduction in benefits resulting from the loan made to the defendant.

Inasmuch as the stipulation did not contain any provision directing that the plaintiff's share of the defendant's pension benefits be calculated on the maximum value that the

pension would have had without the defendant's provision of post-divorce survivor benefits to his second wife, the Supreme Court, and the Appellate Division were without authority to grant the plaintiff the greater rights she sought. The stipulation did not contain any expressed prohibition against the defendant obtaining a loan against the pension or providing a survivor benefit to a future spouse. The Court of Appeals, in *McCoy v. Feinman* (99 N.Y.2d 295), made clear that where a stipulation is not ambiguous and does not cover certain benefits-in that case, pre-retirement death benefits-the plaintiff is not entitled to receive those 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. Thus, it is improper for a court to issue any qualified domestic relations order that encompasses rights that were not provided in the underlying stipulation. Here, inasmuch as the stipulation did not contain any provision directing that the plaintiff's share of the defendant's pension benefits be calculated on the maximum value that the pension would have had without the defendant's provision of post-divorce survivor benefits to his second wife, the Court was without authority to grant the plaintiff the greater rights she sought.

In 1993, the Court of Appeals, in *Olivo v. Olivo* (82 N.Y.2d 202), addressed the effect that postjudgment events have upon the amount of pension benefits later paid to nontitled ex-spouses. Olivo acknowledged that there are a number of postjudgment events that may increase or decrease the amount of a pension's payout. In *Lemesis v. Lemesis* (38 AD3d 1331), the Fourth Department addressed the circumstance relevant here, where the employed spouse remarried and provided his new wife with a survivorship benefit that reduced the pension's monthly payout upon retirement. The Fourth Department held there that the husband's ex-wife was not entitled to have her Majauskas share of the pension calculated upon the pension's highest potential amount, as if there had been no survivorship benefit provided to the second wife, since there was no provision expressed in the separation agreement providing for such relief. In another Fourth Department decision, *Unser v. Fox* (83 AD3d 1429), the husband began receiving a police pension that was split with his ex-wife, and then commenced new employment that was later reclassified as state employment that suspended his pension benefits. The Fourth Department held that the wife was not entitled to a money judgment equal to her share of the suspended pension payments, as the wife was entitled only to a share of the pension that is ultimately obtained by the pensioner. Applying the foregoing analysis, the Appellate Division held that the plaintiff was not entitled to a recalculation of the defendant's pension benefits so as to negate the survivorship benefit bestowed by the defendant on his second wife (see *Olivo v. Olivo*, 82 N.Y.2d at 210; *Unser v. Fox*, 83 AD3d at 1431; *Lemesis v. Lemesis*, 38 AD3d at 1332). The reduction in the monthly payouts occasioned by the provision of survivorship pension rights to the defendant's second wife was not prohibited by the negotiated terms of the stipulation, and the detriment arising from the reduction in the payout amount was mutually shared by both the plaintiff and the defendant. Accordingly, the effect occasioned by the defendant's provision of survivorship benefits to his second wife should be treated no differently than had the defendant retired early, accepted a

retirement incentive, worked additional years, or been subject to an employer's lawful amendment of the underlying pension plan.

The Appellate Division took a different view with respect to the loan that was secured by the defendant against his pension, which was not repaid at the time of his retirement, and which reduced the amount of monthly payments to both parties, and concluded that the plaintiff's Majauskas share may not be reduced by virtue of the loan. The reason was that, with respect to the loan, the parties did not receive any mutual benefit from the defendant's receipt of the loan proceeds. The loan proceeds were paid to and used solely by the defendant, yet the plaintiff, who derived no benefit from the loan proceeds, was being required to share in its cost by virtue of her receipt of reduced monthly payments for so long as the pension benefits are paid to her. The circumstances under which the defendant secured the loan were distinctly different from those where an employee takes early retirement, works additional years, elects a survivorship benefit, accepts a retirement incentive package, or is subject to changes to the pension imposed by the employer, as, in all of those instances, the gains or losses are mutually shared by the retiree and by the ex-spouse receiving a marital share of the benefits. The defendant's loan, by contrast, was not grounded in mutuality, as the loan proceeds that reduced the value of the defendant's pension were not shared with the plaintiff. Were the court to hold that spouses may take loans against their pensions and retain 100% of the loan proceeds, and thereby reduce their obligation to ex-spouses, employees might be given the incentive to unilaterally strip their pensions of value at the partial expense of their ex-spouse. The reasonable expectations of the parties, as discerned from their stipulation, cannot be construed as permitting the consequences urged by the defendant, where both parties incur a reduction in the monthly payout of pension benefits by virtue of a loan, but the defendant derives 100% of the benefit of the loan proceeds.

July 1, 2015

Appellate Division - First Department

"He Who Represents Himself..." - Divorce - Sanctions - Matrimonial Attorney Who Represented Himself Sanctioned For Delay Harassment and Obfuscation

In *Borstein v Henneberry*, --- N.Y.S.3d ----, 2015 WL 3851807 (N.Y.A.D. 1 Dept.), after trial the parties submitted post-trial memoranda. In a section entitled "Assets and Liabilities Claimed to be Marital," the husband, an experienced matrimonial lawyer, claimed that he loaned the wife "\$27,000 during the years after the filing for divorce" to allow her to finance

a business venture. He also listed the loan as the sixth of nine credits totaling \$1,184,500, and stated that he had "loaned to [the wife] about \$27,000 after the filing for divorce and should receive a credit for the full \$27,000." In addition, his Statement of Proposed Disposition listed the loan in a section titled, "Assets claimed to be marital property." The decision after trial and an order, did not specifically address the \$27,000 loan. However, the concluding paragraph to the decision stated that "[a]ny arguments raised by the parties which have not been expressly addressed in this decision are rejected. The husband then commenced this action against the wife seeking recovery of the same \$27,000 sought by the husband as a credit in the divorce action. The wife's counsel sent the husband a letter asking him to discontinue the action voluntarily because the divorce action had determined his rights regarding the loan in light of the court's ruling on the husband's request for credits. The supreme Court then granted the wife's motion for summary judgment dismissing the complaint. She had argued, inter alia, that the husband's claim was barred by res judicata principles because it had been fully litigated in the divorce action. Supreme Court rejected the husband's argument that the issue was never fully litigated because there was no formal finding that the source of the loan was marital property. The wife subsequently moved, for an order awarding her attorneys' fees, costs, disbursements, and sanctions due to the husband's "frivolous and improperly motivated" lawsuit. The court held that the husband's conduct in seeking repayment of the loan was not so frivolous as to warrant sanctions pursuant to 22 NYCRR part 130; however, as the court had dismissed the action in its entirety, it awarded the wife costs and disbursements in successfully defending the action.

The Appellate Division modified the order on the law and the facts, to impose sanctions on plaintiff in the amount of \$5,000, and to award defendant reasonable costs and attorneys' fees associated with the motion and the appeal, payable by plaintiff in an amount to be determined on remand, and otherwise affirmed the order. It found that the husband made a claim in the divorce action for repayment of the \$27,000 "loan," and Supreme Court rejected it. He then failed to challenge that finding on direct appeal. Any argument that Supreme Court did not actually decide the issue of the "loan" because it did not specifically address it was rejected, since the court included the "catch-all" language that any claims not discussed were denied. It is well settled that "res judicata bars a subsequent plenary action concerning an issue of marital property which could have been, but was not, raised in the prior matrimonial action" (*Boronow v. Boronow*, 71 N.Y.2d 284, 289 [1988]). The Appellate Division pointed out that it was required to consider "the circumstances under which the conduct took place" when reviewing a sanctions motion (22 NYCRR 130-1.1[c]). Here, the circumstances were that the husband, an experienced divorce lawyer, ignored a long-standing principle of matrimonial jurisprudence. Thus, his decision to commence an action that he knew, or should have known, was futile from its inception, weighed heavily in favor of a finding that his conduct was intended solely to harass the wife. The Court observed that a court must be careful not to confuse legal arguments that may appear at first blush to be frivolous with good faith efforts to modify existing law (see *W.J. Nolan & Co. v. Daly*, 170 A.D.2d 320, 321 [1st Dept 1991]). Here, the issue was not whether the husband should have prevailed on his claim in the matrimonial action, but whether he had any grounds for pursuing the matter

after that action became final. It simply defied logic that, as the husband argued, the court in the matrimonial action would have implicitly ruled that the loan was separate property, when he conceded before it that the source of the funds was marital property. Further, the husband utterly failed to account for the court's explicit statement that any arguments it did not address should be considered rejected.

Aside from the blatant lack of merit to the complaint, other factors justifying sanctions and attorneys' fees were present here. First, the wife expressly informed the husband that she considered the action barred by res judicata and urged him to discontinue it, but he pressed on, forcing her to expend unnecessary resources. Such unreasonable persistence in a position that has been demonstrated to be frivolous warrants the imposition of sanctions (see *Cattani v. Marfuggi*, 74 AD3d 553 [1st Dept 2010] [plaintiff insisted on pursuing action against defendant that he had been advised was cloaked with absolute immunity from suit]). Further, it could not ignore that this was not the first instance in which the husband had taken a position that was not legally tenable. He was ordered in the matrimonial action to pay the wife's legal fees in connection with his noncompliance with a temporary support order. Later in the action, however, the court explicitly stated that the husband had "frivolously" asked it to "re-write its decision" regarding the forced sale of a boat so as to make his actions, which failed to comply with the decision, compliant nunc pro tunc. Coupled with these earlier incidents, the commencement of this action exhibited a "broad pattern ... of delay, harassment and obfuscation" that warranted the imposition of sanctions and attorneys' fees (*Levy v. Carol Mgt. Corp.*, 260 A.D.2d 27, 33 [1st Dept 1999]).

Appellate Division - Fourth Department

Child Support - Award - Calculation of Income - Food Stamps are Income For Purposes of Child Support Calculation But Not Future Maintenance Payments

In *Lattuca v Lattuca*, --- N.Y.S.3d ---, 2015 WL 3796404 (N.Y.A.D. 4 Dept.), the Appellate Division rejected the defendant husband's argument on appeal from a judgment of divorce that, inter alia, confirmed the Report and Recommendation of the Referee that the Referee erred in excluding plaintiff's maintenance award from the wife's income in calculating her child support obligation. There is no authority in the Child Support Standards Act (CSSA) for adding future maintenance payments to the recipient's income for the purpose of calculating child support.

The Appellate Division agreed with the defendant that the Referee erred in failing to include the value of plaintiff's food stamps in her yearly income for purposes of calculating

her child support obligation. Food stamps are not "public assistance" to be deducted from income pursuant to Domestic Relations Law s 240(1-b)(b)(5)(vii)(E) inasmuch as Social Services Law article 5, which governs public assistance, refers to "public assistance or food stamps" (Social Services Law s 131[12]), thereby distinguishing the two. Because plaintiff's income did not fall below the poverty income guidelines when the value of her food stamps was included, it modified the judgment by vacating the award of child support, and remitted the matter to Supreme Court to recalculate plaintiff's child support obligation in compliance with the CSSA.

Custody - UCCJEA - Order Denying the Mother's Motion to Dismiss Reversed Where New York Did Not Have Temporary Emergency Jurisdiction and Had Not Complied with the Communication Requirements of DRL§ 76-c.

In Matter of Bretzinger v Hatcher, --- N.Y.S.3d ----, 2015 WL 3796509 (N.Y.A.D. 4 Dept.), pursuant to an order of custody issued by a Texas court, petitioner father had the exclusive right to designate the primary residence of the child. The father, who was in the military, thereafter relocated with the child to Fort Drum in New York, where he was stationed. Pursuant to the order, respondent mother had visitation with the child, and the father was to pay for the transportation of the child to the mother three times per year. In May 2013, the child's paternal grandmother filed a petition to modify the custody order by suspending the visitation rights of the mother, who still resided in Texas. The petition was later amended to name the father as the petitioner once he returned from deployment overseas. In August 2013, the mother moved to dismiss the petition for lack of jurisdiction, which Family Court denied. In October 2013, the court communicated with a Texas court, which declined jurisdiction. At a court appearance in April 2014, the mother indicated by telephone that she would not be able to appear personally for the hearing set later that month because of financial constraints, the court disconnected the call, and the father moved for a default order based on the mother's statements. The court granted the father's motion.

The Appellate Division held that the Family Court abused its discretion in granting the motion of the mother's attorney, made before the court took testimony from the father upon the default, to withdraw as counsel for the mother without notice to her, and because the purported withdrawal of counsel was ineffective, the order entered by the court was improperly entered as a default order and appeal therefrom was not precluded.

The Appellate Division agreed with the mother that the court erred in denying her motion to dismiss the petition. Texas had exclusive, continuing jurisdiction pursuant to Domestic Relations Law § 76-a at the time of the filing of the petition, and the father's allegations in the petition were insufficient for the court to exercise temporary emergency jurisdiction pursuant to Domestic Relations Law § 76-c. In any event, the court did not "immediately" communicate with the Texas court, as required by section 76-c (4).

Furthermore, the court erred in requiring the mother to seek an order from a Texas court inasmuch as it was the father's burden to do so (DRL § 76-c [3]). Although the court later acquired jurisdiction when it communicated with the Texas court, which declined jurisdiction over the petition (DRL § 76-b [1]), at the time the court issued its order denying the mother's motion to dismiss, it did not have temporary emergency jurisdiction and had not complied with the requirements of section 76-c. It reversed the order, denied the father's motion for a default order, and granted the mother's motion to dismiss.

Custody - Attorney for Child - No Duty to Advocate for Child's Wishes Where it is is likely to result in a substantial risk of imminent, serious harm to the child - Error in declining to release report of a court-appointed psychological expert and the expert's notes was harmless.

In *Matter of Viscuso v Viscuso*, --- N.Y.S.3d ----, 2015 WL 3798030 (N.Y.A.D. 4 Dept.), the Appellate Division rejected the mothers argument that the Attorney for the Child (AFC) violated her ethical duty to determine the child's position and advocate zealously in support of the child's wishes, because the AFC advocated for a result that was contrary to the child's expressed wishes in the absence of any justification for doing so. It held where, as here, the AFC 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 AFC would be justified in advocating a position that is contrary to the child's wishes" (22 NYCRR 7.2[d][3]). The evidence supported the court's conclusion that to follow the child's wishes would be tantamount to severing her relationship with her father, and that result would not be in the child's best interests. It concluded that the mother's persistent and pervasive pattern of alienating the child from the father was likely to result in a substantial risk of imminent, serious harm to the child (22 NYCRR 7.2[d][3]), and that the AFC acted in accordance with her ethical duties.

The court's determination to award custody of the child to the father was supported by a sound and substantial basis in the record. It is well settled that a " 'concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child ... as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent' " The mother interfered with the father's relationship with the child by, inter alia, blatantly and repeatedly violating the court's directive not to discuss the litigation with the child, attempting to instill in the child a fear of the father, and encouraging the child to medicate herself before going to visit the father.

The Court rejected the mother's contention that the court erred in denying her pretrial request to release certain materials, i.e., the report of a court-appointed psychological expert and the expert's notes. The potential for abuse in matrimonial and custody cases is great, and the court has broad discretionary power to limit disclosure and grant protective orders. The court did not abuse its discretion in denying the mother's request, particularly

in light of the mother's repeated violations of the court's orders prohibiting her from disclosing confidential materials. Moreover, the court denied the request without prejudice to renewal, and thus the mother could have reapplied for release of the materials upon submitting evidence demonstrating that she had actually retained an expert who required access to the report prior to trial. In any event, any error in declining to release the materials prior to trial was harmless. The mother introduced the materials in evidence several months before the trial ended, and she therefore had more than ample access to the materials in time to use them at trial. She had the use of the materials for cross-examination purposes, and thus there was no denial of due process.

June 1, 2015

Appellate Division - First Department

Domestic Relations Law § 236(B)(5)(F) - Stay of Civil Court Holdover Proceeding Brought by Husbands Brother Proper Even Though He Was Not a Party to the Divorce Action and Was Not Served with Plaintiff's Motion for a Stay

In Yu Dan Wong v. Kenneth Ming Wei Wong, --- N.Y.S.3d ----, 2015 WL 2364930 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order in an action for a divorce, which denied the nonparty-appellant's motion to vacate Supreme Court's stay of a Civil Court holdover proceeding. Appellant, defendant's brother, brought the holdover proceeding against plaintiff, defendant's wife, to remove her from a cooperative apartment she used to share with defendant and their child. The Appellate Division held that the stay was proper and did not violate appellant's due process rights, even though he was not a party to the divorce action and was not served with plaintiff's motion for a stay. Appellant had knowledge of the stay and the court was presented with sufficient evidence that he and defendant were acting together to evict plaintiff from the apartment (Ricatto v. Ricatto, 4 AD3d 514, 516 [2d Dept 2004]). Moreover, appellant's counsel was able to argue against the stay before and after it was issued It found that a stay was warranted to avoid plaintiff's eviction pending resolution of the divorce proceeding. Domestic Relations Law § 236(B)(5)(f) permits a court to issue an order regarding the use and occupancy of the marital home, "without regard to the form of ownership of such property." It had not yet been determined in the divorce action whether the apartment was marital property and, if it is, how it might be equitably distributed. Appellant had not shown that the property was not marital property, as there was evidence in the record that defendant acquired the property during his marriage with plaintiff.

Child Support - Enforcement - No Exception to Rule that Child Support Arrears May be Modified Retroactively

In *Commissioner of Social Services of City of New York ex rel. Melvenia H. v. Juan H.M.*, --- N.Y.S.3d ----, 2015 WL 2236930 (N.Y.A.D. 1 Dept.), the Appellate Division observed that the law is well settled that child support arrears cannot be modified retroactively (see *Matter of Dox v. Tynon*, 90 N.Y.2d 166, 173-174 [1997]) and that there is no exception for arrears accrued during a period of incarceration (*Matter of Zaid S. v. Yolanda N.A.A.*, 24 AD3d 118 [1st Dept 2005]).

Appellate Division - Second Department

Domestic Relations Law § 236[B][5-a][e][2] - Temporary Maintenance - Child Support - Award - Unjust and Inappropriate to direct plaintiff to pay all of the carrying costs associated with the marital residence plus presumptive award of temporary maintenance.

In *Su v Su*--- N.Y.S.3d ----, 2015 WL 2400234 (N.Y.A.D. 2 Dept.), defendant moved for pendente lite relief seeking, inter alia, temporary spousal maintenance of \$4,500.15 per month and to compel the plaintiff to pay all of the carrying costs associated with the marital residence, where both he and the plaintiff continued to reside. Supreme Court, inter alia, directed the plaintiff to pay 100% of the carrying costs associated with the marital residence, totaling \$5,003 per month. The court also calculated the defendant's presumptive award of temporary maintenance to be \$2,057 per month, but found that "it would be unjust and inappropriate" to direct the plaintiff to pay all of the carrying costs associated with the marital residence plus the presumptive award of temporary maintenance. Therefore, the court downwardly deviated from that presumptive award of temporary maintenance, and awarded him \$200 per month. The Appellate Division affirmed. The Appellate Division observed that a court may deviate from the presumptive award of temporary maintenance if that presumptive award is 'unjust or inappropriate.' (Domestic Relations Law § 236[B][5-a][e][2]).The Appellate Division found that the Supreme Court's calculation of the presumptive award of temporary maintenance was erroneous. In performing the calculation required by Domestic Relations Law § 236(B)(5-a), a court must begin with the parties' gross income as reflected in their most recent federal tax returns, less, among other things, "federal insurance contributions act (FICA) taxes actually paid" (Domestic Relations Law § 240[1-b][b][5][vii][H]; Domestic Relations Law §§ 240[1-b][b][5][i]; 236[B][5-a][b][4]). Here, in performing the calculation required by Domestic Relations Law § 236(B)(5-a), the court erroneously used the plaintiff's anticipated gross income for 2014, which the court found to be \$118,066, rather than the plaintiff's gross income as reported on her 2013 federal income tax return, which was \$131,121.49. However, in light of the Supreme Court's appropriate and significant downward deviation from any presumptive award of temporary maintenance, this error did not require reversal. The formula to determine temporary spousal maintenance that is outlined in Domestic Relations Law § 236(B)(5-a)(c) is intended to cover all of the payee

spouse's basic living expenses, including housing costs of food and clothing, and other usual expenses. In addition, where both parties continue to reside in the marital residence and one party is ordered to pay the carrying costs, the payor spouse may be credited with half those costs. Here, nearly all of the defendant's basic living expenses which would be included in the presumptive award of temporary maintenance would already be paid by so much of the order as directed the plaintiff to pay 100% of the carrying costs associated with the marital residence, as the court calculated these carrying costs to include the monthly costs for the mortgage, gas, electricity, telephone, water, groceries, home entertainment, household repairs, appliances, laundry, gardening/landscaping, and snow removal. Moreover, the defendant failed to demonstrate that the pendente lite award of \$200 per month has left him unable to meet his financial obligations. Under these circumstances, the Supreme Court properly concluded that it would be unjust and inappropriate for the plaintiff to pay all of the monthly carrying charges on the marital residence plus the presumptive award of pendente lite maintenance, and appropriately downwardly deviated from the presumptive award of temporary maintenance to award the defendant \$200 per month.

Child Support - Award - Family Ct Act §413[1][B][5][I] - Child Support must Be Based upon Income Reflected on Most Recently Filed Income Tax Return

In Matter of Cordwell v. Clarke,--- N.Y.S.3d ----, 2015 WL 2387378 (N.Y.A.D. 2 Dept.), the Appellate Division reduced the child support award the father was directed to pay on the ground that the Support Magistrate's calculation of the mother's income was incorrect. It observed that 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 parties' most recently filed income tax return (Family Ct Act §413[1][b][5][i]). The Support Magistrate, applying the information set forth on the mother's 2012 W-2 form, found that her income was \$70,439, but her 2012 federal income tax return shows that her income was \$92,846. Thus, the Support Magistrate should have calculated the mother's gross adjusted income based upon her reported income of \$92,846.

Family Court

Family Offense - Standing - Fam. Ct. Act § 812[1] - Members of the Same Family or Household - Aunt, by Marriage, of Respondent Lacks Standing to Petition for Order of Protection - Not Related by Affinity.

In *Matter of Anita C. v Johana S.*, --- N.Y.S.3d ----, 2015 WL 2190680 (N.Y.Fam.Ct.) the family offense petition alleged, inter alia, that Anita C. was “the aunt (by marriage) of the respondent” Johana S. and that the parties resided in different apartments in the same building in College Point. Petitioner testified that she and the respondent “are related” and that respondent was “married to Raul who is petitioner’s husband’s half-sister’s son.” Petitioner conceded that she and the respondent had no personal relationship. The Court pointed out that it is vested with jurisdiction over family offenses occurring “between ...members of the same family or household” (Fam. Ct. Act § 812[1]). The statute defines “members of the same family or household” as, inter alia,: “(a) persons related by consanguinity or affinity. Petitioner asserted that the Family Court had jurisdiction because she was “related” to the respondent through her marriage, in other words, that she and the respondent were related by affinity.

Family Court explained that affinity is “a connection formed by marriage.” *Kelly v. Neely*, 12 Ark 657 [Sup Ct 1852]; see also, *Matter of Bibeau v. Ackey*, 56 AD3d 971, 972 [2008]; *Matter of Anstey v. Palmatier*, 23 AD3d 780 [2005]. “Affinity properly means the tie which arises, from marriage, betwixt the husband and the blood relatives of the wife, and between the husband and the blood relatives of the husband. And the blood relatives of the wife, while the marriage continues, stand in the same degree of affinity to the husband as they do in consanguinity to her” (*Paddock v. Wells*, 2 Barb Ch 331 [1847]; see also, *Higbe v. Leonard*, 1 Denio 186, 187 [1845]; *Anstey*, 23 AD3d at 780; *Weisinger v. Van Rensselaer*, 79 Misc2d 1023, 1024 [1974]). “Affinity is an artificial relationship” (*Tegarden v. Phillips*, 14 Ind App 27, 42 NE 549, 551 [1895]), and it “is the tie which exists between one of the spouses with the kindred of the other” , but the “relationship by affinity always depends upon the blood of the two spouses, and cannot extend beyond such blood kindred” (*id.* [emphasis added]). Thus, the *Tegarden* court explained, affinity “exclude[s] the affinity relatives of the respective spouses. My wife’s brother’s wife is related to my wife by affinity, because of the blood relationship existing between my wife and her brother; but she is not related to me by affinity, because there is no blood in common between us. In other words, the affinity relatives of my wife are not my affinity relatives, nor vice versa.” Thus “an affine of one spouse is not related to an affine of the other spouse.

The Court noted that respondent, Johana S., was married to “Raul” who is the son of the half-sister of petitioner’s husband. It would appear then that the petitioner was the sister-in-law of her husband’s half-sister by virtue of her marriage, and consequently that she was the paternal aunt (by marriage or affinity) of “Raul”, the son of her husband’s half-sister, as petitioner stood in the same degree of affinity as her husband stands by consanguinity to her husband’s blood relatives. However, because a relationship of affinity does not extend to the spouses of affines, it was clear that respondent has no relationship of affinity to the wife of her husband’s uncle, and vice versa. The Court held that the parties were not related at all and were not “members of the same family or household”. It found that it had no subject matter jurisdiction over this proceeding, and the petition was dismissed.

May 16, 2015

Court of Appeals

Court of Appeals, Construing Family Court Act § 1012(g), Holds That Uncle Is a "Person Legally Responsible."

In re Trenasia J., --- N.Y.3d ----, 2015 WL 1979291 (N.Y.) the primary issue in the appeal was whether appellant Frank J. was a "person legally responsible" (PLR) as defined by Family Court Act § 1012(g) and in accordance with the courts decision in Matter of Yolanda D. (88 N.Y.2d 790 [1996]). Frank J. was the uncle of the child through marriage, and the father of three children (the J Children). In February 2011, the Administration for Children's Services (ACS) filed petitions against Frank J. alleging that according to statements made by the subject child, Frank J. "forcibly attempted to have sexual intercourse" with her "after entering the bathroom while she was taking a shower" during an overnight visit at Frank J.'s home on December 31, 2010. The child, who was 11 years old at the time of incident, alleged that while she was taking a shower, Frank J. entered the bathroom and asked her if she wanted to make \$5, warning her against telling her mother. The child alleged that Frank J. forcibly grabbed her by her hips, pulled her towards him, and attempted to pull out his penis. The child then ran crying to her cousin's room, put on some clothes and ran out of the house to a nearby supermarket where an ambulance was called.

The Court of Appeals observed that the Family Court Act defines a "respondent" in a child protective proceeding as "any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child" (Family Court Act § 1012 [a]). A person legally responsible for a child is defined as "the child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child" (Family Court Act § 1012[g]). Frank J. moved to dismiss the petition for want of jurisdiction, arguing that he was not a PLR because he was neither the guardian nor custodian of the child, and she was never a member of his household. The attorney for the J Children supported Frank J.'s motion to dismiss. After a hearing on the motion to dismiss, where the court heard testimony from the responding police officer and the child's mother, Family Court, Kings County, denied Frank J.'s motion to dismiss, stating that there was no "serious question that [Frank J.] is a [PLR] within ... the meaning" of the statute.

The Court of Appeals observed that Matter of Yolanda D. (88 N.Y.2d 790 [1996]) was the Court's seminal decision on the factors to consider in determining who is a PLR under Family Court Act § 1012(g). In that case the Court recognized "that parenting functions are not always performed by a parent but may be discharged by other persons, including

custodians, guardians and paramours, who perform caretaking duties commonly associated with parents. Thus, the common thread running through the various categories of persons legally responsible for a child's care is that these persons serve as the functional equivalent of parents." It held that deciding whether "a particular person has acted as the functional equivalent of a parent is a discretionary, fact-intensive inquiry which will vary according to the particular circumstances of each case". It listed factors to be considered when determining who is a PLR, which include (1) "the frequency and nature of the contact," (2) "the nature and extent of the control exercised by the respondent over the child's environment," (3) "the duration of the respondent's contact with the child," and (4) "the respondent's relationship to the child's parents" (id.). The Court also stated that "article 10 should not be construed to include persons who assume fleeting or temporary care of a child such as a supervisor of a play-date or an overnight visitor or those persons who provide extended daily care of children in institutional settings, such as teachers".

The Court found that based on the evidence admitted during Frank J.'s hearing, there was record support for Family Court's affirmed finding of fact that Frank J. was a PLR under Family Court Act § 1012(g) and Yolanda D. With respect to "the frequency and nature of the contact," and "the duration of the respondent's contact with the child," under Yolanda D, the responding police officer testified without objection that the child informed her that she had been staying at Frank J.'s home for a week prior to the incident. The child's mother testified that during the year before this incident, the child had visited Frank J.'s home eight or nine times and four of those occasions were overnight visits. There was also testimony that Frank J. and the child interacted at family functions such as family reunions, holidays and birthday parties. Thus, the total contacts between Frank J. and the child were significant. As to "the nature and extent of the control exercised by the respondent over the child's environment," this incident occurred in Frank J.'s home during an overnight visit, and he was the only adult present at the time. Additionally, Family Court noted in its oral decision denying Frank J.'s motion to dismiss that the child's mother "testified that she expected her sister to care for the child, but if the sister wasn't there then [Frank J.] was expected to care for the child." Finally, in considering "respondent's relationship to the child's parents," Frank J. was related to the child through marriage, as his wife's sister was the child's mother. Although the existence of a familial relationship is not dispositive, it is appropriately considered in determining whether a respondent is a PLR. Applying the Yolanda D. factors to these facts record support existed for the lower courts' determination that Frank J. was a PLR under Family Court Act § 1012(g).

Appellate Division, Second Department

Appellate Division Holds Courts Retain Discretion to Entertain Requests for Affirmative Relief That Do Not Meet Requirements of CPLR 2215

In Smulczeski v Smulczeski, --- N.Y.S.3d ----, 2015 WL 2076021 (N.Y.A.D. 2 Dept.), 2015 N.Y. Slip Op. the Appellate Division held that to the extent the Supreme Court concluded that it lacked discretion to consider the plaintiff's request for affirmative relief, which was not presented in a proper cross motion pursuant to CPLR 2215, its conclusion was erroneous. Although "a party seeking relief in connection with another party's motion is, as a general rule, required to do so by way of a cross motion," courts "retain discretion to entertain requests for affirmative relief that do not meet the requirements of CPLR 2215" (Fried v. Jacob Holding, Inc., 110 AD3d 56, 64, 65). Nonetheless, the plaintiff would not have been entitled to the requested relief had she made a cross motion under CPLR 2215. The plaintiff sought to alter the equitable distribution provisions of the parties' judgment of divorce, but the Supreme Court lacked the authority to do so (see Wasserman v. Wasserman, 103 AD3d793).

Child Support - Award - Annual Income - Proper to Use Pay Stubs Pay Period Figure Multiplied by 26 to Determine Annual Income.

In Matter of Thomson-Fleming v Fleming--- N.Y.S.3d ----, 2015 WL 2077958 (N.Y.A.D. 2 Dept.), the Appellate Division observed that the Family Court's award of child support was based upon, inter alia, the Support Magistrate's calculation of the father's annual income. In calculating the father's income, the Support Magistrate apparently relied upon the year-to-date figures on a pay stub for a two-week period ending on July 13, 2013, but failed to take into account that the father began his employment on March 28, 2013. It held that under these circumstances, the Support Magistrate should have taken the pay stub's pay period figure and multiplied that figure by 26 to determine the father's annual income, rather than rely upon the year-to-date figure.

Termination of Parental Rights - Domestic Relations Law § 111-a and Social Services Law § 384-c - Where Paternity Not Ascertained in Fact or by Law, Court May Not Conclusorily Find Respondent Is Not a "Consent Father," or That His Consent, While Otherwise Required, Has Been Forfeited.

In re Heaven A.A.--- N.Y.S.3d ----, 2015 WL 2078685 (N.Y.A.D. 2 Dept.), 2015 N.Y. Slip Op. 03833 the Appellate Division held that the Family Court may not render a determination that a putative father has abandoned a child so as to free the child for adoption, unless there is a threshold finding that the putative father is, in fact, the father of the child. It concluded that where paternity is not ascertained in fact or by law, the Family Court may

not conclusorily find that a respondent is not a "consent father," or that his consent, while otherwise required, has been forfeited by reason of his abandonment of the child.

The petitioner, filed a petition to, inter alia, terminate the parental rights of the respondent putative father, Tyrone W. on the ground of abandonment. There was one child, Heaven, who was born on February 22, 2008. The petition specifically alleged that the appellant's consent to the child's adoption was not required under Domestic Relations Law § 111-a and Social Services Law § 384-c, because he was never married to the mother, had maintained no substantial and continuous contact with the child, had not claimed paternity, was not named on the child's birth certificate, was not openly living with the child, and was not listed in the Putative Father Registry. The appellant appeared in the Family Court on April 2, 2013, with court-appointed counsel, and requested a DNA test to determine paternity. The request was denied, and the matter was adjourned to May 29, 2013, for an estoppel hearing. On May 29, 2013, the appellant again requested a DNA test, which the Family Court denied. The court explained that, subject to a hearing, the appellant's parental rights could be terminated regardless of whether he was the biological father. A hearing commenced. The case worker, Robin Torres, testified that the child had been placed into foster care shortly after she turned one year old, and that during the six months preceding the filing of the petition, the appellant had no contact with either the child or the petitioner and had provided no support for the child. During cross-examination, Torres was asked the basis for the petitioner's belief that the appellant was the father, and she responded that the appellant was listed "in the [Putative Father] Registry." However, no documentation from the Putative Father Registry was proffered. The foster mother, Ketsie R., testified and corroborated that the appellant had no contact with the child during the six months preceding the filing of the petition. The appellant testified that he was unaware of the child's existence until he was served with a copy of the petition while he was incarcerated. Although he stated that his paternity was a possibility, he was not sure, as the mother never told him that she was pregnant, and he never observed her to be in that condition. The Family Court held in favor of the petitioner. It reasoned that, pursuant to established case authority, the appellant bore the responsibility of confirming whether he was the father of the child born of the mother with whom he had sexual relations. Having failed to fulfill that responsibility, the court found that the father had abandoned the subject child. The Family Court terminated the parental rights of both the mother and the appellant, and determined that it was in the child's best interests to remain in foster care.

The Appellate Division reversed the order of disposition insofar as appealed from, and the petition was dismissed insofar as asserted against the appellant. The Court observed that Social Services Law §384-b provides that guardianship and custody of a child may be transferred to a social services agency to free the child for adoption, if, inter alia, the parent or parents, whose consent to the adoption of the child would otherwise be required, abandoned the child for the six-month period immediately preceding the filing of the petition (Social Services Law § 384-b[4][b]). Abandonment, as it pertains to adoption, is conduct by the parent that evinces a purposeful ridding of parental obligations and the foregoing of parental rights. The burden of proving abandonment is on the presentment agency by a

clear and convincing evidence standard, although proof of a parent's failure to visit or communicate with the child for the requisite six-month period creates a rebuttable presumption of abandonment. The Social Services Law expressly incorporates Domestic Relations Law § 111, which provides that the "consent" of the father of a child born out of wedlock is required for an adoption if the father has "maintained substantial and continuous or repeated contact with the child," such as by paying child support, visiting the child, or communicating with the agency or person providing care and custody of the child (Domestic Relations Law s 111[1][d]). However, consent is not required if the parent is unable to adequately care for the child as a result of mental illness or mental retardation (Social Services Law § 384-b[4][c]). All four Judicial Departments have held, in sum and substance, that proceedings to terminate parental rights on the ground of abandonment are unnecessary where the consent of the person whose parental rights are being terminated is not required. In other words, if an out-of-wedlock father does not qualify for consent rights in connection with a proceeding pursuant to Social Services Law § 384-b to terminate parental rights, there is no need for or purpose served by a proceeding to terminate parental rights on the ground of abandonment (see Matter of Daryl D., 6 AD3d 1196; Matter of Carrie GG., 273 A.D.2d 561, 562; Matter of Kasiem H., 230 A.D.2d 796,797; Matter of Christy R., 183 A.D.2d 434, 434; Matter of Catholic Child Care Socy. of Diocese of Brooklyn, 112 A.D.2d 1039, 1040-1041).

The Appellate Division pointed out that the appellant consistently disputed whether he was the child's father, sought DNA testing, and expressed concern that the stigma of an abandonment could negatively impact his relationship with his four children, who apparently resided with his aunt. The petitioner provided no proof of the appellant's paternity. While Torres testified that the appellant was listed as the child's father in the Putative Father Registry, the petition expressly alleged that the father was not listed in the Putative Father Registry. The child's birth certificate did not name the appellant as the father, no sworn statement from the mother identified the appellant as the father, and the appellant's paternity had never been adjudicated by any court.

The Court rejected petitioners argument that it was under no obligation to prove the appellant's paternity, which relied upon Matter of Robert O. v. Russell K. (173 A.D.2d 30, affd 80 N.Y.2d 254), wherein the Court of Appeals specifically reasoned that the prompt assertion of parental responsibilities should be measured not from the father's awareness of the child, but from the beginning of the child's life (see Matter of Robert O. v. Russell K., 80 N.Y.2d at 264). The father in Matter of Robert O. was held to have forfeited his right to contest the subject adoption proceeding as he had failed to earlier and promptly assert his paternal rights by learning of the child and developing a protectable custodial relationship. It distinguished Matter of Robert O. from this proceeding as there was no question that the unwed father in Robert O. was the biological father of the child. Here, in contrast, the appellant challenged his paternity and such paternity was never established by the petitioner. Thus, the appellant was not attempting to assert parental rights as much as he is attempting to ascertain whether he has any parental rights to assert in the first instance.

The Appellate Division held that Family Court should have granted the appellant's request for DNA testing to determine if he was the biological father of the child. If the results of such testing demonstrated that the appellant was not the child's biological father, then there would have been no need to commence a termination of parental rights proceeding against him. However, if the results of the DNA testing demonstrated that the appellant was the biological father, they would support the Family Court's conclusion that he was not a "consent father" under Domestic Relations Law § 111(1)(d), and Matter of Robert O., or that his consent would otherwise be required but his right thereto had been forfeited by his abandonment of the child pursuant to Social Services Law §384-b(4)(b). Neither determination could be properly reached absent the DNA evidence, which the appellant had requested. Without the benefit of DNA testing, the appellant would be subject to the stigma of an abandonment finding as to a child for whom he may not have any parental rights or responsibilities. Moreover, such finding might negatively affect the appellant's status in potential future court proceedings.

Appellate Division, Third Department

Child Support - Enforcement - Ineffective Assistance of Counsel - Counsel's Failure to Present Sufficient Evidence Regarding Defense Constituted Ineffective Assistance of Counsel Warranting Reversal of Commitment

In Matter of Albert v Terpening,--- N.Y.S.3d ----, 2015 WL 2097576 (N.Y.A.D. 3 Dept.), , petitioner (mother) filed a violation petition alleging that the father had failed to pay child support as required by a 2012 support order. The father later filed a petition seeking a downward modification of child support, claiming that he was disabled. At the hearing on the mother's petition, a representative from the Support Collection Unit testified that the father had accumulated additional arrears since the 2012 order. The father testified that he was disabled and unable to work due to back problems that had prevented him from maintaining employment and for which he had upcoming surgery, and his medical records were introduced into evidence. Family Court found that the medical evidence did not establish the father's inability to work during "most of the relevant period" in issue and, at most, demonstrated his temporary disability for certain "short periods." The court issued an order, inter alia, committing him to the County jail to be suspended after 30 days if the father made specified payments.

The Father argued on appeal that his assigned counsel's failure to present sufficient evidence to satisfy his burden to offer, in response, "some competent, credible evidence of his inability to make the required payments" (Matter of Powers v. Powers, 86 N.Y.2d 63, 69-70 [1995]) constituted ineffective representation. The Appellate Division held that to succeed on this claim, he had to demonstrate that, viewing the record in its totality, counsel did not provide meaningful representation.

Its review of the father's medical records disclosed that, during the period at issue, the father had ongoing medical care and treatment for ongoing back problems, had a pending disability benefits claim for which he was awaiting a hearing, underwent a surgical block injection and had a second one planned. There were several documented periods in which he was directed not to work by his treating physicians for periods of between four and six weeks or for unspecified periods of time. Counsel submitted these subpoenaed medical records into evidence at the hearing, arguing that the records demonstrated that the father had been unable to work for much of the time since the 2012 order. However, these records were submitted in an unsorted mass and without the benefit of any corresponding testimony, explanation or development in any meaningful manner so as to aid Family Court in reviewing and determining the pertinent documentation of disability. The court made an effort to conduct a meaningful review of the records, which were found to contain certain deficiencies that counsel should have addressed prior to the hearing; counsel's request for an adjournment to obtain medical testimony at that juncture was properly denied. Additionally, in the course of this review, when the court asserted that the records failed to reveal a "permanent disability," counsel failed to object that this was an incorrect standard. The Court noted that ideally, medical testimony would be available and proffered but it was not unmindful of the real world difficulties and the attendant costs of obtaining such evidence, and that it is not currently possible to achieve this in every legal proceeding. Nonetheless, other methods of presenting pertinent medical evidence were available, for example, by obtaining a medical affidavit. It stated that at a minimum, an attorney may be expected to organize and present the disability documentation found within a medical file, accompanied with explanatory argument as to the legal significance of said documents. It found that the marshaling of the evidence was not adequate to appropriately present an available defense and, thus, fell below the requisite standard. It found that had the available proof been properly submitted, accompanied by appropriate legal arguments, the father may have been able to demonstrate support for his testimony that, for at least some parts of the relevant period, he was unable to work and, at a minimum, the resulting penalty might have been mitigated. Accordingly, it held that counsel's failure to present sufficient evidence regarding his medical condition and inability to work constituted ineffective assistance of counsel (*Matter of Templeton v. Templeton*, 74 AD3d at 1513; *Matter of Martin v. Martin*, 46 AD3d 1243, 1246 [2007]) and reversed the orders on the law, and remitted to the Family Court for further proceedings not inconsistent with the Court's decision.

Appellate Division, Fourth Department

Attorneys - Liens - Charging Lien - Fourth Department Observes That No New York Appellate Court Has Held That Child Support Awards Are Categorically Excluded from an Attorney's Charging Lien.

In *Mura v Mura*, --- N.Y.S.3d ----, 2015 WL 1949276 (N.Y.A.D. 4 Dept.), 2015 N.Y. Slip Op. Plaintiff and defendant were divorced in 1993. The judgment of divorce awarded plaintiff child support and ordered defendant to pay \$25,226.72 in child support arrears that had accrued from the commencement of the divorce action through entry of the judgment. For 16 years, the child support obligation was not enforced. In April 2011, plaintiff hired Bezinque to recover the accumulated child support arrears that, with interest, totaled \$549,403.62 as of September 2011. At the time, defendant owned real property in Ontario County, and the judgment of divorce was filed in Monroe County. Bezinque filed the judgment in Ontario County and commenced actions in both Ontario County and Monroe County to restrain the sale of the Ontario property. While those proceedings were ongoing, defendant sold the property in violation of a court order. Upon Bezinque's motion, defendant's share of the proceeds from the sale of the home was placed in escrow "in anticipation of a final judgment for unpaid child support" (escrowed funds). In July 2012, the court awarded interim attorney's fees to White and Bezinque to be paid from the escrowed funds. No appeal was taken from that order. Bezinque referred plaintiff to another law firm for the preparation of executions and levies against the escrowed funds held by defendant's then attorneys, and requested payment of the outstanding balance of his legal fees from those funds. Plaintiff did not respond to that request. Bezinque thereafter moved by order to show cause seeking, inter alia, a charging lien pursuant to Judiciary Law §475 against the escrowed funds sufficient to cover his outstanding fees. Plaintiff opposed Bezinque's motion and cross-moved for an order directing Bezinque and White to return the counsel fees they received pursuant to the interim order. Supreme Court granted Bezinque's motion.

The Appellate Division affirmed. It observed that Judiciary Law § 475 "codifies and extends the common-law charging lien." The lien comes into existence, without notice or filing, upon commencement of the action or proceeding," and gives the attorney an equitable ownership interest in the client's cause of action" (*LMWT Realty Corp. v. Davis Agency*, 85 N.Y.2d 462, 467). The only exception contained in the statute is for proceedings before "a department of labor" (Judiciary Law s 475). In addition to that statutory exception, the Court of Appeals has held that, as a matter of public policy, a charging lien may not attach to an award of alimony or maintenance (see *Turner v. Woolworth*, 221 N.Y. 425, 429-430; see also *Matter of Balanoff v. Niosi*, 16 AD3d 53, 63; *Cohen v. Cohen*, 160 A.D.2d 571, 572; *Theroux v. Theroux*, 145 A.D.2d 625, 627). Plaintiff contended that child support awards should likewise be immune from attachment under Judiciary Law § 475, relying solely on *Shipman v. City of N.Y. Support Collection Unit* (183 Misc.2d 478, 485). The Appellate Division found that contrary to plaintiff's characterization, the funds at issue were not a "child support award" or "child support arrears." Rather, the escrowed funds constituted defendant's share of the net proceeds of the sale of his residence and, as the trial court recognized, "[t]here has been no determination [as to] what amount of the house sale proceeds are necessary to pay any child support arrears owed by [defendant]." In any event, it noted that no New York

appellate court has cited *Shipman* for the proposition relied upon by plaintiff, i.e., that child support awards are categorically excluded from an attorney's charging lien, and it concluded that *Shipman* was unpersuasive, particularly in the context of this case. Even assuming, arguendo, that there is a general public policy precluding the enforcement of a charging lien upon a child support award, it concluded that such a policy was not implicated under the unique circumstances of this case. The plaintiff did not seek to enforce the 16-year-old support obligation until the parties' children, who were the intended beneficiaries of the support, were either emancipated or nearly emancipated. This was therefore not a situation in which the enforcement of a lien pursuant to Judiciary Law s 475 would result in the depletion of monies necessary for the ongoing support of a minor child or children (see *Shipman*, 183 Misc.2d at 487).

It concluded that Bezinque established his prima facie entitlement to a charging lien in the amount of \$30,545.91 by submitting, inter alia, his most recent billing statement and an affirmation in which he averred that he sent monthly billing statements to plaintiff, that plaintiff never raised an objection to those statements, and that she "repeatedly and persistently promised payment out of the proceeds of this litigation" (see *Wasserman v. Wasserman*, 119 AD3d 932, 934). It further concluded that the court properly denied plaintiff's cross motion for disgorgement of funds paid to Bezinque and White. The funds from which Bezinque and White were paid in 2012 did not constitute "child support ." Moreover, the interim fee award was made upon plaintiff's motion, and no appeal was taken from that order. In any event, it agreed with the court that plaintiff provided no factual or legal basis to support the equitable remedy of disgorgement (see generally *Law Off. of Sheldon Eisenberger v. Blisko*, 106 AD3d 650, 652).

May 1, 2015

Appellate Division, First Department

Agreements - Counsel Fee Provision - Appellate Division Construes Counsel Fee Provision of Agreement in Favor of Attorney

In *Myles v Perry*, --- N.Y.S.3d ----, 2015 WL 1781740 (N.Y.A.D. 1 Dept.) the Appellate Division held that Supreme Court correctly held that the settlement agreement between the parties authorized defendant's firm to seek counsel fees from plaintiff. The Agreement stated that the parties "agree that, with respect to the unpaid legal fees and disbursements each party owes to his or her attorneys ... requests may be made for same to the Court upon papers ... Notwithstanding the foregoing, each party shall be responsible for and shall pay his or her respective counsel ... fees ..." The Agreement then provided that each party is "solely responsible" for his counsel's fees and that each party agrees to indemnify the adversary spouse against third-party claims for those fees. The Appellate Division held

that relying on its prior order, the court correctly interpreted the provision thus: "first, to allow counsel to seek any unpaid legal fees from the adversary spouse upon motion to the court, and second, in the event the court awarded only part of the legal fees, to obligate the spouse to pay his remaining portion. Similarly, as the spouse remains solely responsible for the remaining portion, he must indemnify the adversary spouse if that remaining portion is sought from her."

It rejected plaintiff's argument on appeal that the Agreement allowed counsel to seek fees from her own client only, not from the adversary spouse. As the Supreme Court noted, there was no apparent reason to include such an agreement between an attorney and her client in a settlement agreement between adversary spouses.

Counsel Fees - Award - Domestic Relations Law § 237(b) Expressly Grants the Court Discretion to Award Attorney's Fees in Custody Disputes to a Parent

In *Evgeny F. v. Inessa B.*, --- N.Y.S.3d ----, 2015 WL 1897193 (N.Y.A.D. 1 Dept.), the Appellate Division affirmed an order which, after a hearing, granted respondent mother's application for an interim award of attorney's fees in the amount of \$525,000 and expert's fees of \$38,000 from petitioner father. It found that in this child custody proceeding, the court providently exercised its discretion in awarding respondent counsel fees and expert fees based on the relative financial circumstances of the parties and the circumstances of the case as a whole. The evidence established that petitioner was in a superior financial position and that he heavily litigated this matter to purposely delay the proceedings in an effort to cause respondent to spend her more limited resources on the case. Thus the Referee properly exercised her discretion in determining that respondent should be completely reimbursed for the legal and expert fees she incurred, which were supported by her attorney's testimony and records. It rejected the petitioners argument that the court's determination was undermined by its reference to the "rebuttable presumption" language of Domestic Relations Law § 237(b), which petitioner maintained applies only when attorney's fees are sought by a "spouse." The statute expressly grants the court discretion to award attorney's fees in custody disputes to a "spouse or parent".

Appellate Division, Second Department

Domestic Relations Law 236[B][6-a] - Temporary Maintenance - Award - Court Not Required to Set Forth Factors and Reason for its Decision Where Cap Not Exceeded.

In *Lundgren v Lundgren*, --- N.Y.S.3d ----, 2015 WL 1652357 (N.Y.A.D. 2 Dept.), the Appellate Division affirmed an order of Supreme Court that directed the defendant to pay temporary maintenance and temporary child. The Appellate Division held that since the court awarded the presumptive amount of temporary maintenance, calculated based upon income that did not exceed the specified income cap, the court was not required to set forth the factors it considered and the reason for its decision.

Agreements - Set Aside - Appellate Division Holds Plenary Action Not Required to Challenge Validity of the Separation Agreement Where No Judgment of Divorce Entered in Divorce Action

In *Kuznetsov v Kuznetsov*, --- N.Y.S.3d ----, 2015 WL 1810427 (N.Y.A.D. 2 Dept.), the parties were married in Russia in 1991 and emigrated to the United States in 1997. In 2007, the plaintiff commenced the action for a divorce and in 2012, the defendant moved for a declaration that the parties' separation agreement dated December 16, 2002, was valid, and, in effect, that an ex parte judgment of divorce obtained by the plaintiff in Russia in 2003 was valid insofar as it terminated the marital status of the parties. The plaintiff cross-moved for declarations that the separation agreement and the Russian judgment of divorce were invalid. The Supreme Court granted the defendant's motion and denied the plaintiff's cross motion.

The Appellate Division held that contrary to the defendant's contention, the plaintiff was not required to bring a plenary action in order to challenge the validity of the separation agreement because no judgment of divorce had been entered in this action (citing *Petracca v. Petracca*, 101 AD3d 695; *Kabir v. Kabir*, 85 AD3d 1127; *Arato v. Arato*, 15 AD3d 511; cf. *Thelander v. Thelander*, 42 AD3d 495, 496; *Sloboda v. Sloboda*, 24 AD3d 533, 534; *Luisi v. Luisi*, 6 AD3d 398, 401; *Spataro v. Spataro*, 268 A.D.2d 467, 468; *Dombrowski v. Dombrowski*, 239 A.D.2d 460, 460).

The Appellate Division also held that Supreme Court correctly declared that the ex parte Russian judgment of divorce obtained by the plaintiff was valid to the extent the judgment terminated the marital status of the parties. Generally, the courts of this State will "accord recognition to the judgments rendered in a foreign country under the doctrine of comity which is the equivalent of full faith and credit given by the courts to judgments of our sister States." Here, it was not the defendant who sought to invalidate the judgment of divorce obtained in Russia, but the plaintiff, who procured that judgment in 2003. A "party who properly appeared in the action is precluded from attacking the validity of the foreign country judgment in a collateral proceeding brought in the courts of this State." (*Greshler v. Greshler*, 51 N.Y.2d at 376).

Supreme Court

Family Offense - Order of Protection - Defendant's E-mails Containing Gratuitous Vile and Offensive Language Constituted Harassment Warranting Order of Protection for Committing Family Offense.

In *L.T. v K.T.*, 2015 WL 1783716 (N.Y.Sup.), 2015 N.Y. Slip Op. 50557(U) after the parties had entered into a "so ordered" custody stipulation, but before the judgment of divorce was entered, Plaintiff, inter alia, sought an Order of Protection pursuant to DRL § 252, prohibiting Defendant from: "Committing a family offense as defined in subdivision one of section 530.11 of the Criminal Procedure Law or any criminal offense against the Plaintiff and to refrain from harassing, intimidating, or threatening the Plaintiff."

The basis for order of protection, and a Contempt finding was a series of embarrassing and harassing e-mails from Defendant to Plaintiff, set forth in the moving papers, which showed Defendant insolently mentioning issues between the parties and then repeatedly and gratuitously adding language one would expect to hear from drunken sailors or college students at a fraternity party. They included: September 29, 2014: "you may be the stupidest person I ever encountered ... Holy crap ... fuck you ... funk your family ... btw did I say fuck you ... btw ... you look pregnant; October 14, 2014: I DON'T GIVE A FUCK!!!!... good luck in life dummy, you will need it ... btw if you don't get this shit soon I will have it dropped off in your parents driveway ... also fuck you if that was not clear lol ... I don't know how to get this through your dented head.I'm the competent parentas always, fuck you.; October 28, 2014: E-mail No.1: The kids are sleeping, do you really want me to wake them up because you are a bad mother? Also fuck younasty bitchwhen the kids need money for college ... first carsweddings....I will show them what you did....soooooo fuck you, they will get off the bus at your parents house tomorrow....I can't wait till the kids tell you they want to stay at my house cuz you are living in a basement apartment, like a divorced woman loseryou fuckin disgrace. E-mail # 2: They are sleeping....I guess your masters degree doesn't cover reading comprehension.now leave me alone bitch.I don't have to take your mouth anymore....btw fuck you!!!!!!!god I love to say that.

The Court held that a hearing was not required because Defendant did not deny the content of the e-mails or that he wrote and sent them to Plaintiff. Instead, he tried to justify his conduct. Supreme Court observed that for the Court to issue an Order of Protection, there must exist a family offense as described in FCA § 812, DRL § 252. The selected statutes follow the Penal Law wording, except to the extent that "disorderly conduct" (PL §240.20) includes disorderly conduct not in a public place. Plaintiff asserted that defendant's e-mails constituted a form of harassment. Defendant conceded e-mails can be the basis of a family offense. *Julie G. v. Yu-Jen G.*, 81 AD3d 1079 (3rd Dept.2011). The court found that Harassment in the Second Degree (PL § 240.26) approximated the conduct and should be applied here. For PL § 240.26(3) to apply, Defendant must, "with intent to harass annoy or harm another person ... engage[] in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose." The parties, in their "so-ordered" Stipulation, limited their

communication to "one e-mail a day for the purpose of discussing issues concerning the children." It followed then, that any content of the e-mail that did not concern the children was gratuitous and served "no legitimate purpose" within the meaning of PL § 240.26(3). The court found that the numerous e-mails sent between September 29, 2014 and November 19, 2014 established a course of conduct. Their communications were limited to issues concerning the children, and the inquiries and responses must remain within those bounds. Any e-mail which did not involve an issue concerning the children (or individual child of the parties) did not belong in the e-mail as it did not serve the legitimate purpose defined by the parties. An Order of Protection was issued in favor of Plaintiff and against Defendant.

Custody - Assignment of Counsel - Judiciary Law § 35(8) - Unemployed Defendant with MBA Entitled to Assignment of Counsel in Supreme Court

In *Abadi v Abadi*, --- N.Y.S.3d ----, 2015 WL 1648777 (N.Y.Sup.) the father, who held an MBA degree from the Wharton School of Business of the University of Pennsylvania, moved for an order that this court appoint an attorney utilizing public funds to represent him in post-judgment litigation concerning access to the parties' children and restrictions sought by plaintiff his former wife. The defendant claimed that his earnings were \$18,371.00 for the year 2014, and he was unable to obtain counsel because of his inability to pay legal fees. He asserted that he had total debt in student loans of \$40,388.03. He had another debt from Banistmo S.A. the amount of \$29,521.15. He also had credit card debt in the amount of \$24,095.36. Additionally, he had liabilities in the form of counsel fees in the amount of \$84,022.66. He asserted that he was unable to obtain employment commensurate with his abilities and education.

Supreme Court observed that the assignment of counsel to represent adult who are unable to afford counsel is provided for in the Judiciary Law § 35(8) which states, "whenever supreme court shall exercise jurisdiction over a matter which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto pursuant to law, and under circumstances whereby, if such proceedings were pending in family court, such court would be required by section two hundred sixty-two of the family court act to appoint counsel, supreme court shall also appoint counsel and such counsel shall be compensated in accordance with the provisions of this section." It found that the defendant also met the requirements under the Family Court Act § 262(a)(v) which states, "(a) Each of the persons described below in this subdivision has the right to the assistance of counsel... (v) 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;" Defendant also met the requirements under Family Court Act § 262(b) which states, "(b) Assignment of counsel in other cases. In addition to the cases listed in subdivision (a) of this section, a judge may assign counsel to represent any adult in a proceeding under this act if he determines that such assignment of counsel is mandated

by the constitution of the state of New York or of the United States, and includes such determination in the order assigning counsel."

Thus, under Judiciary Law § 35(8) defendant was eligible for the assignment of counsel. Defendant made a sufficient threshold showing that would warrant government funds to be utilized to provide defendant with legal representation and by separate order the appointed an attorney to represent him.

April 16, 2015

Appellate Division, First Department

Pendente Lite Maintenance - Award - Domestic Relations Law § 236(B)(5-a) - Imputed Income - Wife Denied Award Where Income Imputed Equal to Husbands Income. Pendente Lite Child Support Modified.

In *Finn v Piesco*, --- N.Y.S.3d ----, 2015 WL 1636653 (N.Y.A.D. 1 Dept.) the Appellate Division held that Supreme Court providently exercised its discretion in imputing income of \$75,000, to plaintiff based on her work history, education, and skills, thus deeming her income equal to that reported on defendant's tax return and denying plaintiff's request for temporary maintenance. Supreme Court correctly concluded that plaintiff failed to explain why, as an experienced attorney with a master's degree in public administration and a real estate license, she earned no income in 2012. Plaintiff failed to submit any evidence to refute defendant's claim that she held a valid real estate license. She also failed to explain how the Ninth Judicial District Grievance Committee's investigation into complaints against her, which seem to have been fairly limited in scope and did not result in any disciplinary suspensions, would prevent her from operating her law practice or otherwise earning any income for years at a time, as she claims. She also failed to submit documentation to support her claim that defendant, a carpenter, made \$125,000, rather than the \$75,000 reported on his tax return.

The Appellate Division held that plaintiff 's pendente lite application for an upward modification of the child support award entered by the Family Court, should have been granted. In the Family Court proceeding, the parties had consented to an award of \$153 per week for the parties' two children, based on the husband having an adjusted annual income of about \$30,000. In opposition to plaintiff's application in the instant proceeding, however, he submitted a net worth statement and tax return disclosing at least \$75,000 in adjusted gross income. Plaintiff also submitted evidence that she and the children were receiving food stamps, and that she had substantial outstanding bills for household necessities and the children's expenses. In light of the substantial

discrepancy between the amount of income attributed to the husband in the Family Court order and the amount disclosed subsequently, the Supreme Court erred in concluding that the amount agreed upon in Family Court was appropriate. The application was granted to the extent of remanding for further proceedings, to redetermine the award of temporary child support with a final award to be made after trial *Matter of Brescia v. Fitts*, 56 N.Y.2d 132, 138, 141 [1982])

Appellate Division, Second Department

Child Custody - Visitation - Grandparent Visitation - Domestic Relations Law §72 - Visitation Denied Where Mother Did Not Prevent Voluntary Visitation with the Children

In *Matter of Troiano v Marotta*, --- N.Y.S.3d ----, 2015 WL 1542194 (N.Y.A.D. 2 Dept.), the Appellate Division affirmed an order which denied a petition pursuant for grandparent visitation. The Court found that the Family Court properly determined that the grandfather lacked standing to seek visitation with the grandchildren. The grandfather failed to demonstrate that the mother frustrated his visitation with the grandchildren (see *Matter of Bender v. Cendali*, 107 AD3d at 982). It was undisputed that the mother had asked the grandfather to visit with the grandchildren, and that he only refused because the mother did not want the grandmother to accompany him.

Maintenance - Award - Denied Where Mother Cohabiting with Boyfriend and Received Adequate Support-

In *Heydt -Benjamin v Heydt-Benjamin*, --- N.Y.S.3d ----, 2015 WL 1542466 (N.Y.A.D. 2 Dept.), the Appellate Division found that the Supreme Court properly concluded that there was insufficient evidence presented to support the defendant's application for equitable distribution of the plaintiff's pension. The document which the defendant sought to admit to show the existence of a pension was written in German and not accompanied by the requisite translator's attestation (see *Martinez v. 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 902; CPLR 2101[b]).

The court properly determined that the defendant alone was required to bear the obligation of repayment of the balance of her student loan because no benefit inured to the marriage (see *Dashnaw v. Dashnaw*, 11 AD3d 732, 735; see also *Mahoney-Buntzman v. Buntzman*, 12 NY3d 415, 422 n).

The Appellate Division held that Supreme Court did not improvidently exercise its discretion in declining to award maintenance to the defendant. The defendant admitted at trial that she had been cohabiting with her boyfriend and their child for more than two years, and that she received adequate economic support.

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Jurisdiction - Members of Same Family or Household - Intimate Relationship Established Where Appellant's Children Were Residing with the Petitioner.

In Matter of Winston v Edwards - Clarke--- N.Y.S.3d ----, 2015 WL 1447096 (N.Y.A.D. 2 Dept.), at a fact-finding hearing on the family offense petition, the petitioner described herself as the fiancée of the appellant's ex-husband (the ex-husband). The ex-husband was the father of one of the petitioner's children and had custody of the appellant's children. The ex-husband and his children lived in the same household as the petitioner and her children. The petitioner functioned as stepmother to the appellant's children, and helped to arrange for the appellant's visitation with her children. The hearing evidence established that the appellant engaged in a public disturbance regarding the conditions of her visitation with her children outside of the home shared by the petitioner and the ex-husband. At the hearing, the petitioner acknowledged that she and the appellant did not live together, and that they did not spend time together as a family. However, when the appellant made an application, in effect, to dismiss the proceeding for lack of subject matter jurisdiction, the Family Court concluded that it had jurisdiction over the controversy since the parties "have an ongoing relationship by virtue of the children" and the appellant's children were residing with the petitioner. At the conclusion of the fact-finding hearing, the Family Court found that the appellant had committed the family offense of disorderly conduct.

The Appellate Division affirmed. It held that the Family Court properly concluded that it had subject matter jurisdiction over this proceeding. Family Court Act § 812(1) gives the Family Court jurisdiction over family offenses committed "... between members of the same family or household. Family Court Act § 812(1) includes: "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. 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. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an 'intimate relationship' " (Family Ct Act §812[1] [e]). A determination as to whether persons are or have been in an intimate relationship within the meaning of Family Court Act § 812(1)(e) is "a fact-specific determination." Generally, the "relationship should be direct, not one based upon a connection with a third party," such as a child or a common boyfriend or girlfriend (Matter of Jose M. v. Angel V., 99 AD3d at 247). Here an intimate relationship was established by the fact that the petitioner was living with the appellant's children and their father, who had custody of them, and was acting as a stepmother to the appellant's children. Frequency of contact is a significant factor in determining whether there is an "intimate relationship" within the

meaning of Family Court Act § 812(1)(e), and it appeared from the record that there was frequent contact between the appellant and the petitioner in order to arrange for the appellant's visitation with her children.

Appellate Division, Third Department

Agreements - Stipulations - Set Aside - Where Parties Never Came to a "Meeting of the Minds as to the Essential Terms of The" Stipulation, it Was Not a Binding Agreement in Any Respect

In *Fulginiti v Fulginiti*, --- N.Y.S.3d ----, 2015 WL 1565661 (N.Y.A.D. 3 Dept.), the Plaintiff (wife) and defendant (husband) were married in 1991 and were the parents of three children. The wife commenced the divorce action in August 2010, alleging that she had been subjected to cruel and inhuman treatment. The husband answered and counterclaimed for divorce upon the same grounds. The parties appeared before Supreme Court in July 2012 and entered into a stipulation which allegedly included a commitment by the husband to withdraw his answer and permit a divorce on the ground stated in the wife's complaint. Supreme Court issued a decision after trial in May 2013, finding, inter alia, that the wife was entitled to a divorce on the ground stated in the complaint and granting ancillary relief. The husband moved for renewal and/or reargument in July 2013 and asserted, among other things, that he had never agreed to withdraw his answer and permit a divorce on the ground stated in the complaint. Supreme Court adhered to its original decision.

The Appellate Division observed that while CPLR 2104 refers to open court stipulations made by counsel, the husband was free to enter into such a stipulation without counsel given that he knowingly elected to proceed pro se. It noted that a valid stipulation must be construed "as an independent contract subject to settled principles of contractual interpretation" (*McCoy v. Feinman*, 99 N.Y.2d 295, 302 [2002]). The record was essentially silent as to the fate of the husband's answer. The only reference thereto was a brief comment by counsel for the wife, who expressed his belief that the husband had agreed to withdraw his answer and "go forward" on the complaint. The husband never confirmed that belief, nor were its implications explained to him. Silence by a pro se litigant on a seemingly offhand remark in the midst of involved negotiations cannot be said to be misleading and "may not be translated into acceptance merely because the offer purports to attach that effect to it," creating an ambiguity in the terms of the stipulation (*Matter of Albrecht Chem. Co. [Anderson Trading Corp.]*, 298 N.Y. 437 [1949]). The husband gave no indication that he understood the stipulation to include a commitment to withdraw his answer, telling Supreme Court that he found the stipulation as a whole acceptable despite having "[a] million" questions about it. Thereafter, while the husband retained counsel and submitted to a trial on unresolved economic issues, he repeatedly asserted that he had not

withdrawn his answer and sought reargument of Supreme Court's finding that he had done so. Given the paucity of evidence to suggest that the husband actually agreed to withdraw his answer as part of the stipulation, Supreme Court erred in construing the stipulation in that manner. As the record established that the parties never came to a "meeting of the minds as to the essential terms of the" stipulation, it was not a binding agreement in any respect (*May v. Wilcox*, 182 A.D.2d 939, 939, 582 N.Y.S.2d 294 [1992]). Accordingly, there was no proper finding as to whether a divorce was appropriate .The Appellate Division held that a trial was required on the fundamental issue of grounds, and that the husband's remaining arguments "cannot be addressed at this juncture."The judgment and order were reversed, on the law, and matter remitted to the Supreme Court for further proceedings not inconsistent with the Court's decision.

Maintenance - Modification - DRL § 236(B)(9)(b) -Surviving Agreement - Downward - Extreme Hardship -Undisputed Proof Indicating That the Husband Earned, after Taxes, less than His Monthly Support Obligation Was Sufficient to Demonstrate Prima Facie Evidence of Extreme Hardship

In *McKelvey v McKelvey*,--- N.Y.S.3d ----, 2015 WL 1470793 (N.Y.A.D. 3 Dept.) Plaintiff (wife) and defendant (husband) were married in 1980. In October 2009, when the wife commenced the action for a divorce, the parties had one unemancipated child. In November 2009, a Support Magistrate issued an order directing the husband to pay child support of \$1,213 per month and nondurational spousal support of \$2,787 per month. In June 2010, after the husband defaulted, Supreme Court held an inquest and, granted the wife a judgment of divorce. It was apparent from the terms of the judgment, that the parties appeared at the inquest and "agreed on financial issues." The judgment reflected that the parties agreed to incorporate the Support Magistrate's November 2009 order with regard to spousal and child support into the judgment. In September 2013, the father moved for an order to modify and/or partially vacate the spousal support provision of the judgment. Supreme Court denied the motion without a hearing. The Appellate Division reversed. It held that to the extent that the husband sought to modify the spousal support provision of the agreement that was incorporated into the judgment, Supreme Court should not have denied his request without a hearing. Generally, a party is entitled to a hearing upon such a request if he or she is able to show prima facie evidence of "extreme hardship". The husband presented tax returns for years 2008 through 2011. The husband was the former owner of a successful corporation and that, due to his default, his support obligation was based on the wife's statement of net worth and the parties' 2008 tax returns. That year, the parties' reported income of \$92,647 and the corporation reported profit of \$548,357. The husband claimed that, at some point, the corporation "collapsed" and its property was sold in foreclosure. In 2012, the husband reported income of \$24,800 and, in 2013, he was earning \$800 per week working for the company that purchased "the shell" of his former corporation. The undisputed proof indicating that the husband earned, after taxes, less than his monthly support obligation was sufficient to demonstrate prima facie evidence of extreme hardship, and Supreme Court should have held a hearing on his

request to modify his support obligation. The matter remitted to the Supreme Court for further proceedings not inconsistent with the Court's decision.

April 1, 2015

Appellate Division, Second Department

Counsel Fees Are Not Authorized on Motion to Compel the Wife to Comply with the Alleged Status Quo Regarding Holiday Visitation

In *Hauer v Patel*, --- N.Y.S.3d ----, 2015 WL 1035891 (N.Y.A.D. 2 Dept.), shortly after the action for a divorce was commenced, the husband moved to compel the wife to comply with the alleged status quo the parties had maintained during their separation regarding holiday visitation. The husband also sought counsel fees incurred with respect to the motion. The Appellate Division held that contrary to the Supreme Court's determination, the husband did not move for an award of interim counsel fees pursuant to Domestic Relations Law § 237(a), and thus, the Supreme Court erred in granting such an award. Further, counsel fees were not authorized in connection with the relief the husband requested in his motion (cf. Domestic Relations Law §237[b]). The husband's motion which was for an award of counsel fees incurred in connection with his motion should have been denied.

Enhanced Earning Capacity Attributable to Academic Degrees and Professional Licenses Is Not Marital Property Subject to Equitable Distribution Absent a Substantial Contribution to its Acquisition by the Non-titled Spouse.

Pendente Lite Support Order May Not Be Reviewed on Appeal from Judgment of Divorce.

In *Badwell v Badwell*, --- N.Y.S.3d ----, 2015 WL 1036049 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court did not err in determining that the plaintiff's nursing license was not marital property subject to equitable distribution. 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 a substantial contribution to the titled party's acquisition of that marital asset. 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, there was no evidence that the defendant made a substantial contribution to the plaintiff's acquisition of her nursing degree. There was no evidence that the defendant made career sacrifices or assumed a disproportionate share of household work as a consequence of the plaintiff's education; his contributions were minor.

The Appellate Division held that the propriety of the pendente lite child support order may not be reviewed on the appeal from the judgment of divorce (see *Anderson v. Anderson*, 50 AD3d 610; *Samuelson v. Samuelson*, 124 A.D.2d 650).

Appellate Division, Third Department

Strict Compliance with Court-directed Methods of Service Pursuant to CPLR 308(5) Is Necessary in Order for the Court to Obtain Personal Jurisdiction over a Respondent/defendant

In *Matter of Keith X v Kristin Y*, 124 A.D.3d 1056, 2 N.Y.S.3d 268 (3d Dept, 2015) after petitioner commenced two proceedings to establish paternity and gain joint legal and physical custody of an eight-year-old boy who he alleged was his child, petitioner was unable to effectuate service upon respondent despite numerous attempts to do so. Upon his motion Family Court made an order pursuant to CPLR 308(5) establishing specific alternative methods of personal service. After having determined that petitioner failed to conform to its prescribed methods of service, Family Court dismissed the petitions without prejudice. The Appellate Division affirmed. It held that strict compliance with court-directed methods of service is necessary in order for the court to obtain personal jurisdiction over a respondent/defendant. The order required that the amended orders to show cause and petitions be served on two attorneys who had represented respondent in unrelated litigation and, that substituted service be completed as follows: "2. By serving [respondent] at [two known] email addresses [and] by including with such emails copies of the [p]etitions, this [o]rder, and the [o]rders to show cause filed by [p]etitioner in support of the [p]etitions, in PDF format, each of such emails to be sent on or before April 28, 2014; and 3. By sending [respondent] an SMS/text message at [a known] subscriber number ... advising her of the pendency of the two above-captioned proceedings and advising her to access her email addresses as set forth in paragraph 2 herein, to review this [o]rder and the contents of the attached PDF files and to contact her attorneys ... for copies of the [o]rders to show cause and

[p]etitions upon whom these papers have been served on her behalf, said text to be sent on or before April 28, 2014."

The Appellate Division found that petitioner's compliance with the terms of the order was lacking. As to the email requirement, petitioner's affidavit of service stated that respondent was served on April 28, 2014 via two separate email addresses, as per Family Court's order, and that both emails were returned as undeliverable. While neither dictates of due process nor Family Court's order required proof that respondent actually received notice of the proceedings the affidavit of email service failed to state that the documents were, in fact, delivered to respondent in a PDF format. As to the manner in which petitioner conducted service by text message, petitioner's process server averred that, on April 28, 2014, he sent respondent a text message stating that "[p]aternity and custody petitions have been filed by [petitioner] regarding [the child]. Your court date in [Family Court] is May 21, 2014 at 9AM. Your failure to appear may result in a custody order and default. Contact [respondent's attorneys] for copies of these documents." Having neglected to state in the text message, as expressly required in Family Court's order, that respondent should access her email accounts to review the documents that had been served in a PDF format by email and that the text message was being sent by virtue of Family Court's order, the Appellate Division agreed with Family Court's determination that such substituted service was insufficient to confer personal jurisdiction over respondent.

Appellate Division, Fourth Department

A Medical Income Execution Pursuant to CPLR 5241(b)(2) Can Be Issued Only Where a Court Has Ordered a Parent to Provide Health Insurance Benefits. Dss May Not Issue a Medical Income Execution to a New Employer of the Parent Without Going to Court

In Chautauqua County Dept. of Health and Human Services, ex rel. Matteson v. Matteson, --- N.Y.S.3d ----, 2015 WL 1280444 (N.Y.A.D. 4 Dept.), the Appellate Division observed that Family Court Act § 416(c) requires child support orders to include a provision that, if a parent currently or in the future has health insurance benefits available that may be extended or obtained to cover the child, the parent is required to exercise the option of additional coverage in favor of the child. The term "[a]vailable health insurance benefits" is defined as health insurance benefits that are "reasonable in cost," which in turn is defined as costs that do not exceed five percent of the combined parental gross income (FCA §416[d][2], [3]). A court, however, may also find that the cost is not reasonable considering "the circumstances of the case" (FCA §416[d] [3]). The benefits are not "reasonable" in cost if the "parent's share of the cost of extending such coverage

would reduce the income of that parent below the self-support reserve". CPLR 5241(b)(2)(i) provides in relevant part that, where the court "orders the [parent] to provide health insurance benefits for specified dependents, an execution for medical support enforcement may ... be issued by the support collection unit." CPLR 5241(b)(2)(ii) provides in relevant part that, where a child support order requires the parent "to provide health insurance benefits for specified dependents, and where the [parent] provides such coverage and then changes employment, and the new employer provides health care coverage, an amended execution for medical support enforcement may be issued by the support collection unit ... without any return to court."

The Appellate Division rejected DSS argument that, pursuant to CPLR 5241(b)(2)(ii), it may issue a medical income execution to a new employer of the parent without going to court, and it was therefore error for the Support Magistrate to include the provision that a medical income execution "shall not [be issued] without such Court Order." A plain reading of that statute showed that it was not applicable here because neither parent provided health insurance coverage for the child at the time the Support Magistrate issued the order. The statute specifically provides that, "where the [parent] provides such coverage and then changes employment," an amended medical income execution may be issued by petitioner without returning to court. Inasmuch as there was no medical income execution that was issued in this case, there was nothing to "amend." Contrary to DSS further argument a medical income execution can be issued only where a court has ordered a parent to provide health insurance benefits, and that had not occurred inasmuch as the Support Magistrate determined that such benefits were not available (CPLR 5241[b][2][i]).

Supreme Court

Supreme Court Holds That Settlement Provision Waiving Counsel Fees Bars Subsequent Counsel Fee Application by Attorney.

In *LP v RP*, --- N.Y.S.3d ----, 2015 WL 1241134 (N.Y.Sup.), on December 11, 2014, the parties settled all issues in their matrimonial action and placed the terms of the settlement on the record before the court. In the stipulation of settlement, the parties agreed that with regard to the fees of their own attorneys, "[n]either party will seek any fees from the other, no counsel fees, costs or expenses. They both agree to be responsible for [their] own counsel fees, costs and expenses." Before the settlement was placed on the record, the Court stated: "My understanding is ... the parties have now reached an agreement which will alleviate from me the obligation to write a post-trial decision and will also obviate from me the obligation to decide the pending fee application which was submitted by Mr.

Lieberman in connection with my decision and order of November 26, 2014 which found Mrs. P. to be in contempt." After the Stipulation was placed on the record the court allocuted the parties on the terms of the settlement. Each party agreed to the terms, including the counsel fee provisions. A month after the parties' settlement, relying upon the independent right of counsel to seek fees the wife's attorneys moved for an order directing Defendant to pay an amount no less than \$230,000" in interim counsel fees and costs incurred by Plaintiff pursuant to Domestic Relations Law §237(a). The Court observed that the statute allows the court to order payment of counsel fees to be made "directly to the attorney of the other spouse"; and that an "application for fees and expenses may be maintained by the attorney for either spouse in his own name in the same proceeding." The latter provision gives the attorney an independent right to proceed against the monied spouse for an award of fees in a matrimonial action. Plaintiff's counsel contended that her application was not barred by Plaintiff's waiver of her right to seek counsel fees in the parties' stipulation of settlement. Counsel asserted that "[w]hile the parties agreed to be responsible for their own fees, the Appellate Division, Second Department, made clear in Gregory v. Gregory, 109 AD3d 616, 618 [2nd Dept 2013]) that a stipulation of settlement is not binding upon the attorney for a litigant, who was not a party to the stipulation.

Supreme Court observed that in Gregory counsel for the wife moved for fees against the husband based upon FCA §438, which provides that "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 the children. Prior to disposition of counsel's motion, the wife, without the knowledge or involvement of her counsel, entered into a written stipulation of settlement with her husband, which provided that each of them shall pay their own counsel fees and indemnify and hold each other harmless against any claims for fees. Thereafter, the Family Court denied counsel's fee application on the ground that it was barred by the terms of the stipulation of settlement. The Appellate Division reversed, finding that counsel, who was discharged by the wife, was not bound by a stipulation to which he was not a party. Supreme Court held, inter alia, that the salient fact that distinguished the two cases was that the attorney in Gregory was a complete stranger to, and ignorant of, the stipulation by which he was ostensibly deprived of the opportunity that was authorized by the court to obtain fees from the husband/respondent. In this case, although not a "party" to the stipulation of settlement in the technical sense, Plaintiff's counsel negotiated the settlement and was present for, and participated in, placing the settlement in the record and the allocution of the parties as to the terms of the settlement. Thus, unlike the attorney in Gregory, Plaintiff's counsel was not a stranger to the parties' fee waiver. But for the settlement, Plaintiff's counsel's fee application, which was raised almost daily during the trial, would have been addressed in the Court's post-trial decision.

The Court declined to follow Maher v. Maher, 999 N.Y.S.2d 727 [Sup.Ct., Rockland County 2014], where the parties, acting through counsel, settled their divorce action and all ancillary issues and submitted a copy of the written stipulation of settlement to the court. Following the parties' execution of the stipulation of settlement, the wife discharged her

counsel without cause. The wife's counsel then filed an application against the husband to recover counsel fees incurred by the wife in the divorce action. Relying on Gregory, the court in Maher stated that "the law is clear that simply because the parties agree that they will not seek counsel fees from the other, an attorney is not barred from making an application for fees from the adverse spouse where appropriate." The court then determined that counsel had standing to seek fees from the husband despite the explicit waiver by his former client in the stipulation of settlement, which counsel prepared, of her right to seek counsel fees against her spouse. Supreme Court declined to follow Maher on this point, because it did not believe that a counsel fee award was appropriate under the circumstances in Maher.

Supreme Court held that where, as here, counsel actively participates in a settlement of an action that includes the client's waiver of her right to seek fees from the other spouse, counsel must inform the parties of counsel's intention to seek fees prior to finalizing the settlement in order to preserve that right. Plaintiff's counsel waived her right to seek an award of counsel fees by remaining silent during the settlement proceedings as to her intent to seek fees. Plaintiff's counsel's motion for counsel fees was denied.

Authors Comment: We believe that the decision in Maher v. Maher, 999 N.Y.S.2d 727 [Sup.Ct., Rockland County 2014], is the correct result. "The law is clear that simply because the parties agree that they will not seek counsel fees from the other, an attorney is not barred from making an application for fees from the adverse spouse where appropriate."

March 16, 2015

Appellate Division, Third Department

Counsel Fees - DRL §237 - Wife Denied Counsel Fees for Failing to File Copy of the Retainer Agreement and a Detailed Affidavit Setting Forth the Charges Incurred.

In Curley v Curley, --- N.Y.S.2d ---, 2015 WL 790337 (N.Y.A.D. 3 Dept.), the parties were married in 1979 and had no children together. On June 16, 2009, plaintiff (wife) commenced this action. Supreme Court ordered the husband to pay \$900 per month maintenance starting upon the date of the wife's commencement of the action in June 2009 through December 2012, and \$500 per month thereafter from January 2013 through December 2013, at which time the husband's maintenance obligation would end. The Appellate Division affirmed the award. Supreme Court properly considered the relevant statutory factors, and provided a reasoned analysis of those upon which it had based the award. The court noted that the parties had no children, were both in good health, and had been married for nearly 30 years. During most of that time, the wife worked full time and

also contributed to the household by doing most of the cooking, cleaning, and laundering. The wife had a high school degree; during the marriage, the husband returned to school to obtain a Master's degree, while the wife continued to work. At the time of trial, the wife had retired, while the husband was still working as an engineer. The court noted the wife's testimony that she believed her position was in jeopardy when she accepted an early retirement incentive and, without expressly crediting this testimony, further noted that the position had not been filled in the two years between the retirement and the date of trial. However, in light of the wife's further testimony that she did not intend to seek alternate employment, and in accord with the purpose of maintenance to promote self-sufficiency, the court limited the duration of the husband's obligation and provided for the amount paid to substantially decrease over time.

The Appellate Division found that in exchange for agreeing to retire from her position as a university administrator and surrender her accrued vacation and sick leave, the wife was paid a lump sum of money shortly after commencement of the divorce action. The wife's eligibility for the retirement incentive benefits was derived from her employment during the marriage and, as such, the benefits should have been subject to equitable distribution.

Benefits received in consideration

for an early retirement will constitute marital property if the right to the payments arose during the marriage, or where the incentive is intended as compensation for past services rendered by the employee-spouse during the marriage (see *Olivo v. Olivo*, 82 N.Y.2d 202, 207-208 [1993])). Here, the wife's inclusion in the retirement incentive program was based, at least in part, on the number of years of service to her employer. The wife testified that she accepted inclusion in the early retirement program in April 2009. The court found that the wife's entitlement to the early retirement benefits vested during the marriage. The mere fact that the incentive benefits were not paid until following the commencement of the proceedings did not alter their status as marital property subject to equitable distribution.

The Appellate Division rejected the husband's claim that Supreme Court erred in allowing the wife to receive her distributive share from the proceeds of the sale of the parties' marital home without regard for the resulting tax consequences to the husband. The husband presented no evidence with respect to any alleged tax consequences, and the court was not required to independently analyze the myriad of potential tax ramifications on the parties.

The Appellate Division found that the the wife did not properly support her claim for counsel fees by filing a copy of the retainer agreement and a detailed affidavit setting forth the charges incurred (Domestic Relations Law § 237[a]; 22 NYCRR 1400.3). An award of counsel fees requires that an evidentiary basis be established as to two elements: the parties' respective financial circumstances and the value of the legal services rendered. The wife's testimony at trial as to the amount she had expended, without more, failed to furnish a meaningful way to gauge the value of the services rendered. It reversed the award rendered in the judgment, while specifically noting that this did not affect an earlier award of pendente lite counsel fees.

Supreme Court

Divorce - Grounds - DRL § 170(7) - Summary Judgment of Divorce Granted Based upon Estoppel

In *Alvarado v Alvarado*, 46 Misc.3d 1220(A), 2015 WL 734897 (N.Y.Sup.), 2015 N.Y. Slip Op.50130(U) the Court granted Husband's application for summary judgment of divorce as there was no material issue of fact regarding the grounds for divorce. In support of his application Husband swore under oath that the marriage had broken down irretrievably for a period of six months in compliance with the plain language of DRL § 170(7). Moreover, the Court held that Wife was estopped from denying that the marriage was broken down irretrievably as she had previously sworn that it had in both her initial Summons and Complaint and in both the Preliminary Conference Order and a separate Grounds Order. While summary judgment was granted to Husband, the granting of a judgment of divorce was held in abeyance pending the resolution of ancillary issues.

March 1, 2015

Court of Appeals

Court of Appeals Holds Appeal from a Contested Order of Protection Issued by Family Court, Based upon a Finding That the Subject Individual Has Committed a Family Offense, Is Not Mooted Solely by the Expiration of the Order.

In *Matter of Veronica P. v. Radcliff A.*, --- N.E.3d ----, 2015 WL 566677 (N.Y.), 2015 N.Y. Slip Op. 01300 the Court of Appeals held that an appeal from a contested order of protection issued by Family Court, based upon a finding that the subject individual has committed a family offense, is not mooted solely by the expiration of the order.

Petitioner sought an order adjudging respondent guilty of the charged offenses, as well as an order of protection against him pursuant to Family Court Act § 842. At the hearing, both sides called witnesses to testify to the relevant events, and respondent vigorously opposed the entry of an order of protection or any other adverse adjudication. In an oral decision rendered on February 4, 2011, the court found that respondent was guilty of a family offense, concluding that he had committed acts constituting harassment in the second degree. That same day, the court entered a written two-year order of protection against respondent. The written order stated that a family offense petition had been filed in the case, listed the date of the petition and noted that the order was being issued after a hearing at which respondent had been present. The order directed respondent to stay away from petitioner's home and to refrain from committing

assault, harassment, stalking and certain other offenses against her. (The written did not declare that respondent was guilty of a family offense.)

Respondent appealed, but while the appeal was pending, the order of protection expired. The Appellate Division unanimously dismissed the appeal as moot, citing the expiration of the order (Matter of Veronica P. v. Radcliff A., 110 AD3d 486, 486 [1st Dept 2013]). The Court of Appeals reversed. It observed that 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. The ability of an appellate decision to directly and immediately impact the parties' rights and interests is among the most important aspects of the mootness analysis, for otherwise the analysis might turn on inchoate or speculative matters, making mootness an unwieldy doctrine of a thousand "what ifs." On the other hand, even where the resolution of an appeal may not immediately relieve a party from a currently ongoing court-ordered penalty or obligation to pay a judgment, the appeal is not moot if an appellate decision will eliminate readily ascertainable and legally significant enduring consequences that befall a party as a result of the order which the party seeks to appeal. In this case, the expiration of the order of protection did not moot the appeal because the order still imposed significant enduring consequences upon respondent, who might receive relief from those consequences upon a favorable appellate decision. Because the order of protection on its face strongly suggested that respondent committed a family offense, the court in a future criminal case or Family Court proceeding would likely rely on the order to enhance a sentence or adverse civil adjudication against respondent. Although the order did not declare respondent guilty of a family offense in so many words, the order noted that it was issued after a hearing in a family offense proceeding, and it expressly barred respondent from victimizing petitioner by committing a variety of crimes nearly identical to those charged in the family offense petition. Thus, a court examining the order may readily discern that Family Court found respondent guilty of committing a family offense against petitioner and issued an order of protection to prevent him from continuing to offend against her. Armed with that information, the court in a future case may increase the severity of any applicable criminal sentence or civil judgment against respondent. In the face of the substantial probability that the order of protection would prompt severely deleterious future legal rulings against respondent, an appellate decision in his favor would directly vindicate his interest in avoiding that consequence of the order. The Court found that the the order of protection had other potential legal consequences that render it susceptible to appellate review. Beyond its legal consequences, the order of protection placed a severe stigma on respondent, and he can escape that stigma by prevailing on appeal Rubenstein. The order essentially labeled respondent a family offender. Given the totality of the enduring legal and reputational consequences of the contested order of protection, respondent's appeal from that order was not moot.

Respondent urged the Court to hold that an appeal from any expired order of protection, other than one entered upon stipulation, is not moot. The Court expressed no view on the correctness of that proposed holding because it was unnecessary to resolve the case. The

order was reversed and the matter remitted to the Appellate Division for further proceedings in accordance with the opinion.

Appellate Division, First Department

Counsel Fees - Domestic Relations Law § 237 - Plaintiff Was Not Precluded from Recovering Legal Fees for Services Provided in Opposing Defendant's Affirmative Defense Predicated on Prenuptial Agreement - Failure to Attach a Statement of Net Worth (22 Nycrr 202.16[k][2] Warrants Denial of Motion.

In *Karg v Kern*, --- N.Y.S.2d ---, 2015 WL 686046 (N.Y.A.D. 1 Dept.), 2015 N.Y. Slip Op. 01550 the Appellate Division affirmed an April 3, 2014 order which granted plaintiff wife's application for interim counsel fees in the amount of \$136,000, and directed defendant husband to pay the real estate taxes on the parties' farm property. It held Supreme Court properly awarded the wife interim counsel fees after considering the financial positions of the parties and the circumstances of the case. Plaintiff was the less monied spouse, the disparity between the parties' respective income and assets was significant. The Court held that to the extent the legal fees awarded an April 3, 2014 order may have related to the litigation over the parties' prenuptial agreement and to the extent the court awarded fees in connection with that litigation in its June 5, 2014 order, awarding additional counsel fees, the awards were proper. Plaintiff was not precluded from recovering legal fees under Domestic Relations Law § 237 for services provided in opposing defendant's affirmative defense predicated on the prenuptial agreement (see *Van Kipnis v. Van Kipnis*, 11 NY3d 573, 579 [2008]).

The Appellate Division held that the court correctly denied the part of defendant's motion seeking a downward modification of the support award since defendant failed to attach a statement of net worth (22 NYCRR 202.16[k][2]). In any event, defendant failed to show exigent circumstances or that the court failed to consider the relevant factors.

The Appellate Division held that Supreme Court properly vacated the automatic stay of the April 3, 2014 order obtained by defendant's posting of an undertaking to secure his obligation to pay interim counsel fees (CPLR 5519[c]; *Wechsler v. Wechsler*, 8 Misc.3d 328 [Sup Ct, N.Y. County 2005]). The court was appropriately concerned that defendant was taking advantage of the automatic stay to prevent plaintiff from receiving interim counsel fees, thereby preventing an even playing field in the litigation. Further, defendant could recoup the counsel fee award from plaintiff's share of equitable distribution, while plaintiff would be severely prejudiced if she were forced to wait months to obtain the interim award.

Appellate Division, Third Department

Family Court - Support - Article 4 - Payments under Support Order Issued in Favor of a Social Services District as Assignee Pursuant to Family Ct Act § 571(1) Continue to Be Made to the Support Collection Unit, When Public Assistance Terminates, Unless the Person or Family Requests Otherwise

In Matter of Broome County Dept. of Social Services ex rel. Wheeler v. Kelley, --- N.Y.S.2d ----, 2015 WL 685913 (N.Y.A.D. 3 Dept.) Petitioner, the assignee of the mother of a minor child commenced a child support proceeding in May 2013 pursuant to Family Court Act article 4. Petitioner became the assignee of the mother's right to receive support for her minor child upon the mother's receipt of public assistance. The Appellate Division held that the Support Magistrate did not have the authority to limit the duration of an order of support obtained by petitioner for "so long as [the mother] receives temporary assistance" because the statute does not permit Family Court to terminate a support order upon the termination of public assistance. After concluding that there is "nothing in the Family Court Act that says the order shall continue" upon the termination of public assistance, the Support Magistrate held that it was not appropriate to continue the order once the mother's public assistance case closed because the mother did not appear at the proceeding. This was error. While the court may have placed the mother on notice of the hearing, she was not a party nor was she joined as a necessary party to the proceeding (see Family Ct Act § 571[2]). Moreover, the statute clearly provides that a support order issued in favor of a social services district as assignee pursuant to Family Ct Act § 571(1)"shall direct that payments be made directly to the support collection unit, ... so long as there is in effect an assignment of support rights to such district. Further, the order shall provide that when the person or family no longer receives public assistance, payments shall continue to be made to the support collection unit, unless the person or family requests otherwise" (Family Ct Act § 571[3][a]). This statutory directive avoids a gap in payment, while providing a mechanism for payments to be made directly to the recipient parent. While the statute entitles the mother to commence a de novo support proceeding upon the cessation of her public assistance benefits there was discern no basis for Family Court's conclusion that the order of support automatically terminates.

Supreme Court

Divorce - Grounds - Domestic Relations Law § 230 - an Allegation That the Parties' Marriage Has Been Irretrievably Broken for a Period of Six Months or More and That the "Breakdown" Occurred in New York," Does Not Meet the Requirements of DRL § 230(3).

In *Stancil v Stancil*, --- N.Y.S.2d ----, 2015 WL 669334 (N.Y.Sup.), 2015 N.Y. Slip Op. 25045 the Supreme Court observed that DRL §230 mandates that the plaintiff or the defendant in a matrimonial action live in this state continuously for one year if certain other conditions are present. One such condition is if "the cause occurred in the state." The parties were married in 1998 in Norfolk, Virginia and lived there. Shortly thereafter defendant, who was a member of the United States Navy, was deployed. In January 2011, defendant returned to Virginia. In February 2013, plaintiff, who was now in graduate school in South Carolina, accepted an internship at St. Luke's Roosevelt Hospital in New York. She moved to New York with the parties child in June 2013, having rented the South Carolina residence. It did not appear that defendant has ever visited plaintiff or the child in New York. In August 2014, 14 months after moving to New York, plaintiff commenced an action using New York's no-fault divorce ground. Defendant, claimed that the parties could not divorce in New York because they did not meet New York's residency requirement. Plaintiff contended that pursuant to New York's no-fault divorce provision the parties' marriage has been irretrievably broken for a period of six months or more and that the "breakdown" occurred in New York, thereby meeting the requirements of DRL § 230(3). After a review of the language and purpose of DRL §230, the legislative history of DRL §170(7), and the case law resolving other inconsistencies that have arisen from the legislature's adopting DRL §170(7), the court concluded that the legislature did not intend for the no-fault divorce ground to constitute a "cause" sufficient to satisfy the durational residency requirement in DRL §230(3). The Court held that irretrievable breakdown of the parties marriage did not amount to "cause" within meaning of DRL§ 230 providing a one-year residency requirement for bringing a divorce action if the "cause" occurred in the state.

February 16, 2015

Appellate Division, First Department

Equitable Distribution - Husband Committed Waste of Assets by Failure to Account for More than \$2 Million in Assets, as Well as His Failure to Disclose Various Accounts, and the Fact That He Increased the Encumbrances on the Marital Home in Violation of a Court Order - Court Properly Imputed to Defendant Income of \$1 Million Annually Based on the Fact That He Earned in Excess of \$1 Million Annually from 2000 Through 2009.

In *Branche v Holloway*, --- N.Y.S.2d ----, 2015 WL 358132 (N.Y.A.D. 1 Dept.) the Appellate Division held that Supreme Court's unequal distribution of marital property in plaintiff's favor was amply supported by the record. The court carefully considered all relevant factors, including the parties' 18cyear marriage, the parties' joint decision that plaintiff would take care of the children and home to the detriment of her career, the gross disparity

in the parties' current and probable future incomes, the parties' age at the time of trial, defendant was 59 and plaintiff was 55, and their respective good health. The court also properly considered defendant's egregious economic fault in liquidating, dissipating, or failing to account for more than \$2 million in assets, which represented approximately 25% of the marital estate, as well as his failure to disclose various accounts, and the fact that he increased the encumbrances on the marital home in violation of a court order. It found that the court properly imputed to defendant income of \$1 million annually based on the fact that he earned in excess of \$1 million annually from 2000 through 2009. The report and testimony of a vocational expert showed that defendant's present and future earning potential was \$1 million annually and that defendant had failed to conduct a reasonable job search after his employment was terminated in 2009. Moreover, while defendant's base salary in the position for which he was hired in 2011 was \$350,000, he was eligible for two bonuses that would bring his total salary to \$1 million. The finding of criminal contempt against defendant was overwhelmingly supported by the record, which included evidence of his willful failure to pay the child and spousal support ordered in the pendente lite order and his failure to demonstrate any genuine attempt to obtain employment (see Judiciary Law § 750; see *Spector v. Spector*, 18 AD3d 380 [1st Dept 2005]).

Appellate Division, Second Department

Res Judicata - A party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation"

In *Matter of Singer v Windfield*, --- N.Y.S.2d ----, 2015 WL 446487 (N.Y.A.D. 2 Dept.), the mother and the father entered a stipulation of settlement settling all issues between them. Those stipulations were incorporated but not merged into a judgment of divorce dated August 26, 2010. On or about March 1, 2011, the mother commenced a proceeding, alleging, inter alia, that the father had violated the terms of the stipulation of settlement by failing to pay Bar Mitzvah fees, which were detailed in the earlier stipulations. The mother also sought an award of an attorney's fee. The Support Magistrate granted the mother's cross motion for summary judgment. The Appellate Division held that the mother's claim for reimbursement of Bar Mitzvah fees was precluded by the doctrine of res judicata. "Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (*Matter of Hunter*, 4 NY3d 260, 269). Under New York's transactional approach to res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of

transactions are barred, even if based upon different theories or if seeking a different remedy" (O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357). Family Court properly granted the father's objection to that portion of the Support Magistrate's order which awarded the mother reimbursement of Bar Mitzvah fees. The father presented evidence showing that the mother's claim against him arose from the same operative facts as a claim which was decided on the merits in the Supreme Court matrimonial action, in which she sought, inter alia, a finding of contempt against him for his nonpayment of the same Bar Mitzvah fees. The father thus demonstrated that the claim for Bar Mitzvah fees that was asserted against him in this proceeding could have been raised in the Supreme Court action. Thus, this claim was properly dismissed as barred by the doctrine of res judicata.

Custody- Mental Health Professionals Certification Committee for the First and Second Judicial Departments - Mental Health Professionals Panel - Knowledge That the Court-appointed Forensic Evaluator Had Been Removed from the List of Those Mental Health Professionals Deemed Qualified Was Basis for Removal.

In *Carlin v. Carlin*, --- N.Y.S.2d ----, 2015 WL 361116 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court properly granted defendant's motion for leave to renew her prior motion to remove the court-appointed forensic evaluator, and, upon renewal, in effect, granted that motion. In support of her renewal motion, she submitted a letter dated July 3, 2012, from the Mental Health Professionals Certification Committee for the First and Second Judicial Departments to the court-appointed forensic evaluator, informing him that he had been removed from the Mental Health Professionals Panel. The defendant established that this letter was not available to her when she made her prior motion, or when the court held oral argument on the prior motion. The Mental Health Professionals Panel was established by the Appellate Division, First and Second Judicial Departments, to ensure that courts and parties have access to qualified mental health professionals who are available to evaluate the parties and to assist courts in reaching appropriate decisions as to, inter alia, custody and visitation (22 NYCRR 623.1; see *Lieberman v. Lieberman*, 112 AD3d 583). The Committee is tasked with the responsibility of recommending eligible mental health professionals for appointment to the panel, investigating complaints against panel members, and recommending removal of panel members to the Presiding Justices of the First and Second Judicial Departments (22 NYCRR 623.3, 623.4[c]; 623.9). Thus, knowledge that the court-appointed forensic evaluator had been removed from the list of those mental health professionals deemed qualified by the Committee to assist courts in reaching an appropriate decision as to custody and visitation would have changed the court's prior determination.

Appellate Division, Fourth Department

Equitable Distribution - Maintenance - Child Support - Counsel Fees Award - Not an Abuse of Discretion to Adjusting the Distributive Award in Lieu of Requiring Husband to Contribute to Attorney's Fees - in Light of Husband's Prior Voluntary Maintenance Payments, and Considering Husband's Share of Marital Debt Court Properly Determined That the Wife Was Not Entitled to Retroactive Spousal Maintenance.

In *Antinora v Antinora*, --- N.Y.S.2d ----, 2015 WL 496320 (N.Y.A.D. 4 Dept.) the Appellate Division agreed with the husband that the court failed to articulate a proper basis for applying the Child Support Standards Act (CSSA) to the combined parental income in excess of the statutory cap, which was \$136,000 at the time. The court failed to indicate how the children's actual needs would not be met if it had calculated child support at the statutory cap. It is well settled that "blind application of the statutory formula to [combined parental income] over [\$136,000], without any express findings or record evidence of the children's actual needs, constitutes an abdication of judicial responsibility and renders meaningless the statutory provision setting a cap on strict application of the formula' " The court also erred in failing to order that child support be adjusted upon termination of maintenance, pursuant to Domestic Relations Law § 240(1-b)(b)(5)(vii)(C). It modified the judgment by vacating the award of child support, and remit the matter to Supreme Court to determine the husband's present and prospective child support obligations in compliance with the CSSA, following a further hearing, if necessary, and to order that child support be adjusted upon termination of maintenance.

The Appellate Division found that the court did not abuse its discretion in adjusting the distributive award in lieu of requiring the husband to contribute to her attorney's fees. Inasmuch as the wife was the less monied spouse, thereby triggering the rebuttable presumption entitling her to attorney's fees, the court was required to articulate why it was not awarding attorney's fees to the wife. The court sufficiently articulated its rationale when it explained that, instead of having the husband contribute to the wife's attorney's fees, it would increase the distributive award to the wife by granting her, inter alia, the proceeds of an unsold luxury automobile and relieving her of her share of the marital credit card debt.

The Appellate Division held that with respect to the value of the marital residence, the court erred in simply averaging the values set forth in the appraisals of the parties' experts without articulating its reason for doing so. It modified the judgment by vacating the paragraph concerning the marital residence, and remitted to Supreme Court for "appropriate findings of fact and conclusions of law as required by statute" with respect to the valuation of the marital residence.

The Appellate Division held that in light of the husband's prior voluntary maintenance payments, and considering the husband's share of marital debt the court properly determined that the wife was not entitled to retroactive spousal maintenance.

The Court rejected the wife's contention that she was entitled to a credit for the statutory add-on expenses permitted in addition to the basic child support obligation under the CSSA, which include child care and uninsured health care expenses (Domestic Relations Law § 240[1-b][c][4]-[5]). Although she was entitled to a pro rata share of such payments from the husband, the husband was entitled to a credit against such future expenses based on his past voluntary maintenance and child support payments (see *Lester v. Lester*, 237 A.D.2d 872, 873), and it therefore modified that part of the judgment awarding child support.

The Appellate Division rejected the wife's contention that the court erred in awarding the husband certain benefits under her New York State pension. In pertinent part, those benefits included post retirement cost of living adjustments, pre retirement survivorship protection, post retirement joint and survivor protection, and an early retirement subsidy. It is well settled that "[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 unmaturing at the time the action is begun" (*Majauskas v. Majauskas*, 61 N.Y.2d 481, 485-486). Therefore, the court properly awarded the husband postretirement cost of living adjustments, inasmuch as they "are merely supplements and enhancements to already existing pension benefits". Additionally, the court properly required the wife to elect a preretirement and postretirement survivorship annuity option in her pension to benefit the husband, inasmuch as the wife has the option of electing a maximum payment to herself, which would deny surviving beneficiaries any payment from the pension. Finally, the court properly awarded the husband a right to any early retirement subsidy elected by the wife under the pension. Although the wife had not yet had an opportunity to elect an early retirement subsidy, any enhanced retirement income received as a result of a subsidy, other than a Social Security bridge payment or separation payment, would be considered compensation and marital property subject to equitable distribution.

Ineffective Assistance of Counsel - Fourth Department Overrules Prior Holdings Required a Showing of Actual Prejudice to Prevail on a Claim of Ineffective Assistance of Counsel

In *Matter of Brown v Gandy*, --- N.Y.S.2d ----, 2015 WL 498746 (N.Y.A.D. 4 Dept.) the Appellate Division observed that because the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings. Thus, to the extent that previous decisions of the Court have required a showing of actual prejudice to prevail on a claim of ineffective assistance of counsel under the New York Constitution, those cases are no longer to be followed (see e.g. *Matter of Jada G. [Marcella G.]*, 113 AD3d 1138,

1138; Matter of Alisa E. [Wendy F.], 98 AD3d 1296, 1296; Matter of Michael C., 82 AD3d 1651, 1652, lv denied 17 NY3d 704).

Supreme Court

Child Support - Emancipation - Child's Conduct, Which Constructively Emancipated Him, Obviated His Mother's Obligation to Pay for the Son's College Expenses. Vulgar Words, Voiced by a Son Against His Mother Justified Discontinuing the Mother's Obligation to Support the Ungrateful Child. Husband Was Entitled to Recoup His Overpayment of Child Support.

In *Cornell v Cornell*, --- N.Y.S.2d ----, 2015 WL 463959 (N.Y.Sup.) the father sought child support from the mother, a recoupment of child support paid while the parties negotiated a temporary order, and payment for college expenses. In defense of these claims, the mother argued that her obligations to pay any support-including the cost of college education-is obviated because of the child's calculated estrangement from her. She claimed that her son has described her as a "douche bag" and an "asshole," and that this, among other behavior, caused alienation between her and the son. The parties entered a separation agreement in 1998. A post-judgment order, issued in 2004, required the father to pay child support because the child lived with his mother. The child changed residences in September 2013 and the father subsequently moved to terminate his support obligation and seek support from the mother. The father also sought the mother's proportionate contribution to college costs for the child, which he claimed he paid in full. The demand to pay college expenses arose under a 1999 order, which provided that both parents will contribute to college expenses in "an amount proportionate to their incomes," provided that the child attends full-time, and that both parents approve the college and the course of study. The mother claimed she was never consulted regarding the son's choice of colleges or his course of study, and as a result, has no obligation for his college expenses.

The evidence before the court established that the child repeatedly used the word "fuck" in discussing issues with his mother. Based just on the mother's testimony, the court could not conclude that this word, although used repeatedly, was "deeply offensive". She never suggested she was offended or disturbed by her son's repeated use of this term. However, the proof of the son's language easily became "deeply offensive" when the court's evaluated text messages introduced at trial. The mother and son exchanged these messages either slightly before, contemporaneously with, or slightly after the son's decision to move into his father's home. The text messages are only portions of longer messages, but from the text admitted before the court, the son referred to his mother as an "asshole" on several occasions, and a "douche bag" on another. In these text exchanges, before the court, there was no justification for a high school graduate and college-student to refer to his mother in such terms. The Court observed that other Courts that have

commented on these two terms and described them as displaying an utter lack of taste and propriety. *Doninger v. Niehoff*, 527 F.3d 41, 49 (2d Cir.2008) (use of the phrase "douche bag" was vulgar and offensive); *Finkel v. Dauber*, 29 Misc.3d 325, 906 N.Y.S.2d 697 (Sup.Ct. Nassau Cty.2010). *Lopaka Curtis Bounds v. Pinnacle Special Police, Inc.*, 2006 U.S. Dist. LEXIS 98170 (EDNC 2006) (the use of the term "douche bag" is a form of "rudely insulting others"); *Gilbert v. Daimler-Chrysler Corp.*, 2002 Mich.App. LEXIS 1168, n. 26 (Ct App. Mich.2002) (citing Random House Webster's College Dictionary [2d ed], p. 80, that "asshole"

is a "vulgar" term referring to a "stupid, mean or contemptible person" or "the worst part of a place or thing"); The utterance of these terms has been held to constitute a hostile work environment. *Bader v. Special Metals Corp.*, 985 F.Supp.2d 291,330 (NDNY 2013); *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1539 (10th Cir.1995) ("It is beyond dispute that evidence that a woman was subjected to a steady stream of vulgar and offensive epithets because of her gender would be sufficient to establish a claim under Title VII"); see also *Matter of Melody M. v. Robert M.*, 103 A.D.3d 932, 962 N.Y.S.2d 364 (3rd Dept.2013) (charitably stated, a mother's use of the term "asshole" to describe her 10-year-old child reflected a lack of insight as to the nature of her conduct toward her oldest child).

The Court found that the use of these terms were indicative of a substantial hatred and/or disrespect for the mother. In the court's view, a child who utters such terms about their parent cannot realistically expect this court to ignore such conduct and order the maligned parent to pay any form of support for the child. A child over the age of 18, seeking reimbursement for college expenses, cannot use such language toward a parent and then, either directly or through his other parent, seek child support, and/or payment of college expenses. No one should be permitted to refer to their mother in such fashion, and then, without recanting or asking for forgiveness, seek the court's assistance to have that person support their future life. The court refused to condone such actions by an unworthy son. In addition, there was substantial and uncontroverted evidence that the child had refused all contact with his mother. The court held that constructive emancipation exists even if the proof failed to establish that the father, who would be paid the support, did not support or condone the child's alienating behaviors. The court also held that the child's conduct, which constructively emancipated him, obviates his mother's obligation, as part of her support, to pay for the son's college expenses. The father's request for the mother's contribution to college expenses was denied. The child, having severed his ties to his mother in a despicable fashion, was emancipated, as far as the mother is concerned, as his conduct has caused an alienation which cannot be rewarded. The mother has no obligation to pay support for person-over the age of 18-who acts in this manner. Vulgar words, voiced by a son against his mother easily justify discontinuing the mother's obligation to support the ungrateful child. The Court held that the husband was entitled to recoup his overpayment of child support. The husband was entitled to stop paying support on September 1, 2013, when the child did not return to his mother's home, as the parties agreement provided. The wife was directed repay this amount.

February 2, 2015

**Appellate Division, Second Department
Agreements - Child Custody - Arbitration - Disputes Concerning Child Custody and
Visitation Are Not Subject to Arbitration**

In Goldberg v Goldberg, --- N.Y.S.2d ----, 2015 WL 249835 (N.Y.A.D. 2 Dept.) Raisie Goldberg (mother) and Shmuel Z.B. Goldberg (father) entered into an agreement pursuant to which they agreed to arbitrate all marital issues between them before a rabbinical arbitration tribunal, the Beth Din Kollel Avreichem and Yeshiva (Badatz) (Beth Din). Thereafter, the Beth Din issued a decision, inter alia, awarding the parties joint legal custody of the parties' children, awarding the mother residential custody, awarding the father certain visitation, and determining the father's child support obligation. The mother commenced a proceeding pursuant to CPLR 7510 to confirm the Beth Din award. Supreme Court, inter alia, granted those branches of the petition which were to confirm so much of the award as determined custody and visitation and so much of the award as determined the father's child support obligation. The Appellate Division reversed. It held that although the parties consented to arbitration of custody and visitation matters, they had no power to do so. "Disputes concerning child custody and visitation are not subject to arbitration as 'the court's role as parens patriae must not be usurped' " (Matter of Hirsch v. Hirsch, 4 AD3d 451, 452, quoting Glauber v. Glauber, 192 A.D.2d 94, 98). Accordingly, that branch of the petition which was to confirm the custody and visitation provisions of the arbitration award should have been denied, and the matter was remitted to the Supreme Court for a hearing and determination as to the issues of custody and visitation.

Family Court

Family Offenses - Order of Protection - Extension - Family Court Act §842 - Good Cause Found Where Parties Continued to Have Disputes over the Father's Visitation with the Children

In Matter of Ellen Z, --- N.Y.S.2d ----, 2015 WL 232731 (N.Y.Fam.Ct.) respondent consented to the entry of an order of protection in favor of the petitioner without any admission of wrongdoing. The order of protection directed, inter alia, that respondent "stay away" from petitioner, her home, school, place of business or employment, that respondent commit no family offenses against her, and that the order of protection was subject to the terms of the order of visitation as to the parties' two children issued under other docket numbers. The Court further directed that the parties have no contact except contact incidental to the exchange of the children for visitation, and further that the parties could communicate about visitation via text messaging. Counsel for the mother submitted a proposed order to show cause requesting that this Court extend the November 7, 2013 order of protection

"until December 31, 2015". In support of the motion petitioner referred to the acts of domestic violence she alleged were committed by respondent in the petition she filed in 2013, and she asserted that based upon the "long history of domestic violence perpetrated by" the respondent against her, she "is fearful for her safety as she continues to have regular contact with [respondent] during court appearances and visitation exchanges." Petitioner claimed that respondent became verbally aggressive towards her during an exchange of the children at the police precinct in late November 2014 which made her "feel scared and intimidated", and that respondent "continues to harass and intimidate [her] by filing an enforcement petition for visitation" which she asserted was baseless as the allegations in that petition were false.

The Court found good cause to grant the mother's motion to extend the order of protection for two years. It observed that Family Court Act §842 authorizes the extension of an order of protection "upon motion ... for a reasonable period of time upon a showing of good cause or consent of the parties" (L 2010, ch 325). The statute specifically provides that "[t]he fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order. The record demonstrated that the parties continued to have disputes over the father's visitation with the children pursuant to the order which directed that the children be exchanged by the parents inside of a police precinct for reasons of safety. These disputes led to the father's filing of an enforcement petition alleging that the mother violated the order of visitation, as well as his filing of the family offense petition which the Court dismissed. Based upon the prior incidents of domestic violence as alleged in the underlying family offense petition filed by the mother, the continuing friction surrounding the father's visitation with the parties' children as set forth in counsel's affirmation, the mother's affidavit, and the father's family offense petition, the Court credited the mother's claim that she continued to have a fear that the father may commit additional acts of domestic violence against her should the order of protection not be extended and credited her claim that her recent interactions with the father had caused her to "feel scared and intimidated." Family Court Act §842 permits extension of an order of protection for a "reasonable period of time" for the purpose of preventing a recurrence of domestic violence, whether or not violence has occurred during the existence of the order. In light of the age of the parties' children and the fact that the parties would continue to have face-to-face contact when they exchange the children, the Court concluded that it was reasonable to extend the order of protection for an additional two years, as that is the maximum duration of an order of protection in a case such as this which does not involve a finding that aggravating circumstances exist.

January 16, 2015

Appellate Division, Second Department

Second Department Holds That it Is Only Appropriate for an Attorney for a Child to Form an Opinion as to What Would Be in the Child's Best Interest, after Gathering Evidence and Making a Complete Investigation.

In *Matter of Brown v Simon*,--- N.Y.S.2d ----, 2014 WL 7392499 (N.Y.A.D. 2 Dept.), the parties entered into an agreement to share joint custody of the child, with the mother to have residential custody, which was embodied in an order entered on consent of the parties. Shortly after the agreement was entered into, the child's day care provider reported to the father that the child was not allowing herself to be cleaned when her diaper was being changed, and her resistance had gotten worse. Although an examination of the child by her pediatrician revealed no physical evidence of sexual abuse, the day care provider reported her concerns to the Office of Child Protective Services (CPS). The father and mother each filed a petition seeking sole custody of the child. Before a hearing on the petitions was held, the attorney for the child, based on the out-of-court statements of the day care provider, made an application for the father to be awarded temporary custody of the child. The Family Court granted that application. The Appellate Division pointed out that such an award was improper, as it was based on the disputed hearsay allegations (*Matter of Swinson v. Brewington*, 84 AD3d 1251).

The Appellate Division held that during the hearing on the petitions, the Family Court erred in permitting the father to testify that the child told him that the mother's other daughter "did it." The father's testimony was intended to show that the mother's other daughter might have sexually abused the subject child. The statement was inadmissible hearsay, and did not qualify as either prompt outcry evidence, or as a spontaneous declaration. The admission of this hearsay statement could not be deemed to be harmless, as this hearsay statement was the only evidence presented to support the allegations that the child had been sexually assaulted and that the sexual assault was committed by the child's older sibling. Both CPS and the Administration for Children's Services investigated the allegations and concluded that the allegations were unfounded, and an expert in the area of child abuse concluded that there was no evidence that the child had been physically or sexually abused.

The Appellate Division held that Family Court also erred in overruling the mother's objection to the testimony of her other daughter's treating physician about his treatment of that child on the ground that the Privacy Rule standard of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) for disclosure of her other daughter's medical information was not met (45 CFR 164.512 [e][1][i], [ii]). The mother's other daughter was not a party to the proceeding, and permitting her treating physician to testify in violation of HIPAA directly impaired the interest protected by the HIPAA Privacy Rule of keeping one's own medical records private. As such, the Family Court should have sustained the mother's objection to this testimony, This error could not be deemed harmless, as the physician's testimony was used by the father and the attorney for the subject child to portray the mother's other daughter as seriously disturbed.

Significantly, the Second Department held 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 (citing *Matter of Carballeira v. Shumway*, 273 A.D.2d 753, 756 where the Third Department said that: "A Law Guardian should not have a particular position or decision in mind at the outset of the case before the gathering of evidence.") It is only appropriate for an attorney for a child to form an opinion as to what would be in the child's best interest, after such inquiry. Here, it was inappropriate for the attorney for the child to have advocated for a temporary change in custody without having conducted a complete investigation. The attorney for the child acknowledged that his application was based solely on his discussion with the father and the child's day care provider, which was located near the father's residence, and that he did not speak to the mother or the child's other day care provider closer to the mother's residence.

It remitted the matter to the Family Court for a de novo hearing and directed the Family Court to appoint a new attorney for the child.

Appellate Division, Third Department

Third Department Holds Equitable Distribution Law Does Not Purport to Address Financial Transactions Prior to Their Marriage. Such Contributions by the Wife, Made Before the Marriage, Does Not Transform the Husband's Premarital, Separate Property into Marital Property

In *Ceravolo v DeSantis*,--- N.Y.S.2d ----, 2015 WL 94661 (N.Y.A.D. 3 Dept.) the parties were married in July 1996 and had a daughter (born in 2001). Plaintiff (wife) commenced the action for divorce in June 2010. After trial, Supreme Court determined, among other things, that the marital residence, which had been purchased by defendant (husband) prior to the marriage, was marital property and awarded the wife, among other things, half of its value. In addition, the court awarded the wife durational spousal support and child support. The Appellate Division held that Supreme Court erred in classifying the marital residence as marital property. The husband purchased the marital residence in January 1994-2 ½ years prior to the parties' marriage-paying \$130,000 of his own funds and borrowing an additional \$100,000 from his father, secured by a note and mortgage. Although the wife contributed \$30,000 of her separate funds to the initial purchase of the residence, she did not attend the closing and the husband took title to the property in his name alone. The wife paid the mortgage for more than two years prior to the marriage, as well as after the parties were married through 2003, when a satisfaction of mortgage was issued, notwithstanding a principal balance remaining of approximately \$52,000.

Supreme Court determined that the wife's contributions transformed the residence from the husband's separate property into marital property, which was subject to equitable distribution. The Appellate Division disagreed. It observed that the Equitable Distribution

Law does not purport to address financial transactions between persons prior to their marriage, which cannot be considered to have been the product of the marital enterprise. While Supreme Court's finding that the wife made certain substantial contributions of money and effort toward the acquisition and maintenance of the marital residence was amply supported by the record, the effect of such contributions by the wife, particularly those she made before the marriage, was not to transform the husband's premarital, separate property into marital property. For this same reason, equitable distribution does not afford the wife any remedy with respect to the \$30,000 that she contributed towards the down payment of the house or the premarriage mortgage payments that she made. It noted that she could have, but did not, bring a claim for the imposition of a constructive trust and/or for unjust enrichment. The Court held that to the extent that *Matwiczuk v. Matwiczuk* (261 A.D.2d 784 [1999]) and *Ciaffone v. Ciaffone* (228 A.D.2d 949 [1996]) held that separate property contributions made by a nontitled spouse toward the acquisition or improvement of premarital property can serve to transform such property into a marital asset, they should no longer be followed. In *Matwiczuk* it held, citing *Ciaffone v. Ciaffone* (228 A.D.2d 949 [1996]), that the use of marital funds, together with the nontitled spouse's efforts and contributions of separate funds toward the construction of the marital residence (which began before the marriage on land purchased by the titled spouse a few months earlier) "in furtherance of the marital partnership" were sufficient to transform the residence, including the land, into marital property. In *Ciaffone*, it determined that the parties' investment of marital funds to construct a two-family house on land purchased by the husband with his premarital funds rendered the property a marital asset subject to equitable distribution, with a credit given to the husband for the premarital funds that he used to purchase the land.

The Appellate Division noted, however, that separate property contributions by a nontitled spouse could result in an appreciation of the value of the titled spouse's separate property during the marriage, which appreciation would be subject to equitable distribution. Here, the wife conceded that she was not seeking equitable distribution of the property's value based upon its appreciation. The majority pointed out that title is a critical consideration in identifying the nature of real property acquired before the marriage. Therefore, in its view, the circumstances surrounding the purchase of the residence and the parties' intent relative thereto are irrelevant to the legal classification of the residence as separate or marital property.

The Appellate Division agreed with the wife's alternative argument that she was entitled to recoup her equitable share of marital funds paid toward the mortgage. It is well settled that, in determining the equitable distribution of marital property, a court has the authority to effectively recoup marital funds applied to the reduction of one party's separate indebtedness. The wife testified that she paid the mortgage on the marital residence from the date of the marriage until a satisfaction of mortgage was issued. Although it is not evident from the record what funds were used to make these payments, it could be presumed that marital funds were used. Thus, the wife was entitled to an equitable share of the marital funds that were used to pay the husband's separate indebtedness-the mortgage-during the marriage, and the matter

was remitted to Supreme Court to determine the wife's share thereof and reconsideration of the equitable distribution and maintenance awards. Two Judges dissented.

No change in circumstances must be established to support a relocation petition. Improper for Court to fail to seal transcript and permit the presence of counsel other than the attorney for the children during confidential interview with children.

In *Matter of Julie E v David E*, --- N.Y.S.2d ----, 2015 WL 94774 (N.Y.A.D. 3 Dept.), Petitioner (mother) had a daughter and a son (born respectively in 2007 and 2004). Respondent (father) was the daughter's biological father, and he shared joint custody of both children with the mother pursuant to a 2010 order; the children's primary residence was with the mother. In December 2011, the father filed for modification and the mother cross-petitioned for leave to relocate with the children to Texas. Following a fact-finding hearing and an interview with the children, Family Court dismissed the relocation and modification petitions. The Appellate Division affirmed.

The Appellate Division held that Family Court applied the incorrect standard in dismissing the relocation petition on the ground that the mother had failed to show a sufficient change in circumstances to warrant modification. No change in circumstances must be established to support a relocation petition, as the planned move itself is accepted as such.. Instead, the parent who wishes to relocate bears the burden of establishing that the proposed move is in the best interests of the children. The Appellate Division examined the record and concluded that the mother did not meet her burden of demonstrating that relocation to Texas would be in their best interests.

The Appellate Division noted that Family Court conducted what was described as a "modified" Lincoln hearing, in which counsel for both parents were permitted to be present during the court's interview with the children. The transcript of the interview was not sealed, and was included in full in the appellate record. Neither the presence of counsel other than the attorney for the children during the interview nor the failure to seal the transcript was proper. It reiterated that the right to confidentiality during a Lincoln hearing belongs to the child and is superior to the rights or preferences of the parents. A child who is explaining the reasons for his or her preference in custody or visitation proceedings should not be placed in the position of having [his or her] relationship with either parent further jeopardized by having to publicly relate [his or her] difficulties with them or be required to openly choose between them. It addressed this issue recognizing that, in the course of practice, confusion may have resulted from the different procedure followed during Family Ct Act article 10 proceedings, in which the presence of the parties' counsel during an in camera interview with a child may be permissible due to the fundamental right of litigants in such proceedings to confront their accusers. Although these interviews have sometimes been inaccurately referred to as Lincoln hearings, they are conducted for entirely different purposes than the confidential

interviews conducted during custody and visitation proceedings. For the court to fulfill its primary responsibility of protecting the welfare and interests of a child in the context of a Family Ct Act article 6 proceeding, protecting the child's right to confidentiality remains a paramount obligation (see Matter of Lincoln v. Lincoln, 24 N.Y.2d at 271-272).

Exclusive Occupancy of Marital Residence - Law reflects a preference for allowing custodial parent to remain in the marital residence until 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.

In *Albertalli v Albertalli*, --- N.Y.S.2d ----, 2015 WL 94752 (N.Y.A.D. 3 Dept.) Plaintiff (husband) and defendant (wife) were married in 2005 and had two children, born in 2004 and 2007. The husband commenced this action for divorce in 2011. The main asset to be distributed was the marital residence, purchased five months after the marriage. The proof at trial established that the husband contributed \$33,000 of his separate property into a joint account created one month prior to the purchase of the residence. The parties then used \$24,915 from the joint account as a down payment on the purchase price of \$71,000 and mortgaged the balance. At the time of trial, the residence was encumbered by a remaining balance on the mortgage of approximately \$45,000 and a home equity loan of approximately \$6,500. The evidence at trial established that, in its current condition, the home would be listed for sale at \$64,500 and expected to sell in the low \$60,000 range. In distributing the residence, Supreme Court concluded that the funds used for the down payment were the separate property of the husband and granted him a credit for that amount. The court also directed that the home be listed for immediate sale.

The Appellate Division held it was within Supreme Court's discretion to determine whether to credit the husband for the use of his separate property in acquiring the marital residence. While partial use of separate funds to acquire a marital asset does not mandate that a credit for separate funds be given it found no basis to disturb Supreme Court's exercise of its discretion here.

The Appellate Division agreed with the wife's contention that Supreme Court erred in directing that the marital residence be listed for sale. It observed that case law reflects 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. Proof at trial established that the parties' young children resided with the wife in the marital residence and, although she had the means to pay the mortgage, she was unable to refinance or purchase another residence. No evidence was adduced that the wife could obtain comparable housing at a

lower cost or that either party was in immediate need to recoup their equitable share of the marital residence. Under these circumstances, it found that Supreme Court abused its discretion in directing that the marital residence should be listed for sale and held that the wife was entitled to exclusive possession of the residence until the youngest child reaches the age of 18.

Appellate Division, Fourth Department

Fugitive Disentitlement Doctrine - Appeal Reinstated Where Fugitive Parent Post an Undertaking in Amount of Support Arrears

In *Matter of Shehatou v Louka*, --- N.Y.S.2d ----, 2015 WL 25926 (N.Y.A.D. 4 Dept.), the Appellate Division observed that it had previously dismissed respondent's appeal from an "order of dismissal" entered by Family Court upon declining to sign an order to show cause seeking to vacate two orders entered on respondent's default. One of the orders determined that respondent was in willful violation of a child support order, and the other order committed him to a term of six months of incarceration (*Matter of Shehatou v. Louka*, 118 A.D.3d 1357, 987 N.Y.S.2d 746). The court also issued a warrant for respondent's arrest. It determined that the fugitive disentitlement theory applied both to respondent's order to show cause to vacate the default orders and to the subsequent appeal (*id.* at 1358, 987 N.Y.S.2d 746). It nevertheless granted respondent leave to move to reinstate his appeal upon the posting of an undertaking in the amount of \$25,000 with the court within 60 days of service of our order with notice of entry. Respondent timely posted the undertaking and his motion to reinstate the appeal was granted by this Court. The Appellate Division concluded that by posting an undertaking in the amount of the child support arrears, respondent demonstrated that he was not flouting the judicial process and has provided a means of enforcement of the court's order determining the amount of child support arrears in the event that the court's determination is unchanged. It concluded that the fugitive disentitlement theory no longer applied to respondent (See *Wechsler v. Wechsler*, 58 A.D.3d 62, 65,). It reversed the order and remitted the matter to Family Court to determine respondent's application to vacate the orders entered on his default and the warrant for his arrest.

January 1, 2015

Appellate Division, First Department

Agreements - Prenuptial - Failure to Disclose Entirety of Financial Interests Not a Reason to Vitiate the Contract.

Counsel Fees- Award - DRL§ 237 - Fee Waiver in Prenuptial Agreement May Be Set Aside, in Order to Ensure a Level Playing Field

In Anonymous v Anonymous, --- N.Y.S.2d ----, 2014 WL 7084762 (N.Y.A.D. 1 Dept.) plaintiff wife sought, among other things, to set aside the parties' prenuptial agreement. The Appellate Division found that the court correctly determined that plaintiff did not meet her burden of establishing grounds to set aside the agreement as a whole. The agreement was negotiated over approximately four weeks. Plaintiff was represented throughout that time by highly competent and experienced matrimonial counsel. The agreement went through 6 drafts before a final copy was signed and changes in the terms of the agreement requested by plaintiff's counsel were incorporated into the final document. The agreement expressly disclaimed any reliance on representations other than those set forth in the agreement, and extrinsic evidence regarding the parties' intent may not be considered unless a court first finds that the agreement is ambiguous, which in this case it is not (Van Kipnis v. Van Kipnis, 11 NY3d 573, 577 [2008]).

The Appellate Division found that Defendant's failure to disclose the entirety of his financial interests was also not a reason to vitiate the contract. Plaintiff was well acquainted with defendant's assets, and she specifically acknowledged in the agreement that the amounts she would receive "are so significantly less than either [defendant's] assets or annual income that the precise amount of [his] assets and income is irrelevant to her decision to enter into this Agreement and the enforceability of this Agreement." The parties anticipated at the time of the agreement that defendant's assets would continue to rise significantly. In the face of such an acknowledgment, she could not claim that the agreement is invalid based on a failure to disclose assets.

The Appellate Division held that the court providently exercised its discretion in awarding plaintiff \$300,000 in interim counsel fees for trial preparation on child-related issues on condition that she present documentation of legal work within 30 days after trial (Domestic Relations Law § 237). Supreme Court denied counsel fees for any issues other than child-related matters, in view of plaintiff's waiver of counsel fees contained in the prenuptial agreement. Despite that fee waiver, the Appellate Division directed Supreme Court to determine at trial whether the fee waiver may be set aside. Given the unique procedural posture of this case and the great disparity between the parties' finances both at the time of the execution of the prenuptial agreement and at the time of the commencement of this action, plaintiff's request for counsel fees beyond those incurred for child-related issues was an issue appropriate to leave for trial (Kessler v Kessler, 33 AD3d 42, at 47-48). As Supreme Court had ruled that plaintiff was entitled to a hearing on her challenge to the maintenance provisions of the prenuptial agreement, and, that ruling was not challenged on appeal, an award of counsel fees may be necessary despite the fee waiver, "as justice requires" (Domestic Relations Law § 237[a]) in order to ensure a level playing field to litigate her claim. Accordingly, it directed that the question of the validity of the counsel fee provision for non-child-related issues in the parties' agreement should be considered at trial.

Appellate Division, Second Department

Custody - Visitation - DRL § 170 - Standing - Nonparent - Second Department Finds Nonparent Has Standing to Seek Visitation on Judicial Estoppel Grounds Where Biological Mother Sought and Obtained Child Support from Nonparent.

In Matter of Arriaga v Dukoff, --- N.Y.S.2d ----, 2014 WL 7332764 (N.Y.A.D. 2 Dept.), Estrellita Arriaga and Jennifer L. Dukoff registered as domestic partners in 2007, and thereafter decided to have a child through artificial insemination. Dukoff gave birth to a daughter in November 2008. Dukoff and Arriaga shared in the responsibilities of taking care of the child, and they agreed she would call Dukoff "mommy" and Arriaga "mama." Arriaga never adopted the child. Dukoff and Arriaga ended their relationship in May 2012, and Arriaga moved out of their home in September 2012, when the child was almost four years old. After Arriaga moved out, she continued visiting with the child several days a week. In October 2012, Dukoff filed a petition seeking child support from Arriaga. Following a hearing on the issue of equitable estoppel, the Family Court issued an order where it determined that "the uncontroverted facts establish" that Arriaga "is a parent to [the child]; and as such is chargeable with the support of the child." Arriaga commenced a proceeding pursuant to DRL §70 seeking custody or visitation and filed an amended petition after Family Court issued the order in the support proceeding, asserting that she had been adjudicated a parent of the child in the support proceeding and was therefore seeking custody or visitation as the child's "adjudicated parent." Family Court denied Dukoff's motion to dismiss the petition on the ground that Arriaga did not have standing to commence such a proceeding, since she was not a biological or adoptive parent of the child holding that Dukoff was judicially estopped from arguing in that Arriaga was not a parent of the child, since she had asserted in the support proceeding that Arriaga was a parent of the child, and had secured a child support award on that basis (see Estrellita A. v. Jennifer D., 40 Misc.3d 219 [Fam Ct, Suffolk County]). After a best interests hearing, Family Court granted Arriaga visitation with the child and directed that Dukoff shall retain legal and physical custody of the child and final decision-making authority "after thoughtful consideration of [Arriaga's] input before making a decision."

The Appellate Division affirmed. It rejected Dukoff's argument that Family Courts finding that Arriaga had standing to commence the proceeding was contrary to the Court of Appeals' holdings in Debra H. v. Janice R. (14 NY3d 576) and Matter of Alison D. v. Virginia M. (77 N.Y.2d 651). It noted that Domestic Relations Law § 70(a) provides, in part, that "either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and [the court] may award the natural guardianship, charge and custody of such child to either parent ... as the case may require" This statute has also been construed to grant standing to " 'either parent' " to apply for a writ of habeas corpus to determine the issue of visitation rights (Matter of Alison D. v. Virginia M., 155 A.D.2d 11, 13, affd 77 N.Y.2d 651). The Court observed that in Debra H., the Court of Appeals reaffirmed its holding in Matter of Alison D. that the term "parent" in Domestic Relations Law § 70 encompasses only the biological parent of a child or a legal parent by virtue of adoption and that a "de facto parent" or "parent by

estoppel" could not seek visitation with a child who is in the custody of a fit parent. In Debra H., however, the Court analyzed the significance of the civil union the parties had entered into in Vermont prior to the child's birth. The Court determined that, under Vermont law, a child born during a civil union was a child of both partners. Thus, it concluded, Debra H. was the child's parent under Vermont law. As a matter of comity, the Court recognized her as the child's parent under New York law as well, thereby conferring standing for her to seek visitation and custody at a best interests hearing. In this proceeding, Arriaga asserted that she had standing as a parent of the child pursuant to the doctrine of judicial estoppel. Under that doctrine, "a party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed. The Appellate Division held that the concerns expressed by the Court of Appeals in Debra H. were not implicated in the present case, where Arriaga invoked the doctrine of judicial estoppel, not equitable estoppel. The adjudication of Arriaga as a parent of the child required the biological mother's affirmative legal consent. Dukoff was the party who sought to have Arriaga adjudicated a parent. Although Dukoff did not consent to adjudicating Arriaga a parent of the child for the purposes of visitation rights, the biological mother in Debra H. also did not do so. In Debra H., the biological mother argued that she entered into the legal union in Vermont believing that it was of no legal significance in New York. Dukoff emphasized that the Court of Appeals stated in Debra H. that it 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 Appellate Division found that here, the Family Court did not rely on equitable estoppel to establish standing. It relied on the doctrine of judicial estoppel, which differs from establishing parentage by equitable estoppel. It held that Family Court properly denied Dukoff's motion to dismiss the petition.

Agreements - Enforcement - Waiver - to the Extent That it Has Been Executed a Waiver, Cannot Be Expunged But, Can, to the Extent That it Is Executory, Be Withdrawn

In *Stassa v Stassa*, --- N.Y.S.2d ----, 2014 WL 6910551 (N.Y.A.D. 2 Dept.), the plaintiff and the defendant executed a stipulation of settlement in 1983 resolving all issues in their then-pending divorce action. Parts XI(A)(1) and (B) of the stipulation provided, in relevant part, that "[s]o long as both parties shall live and the [plaintiff] shall not have remarried," the defendant would pay maintenance to the plaintiff which would be adjusted to reflect a cost of living adjustment (COLA) as of the first Monday of each May commencing in 1984. Part VII(6) of the stipulation provided, in relevant part, that "[t]he failure of either party to insist in one or more instances upon the strict performance of any of the terms of this Agreement to be performed by the other party shall not be construed as a waiver or relinquishment for the future of any such term or terms, and the same shall continue in full force and effect." The parties were divorced by judgment entered September 16, 1983. The stipulation was not incorporated into the judgment of divorce. In May 2008, the plaintiff commenced this action alleging that the defendant breached the stipulation by failing to

adjust his maintenance payments to include the annual COLA increases as provided for in part XI(B) of the stipulation. At a nonjury trial, the plaintiff testified that she made oral demands of the defendant on 10 or 12 occasions, beginning in 1984, to adjust the maintenance payments so as to include the COLA increases, but that the defendant always responded that he was unable to pay the increase at that time and would pay the money in the future. On cross-examination, she acknowledged that she never refused any of the maintenance checks given to her by the defendant and that, in her responses to the defendant's interrogatories, she had stated that she consulted with an attorney in 1998 for a reason other than to discuss the COLA increases and decided not to pursue the COLA increases after that meeting. The defendant testified that he did not have any conversations with the plaintiff about increasing his maintenance payments to her in accordance with the COLA provision of the stipulation. The Supreme Court dismissed the complaint, finding that the plaintiff waived her right to COLA increases.

The Appellate Division reversed. It pointed out that waiver, which is the voluntary and intentional relinquishment of a contract right, should not be lightly presumed and must be based on 'a clear manifestation of intent' to relinquish a contractual protection. It may be accomplished by affirmative conduct or failure to act so as to evince an intent not to claim the purported advantage. The mere existence of a nonwaiver clause does not preclude waiver of a contract clause. However, a waiver is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence. The Appellate Division found that plaintiff voluntarily relinquished her right to receive maintenance COLA increases as provided in the parties' 1983 stipulation from 1984 through May 2008, when her waiver was withdrawn. A waiver, to the extent that it has been executed, cannot be expunged or recalled, but, not being a binding agreement, can, to the extent that it is executory, be withdrawn, provided the party whose performance has been waived is given notice of withdrawal and a reasonable time after notice within which to perform. Since the stipulation was an executory contract between the parties pursuant to which the defendant remained under a continuing obligation to pay maintenance to the plaintiff, upon the plaintiff's filing of the summons and complaint in this action, such waiver was withdrawn. It reversed the judgment, and remitted the matter to the Supreme Court, for a determination of the COLA increases owed to the plaintiff by the defendant from the date of commencement of the action to the present, with prejudgment interest calculated thereon from May 2008 pursuant to CPLR 5001, and for the entry of an appropriate amended judgment thereafter.

Supreme Court

Custody - Foreign Judgment of Divorce and Custody - DRL §77-d - Registration -Singapore Judgment of Divorce Entitled to Be Registered in New York as Custody Order Pursuant to DRL§ 77-d.

In *Chue v Clarke*, --- N.Y.S.2d ----, 2014 WL 6980560 (N.Y.Sup.), in September, 2011, the husband commenced a divorce action in Singapore under Singapore law. As part of the litigation, the wife went with her husband to an attorney, where she signed a consent to grant judgment on three years separation on October 19, Three days later, on October 30, 2011, the wife left Singapore and took her children with her. The consent to grant judgment, signed by the wife, was converted into an "interim judgment" on November 17, 2011. Neither party was present when the interim judgment was rendered. The judgment gave "care and control" of the children to the wife and then indicated that the wife could remove the children from Singapore. The judgment gave the husband the "liberal unsupervised visitation" including overnight access, reasonable vacations periods during holidays, electronic access through Skype, and other means and the right for the husband to bring the children back to Singapore on vacation. He was required to give two weeks notice of his visitation and to pay the travel expenses. Thereafter, a final judgment of divorce was issued in 2012. The final judgment made no reference to the father's visitation or consent by either party-it simply dissolved the marriage.

The husband then brought an application in Supreme Court requesting that the court register the foreign judgment of divorce and the custody order pursuant to DRL§ 77-d, and the wife moved to vacate the visitation provisions of the Singapore judgment, and make 12 changes.

Supreme Court observed that failure to disclose the entirety of his financial interests was also not a reason to vitiate the contract, and a predicate to any contempt proceeding. "The UCCJEA is mandatory and provides that a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this article must be recognized and enforced,' except where the child custody law of a foreign country as written or as applied violates fundamental principles of human rights'. The UCCJEA defines "child custody determination" as an order of a court providing for visitation with respect to a child. The Singapore interim judgment was a "child custody determination" within the meaning of the UCCJEA. There was no claim by the wife that the Singapore court improperly applied the laws of Singapore in adding the language which spelled out the husband's visitation rights. The core of the wife's complaint was that the interim judgment of divorce, which contains the specific description of the husband's "liberal" access rights, was modified without either the wife's consent or the findings of a court after a hearing and she claimed the divorce was procured, in part, as a result of domestic violence against her. The Court held that to deny registration on the first ground, the wife had to establish that the insertion of the specific terms of visitation, without her consent or a hearing, was not undertaken in "substantial conformity" with "jurisdictional standards" embodied in Article Five of the Domestic Relations Law or otherwise violates "fundamental human rights." DRL § 75-d(2). The clear import of the phrase "in substantial conformity with jurisdictional standards" is that the state or foreign government that issued the child custody order must have met some minimum contacts over the parties in order to register a child custody order from outside New York. The wife's complaint that she never signed any document agreeing to the exact terms of the visitation could not be characterized as a "jurisdictional dispute" under the UCCJEA. The wife, by signing the

consent to grant judgment, acknowledged the jurisdiction of the Singapore courts and could not invoke this concept to upend the terms of the interim judgment. In the court's view, the Singapore court's incorporation of the "liberal and unsupervised" visitation terms, even if the wife never gave her written consent to those terms, did not violate the wife's "fundamental human rights." The interim judgment of divorce gave the wife a three-month period of time to object to any term of the interim judgment. The wife never filed any objections. Having been given the opportunity to object and have the Singapore court consider her objections, the wife never said a word, even though, throughout all of this time, she was living with her children in the United States. Thus, if the wife had the right to object to the specific terms of the visitation under the interim judgment, she waived it by failing to do so. The court also held that the allegations of domestic abuse, alleged to have occurred before the wife signed the consent to grant judgment, were not within the scope of "fundamental human rights" within the UCCJEA and that the Singapore judgment and its custody order were recognized and registered pursuant to Section 77-d of the Domestic Relations Law.

Temporary Maintenance - Award - DRL §236[B][5-a] - Presumptive Award Unjust and Inappropriate Where it Did Not Factor in High Costs of Maintaining Marital Residence. DRL § 236[B] (5-a)(e)(1)(q) Allowed Court to Consider Cost of Expensive Home and Household in Making Upward Deviation.

In *Harlan v Harlan*, --- N.Y.S.2d ----, 2014 WL 6992453 (N.Y.Sup.), the husband moved to, inter alia, set his temporary maintenance award to the wife at \$2,500 per month. The wife cross-moved, inter alia, for maintenance pendente lite and counsel fees. The wife asserted that the upkeep costs, mortgage, insurance, taxes, and utilities of the home were more than \$4,000 per month. The wife asked the husband to pay \$1,600 per month in maintenance, and an additional \$4,500 per month for household expenses. These expenses and the living allowance described as maintenance, would total approximately \$6,000 per month or more than \$70,000 annually.

The husband's W-2 statement from his employer listed his gross pay as \$152,673.03. The statute requires that his social security payments be deducted. DRL § 236B (5-a)(b)(4)(a). His W-2 revealed \$7,049.40 in FICA payments in 2013. His resulting income for purposes of the temporary calculation was \$145,623.63. The Court held that the party seeking to have income imputed bears the burden of proof and must prove by the preponderance of the evidence that the party, against whom imputation is sought, is underemployed, has spurned employment, or is otherwise responsible for their reporting less income than their earned income potential. The wife acknowledged that prior to the summer of 2013, she earned "up to \$15,000 per year," working a part-time job in the public schools. The court found that the wife retired and that her retreat from the workplace was a decision in the context of the marriage and the husband could now be heard to complain that his wife has left the job market. Given that fact and the conclusion that the husband failed to meet his burden of proof, the court declined to impute any income to the wife. The court used

the husband's income of \$145,623.63 and the resulting calculation of temporary maintenance was \$3,640.57 per month.

The wife sought an upward deviation from this amount, arguing that the calculated presumptive temporary maintenance was too meager. The court held that the wife bears the initial burden of proof to show that the calculated temporary maintenance is unjust or inappropriate. DRL § 236[B] (5-a)(e)(1). In the court's view, the calculation was unjust, as it did not factor in the high costs of the marital residence. Given these expenses and the wife's lack of employment during the pendency of the action, the court held that the amount derived from the temporary maintenance calculation was unjust and inappropriate.

The court explored the 17 factors which, by statute, permit the court to adjust the presumptive award of temporary maintenance. Several factors under the temporary guidelines pointed in the direction of an upward modification. The couple enjoyed a high standard of living. DRL § 236[B] (5-a)(e)(1)(a). The couple was relatively older, but in good health. DRL § 236[B] (5-a)(e)(1)(b). The wife's earning capacity was, she claimed, diminished because she recently retired. It was undisputed that she had few job skills, while the husband had an advanced degree and significant skills. DRL § 236[B] (5-a)(e)(1)(c). Because there was no evidence that she attempted to secure employment, the court could not draw any conclusion that her employment opportunities were circumscribed as a result of the factors listed in DRL § 236[B] (5-a)(e)(1)(o).

The court instead focused on DRL § 236[B] (5-a)(e)(1)(q): the statute's attempt to reserve to the court a seemingly endless equitable power to achieve a "just and proper" temporary maintenance allocation. Having considered the calculated "presumptive amount to be unjust and inappropriate," this court concluded that several factors require an upward deviation of this amount. The wife's age, her support for the husband during the marriage, and DRL § 236B (5-a)(e)(1)(q) clearly justify the upward deviation, even though the wife failed to meet her burden of proof under the other employment-related factors. The (q) factor also allowed this court to consider the cost of the expensive home and household, which the husband, during the marriage, maintained and subsidized. He subsidized an expensive lifestyle-and an expensive house-for his wife and his children. The Court held that these factors supported an upward deviation to \$5,000 per month in temporary maintenance. However, upon receipt of the payments, the wife was entirely responsible for all household expenses listed in her statement of net worth and was directed to pay all joint obligations associated with the house-mortgage, HELOC and taxes-with this monthly payment until either a final maintenance award or the house is sold, whichever first occurs. This amount was driven upward by the costs associated with the house and household. Because the wife was the less-monied spouse, she was awarded \$5,000 in legal fees.

December 16, 2014

Appellate Division, First Department

Domestic Relations Law §237 - Counsel Fees Pendente Lite - Inability to Determine Nonmonied Spouse Does Not Prevent Counsel Fee Award to Party Who Did Not Control Assets.

In *Murjani v Murjani*, --- N.Y.S.2d ----, 2014 WL 6754257 (N.Y.A.D. 1 Dept.) the Appellate Division held that the court providently exercised its discretion in granting plaintiff an award of interim counsel fees (see Domestic Relations Law §237[a]). While the court was unable to determine, based on the papers submitted, which party was the monied spouse, it determined that defendant had unnecessarily delayed discovery in the action and had removed the parties' art collection to London in contravention of court orders. Further, defendant controlled the parties' liquid assets, including the art collection and real property in New York, and the court reasonably ordered her to sell or encumber that property in order to permit plaintiff to carry on this action. The fee award was not made solely to punish defendant for delaying the case.

Appellate Division, Second Department

Child Support - Award - Family Ct Act § 413[1][k] - Failure to Provide Sufficient Financial Information Warrants Award Based Upon Needs.

In *Matter of Weiss v Rosenthal*, --- N.Y.S.2d ----, 2014 WL 6676731 (N.Y.A.D. 2 Dept.), the Appellate Division held that although the father submitted a financial disclosure affidavit and various financial records to the Family Court, his affidavit and the accompanying records did not contain adequate information for the Support Magistrate to determine his income and assets, and that, therefor, the Family Court properly denied his father's objection to the Support Magistrate's determination to base his support obligation only on the child's needs (Family Ct Act § 413[1][k]).

Custody - Award - Effect of Temporary Custody Award - Only One Factor to Consider

In *McDonald v McDonald*,--- N.Y.S.2d ----, 2014 WL 6677192 (N.Y.A.D. 2 Dept.), the Appellate Division held that the existence of an interim order awarding the wife physical custody of the child, which was made without a hearing, did not require the court to engage in a change of circumstances analysis in determining the permanent award after a hearing had been held. The award of temporary custody to a parent before a hearing is conducted is only one factor to be considered in awarding permanent custody; the

permanent award made after a hearing is treated as an initial custody determination, and the court is not required to engage in a change of circumstances analysis before awarding custody to the other parent.

Child Support - Award - Recoupment - Proper to Award Plaintiff \$17,348.80, Representing Overpayment of Child Support, Made Pursuant to Judgment That Was Later Reversed on Appeal

In *Cabral v Cabral*, --- N.Y.S.2d ----, 2014 WL 6677296 (N.Y.A.D. 2 Dept.), after remand, the Appellate Division found that in this long-term marriage, both parties made significant contributions to the marriage. The plaintiff established an insurance agency and developed it as a source of the family's income, and the defendant was employed by Westchester County. The plaintiff's insurance license was revoked in 1991 after he was convicted of felony drug charges, but the defendant continued to derive income from the agency, and obtained her own insurance license in 1997. Under these circumstances, the Supreme Court providently exercised its discretion in dividing the income from the insurance agency, and the pension which resulted from the defendant's employment with the County, equally between the parties for purposes of equitable distribution. The Appellate Division held that Supreme Court properly awarded the plaintiff \$17,348.80, representing his overpayment of child support, as the overpayment was made pursuant to a judgment that was later reversed on appeal (*Cabral v. Cabral*, 87 AD3d at 606; see also *People ex rel. Breitstein v. Aaronson*, 3 AD3d 588, 589).

Authors note: In *People ex rel. Breitstein ex rel. Aaronson v. Aaronson*, 3 A.D.3d 588, 589-90, 771 N.Y.S.2d 159 (2d Dept 2004) the Appellate Division held that "Recoupment is, however, appropriate under limited circumstances, where, as here, the father was temporarily compelled to pay excess support solely due to the Supreme Court's improper application of the CSSA (see *Tuchrello v Tuchrello*, 233 AD2d 917 [1996]; *Matter of Thomas v Commissioner of Social Servs.*, 287 AD2d 642 [2001]; *Matter of Niewiadomski v Dower*, 286 AD2d 948 [2001]; *Hamza v Hamza*, 268 AD2d 459 [2000])."

Paternity - Civil Death - Sentence to Death is Not the Same as Civil Death For Purposes of Paternity Proceeding

In *Matter of Ronell W v Nancy G*, 121 A.D.3d 912, 994 N.Y.S.2d 376 (2d Dept 2014) petitioner, who was convicted of federal crimes in federal court and sentenced to death, filed a paternity petition seeking to be declared the father of the child. The mother made an oral application to dismiss the petition on the ground that the petitioner was "civilly dead" pursuant to Civil Rights Law § 79-a(1), or, in the alternative, for a hearing on the issue of whether a declaration of paternity would be in the child's best interests. The

Family Court dismissed the petition on the ground that the petitioner was civilly dead pursuant to Civil Rights Law § 79-a(1) without considering the mother's alternative request for a best interests hearing. The Appellate Division reversed holding that the civil death provision of Civil Rights Law § 79-a(1) did not apply to the petitioner since he was sentenced to death in federal court, rather than state court (*Matter of Malik*, 108 Misc.2d 774, 438 N.Y.S.2d 888 [Fam. Ct., N.Y. County]; *Winston v. United States*, 305 F.2d 253, 255 n. 2 [2d Cir.], *affd. sub nom. United States v. Muniz*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805; see also *Hayashi v. Lorenz*, 42 Cal.2d 848, 271 P.2d 18). Moreover, although Civil Rights Law § 79-a(1) declares civilly dead any person sentenced to imprisonment for life, it contains no provision pertaining to a person subject to a sentence of death, and it is not for the courts to expand terms beyond the plain language of statutes. It reinstated the petition and remitted the matter to the Family Court for further proceeding on the petition, including a determination of whether a declaration of paternity would be in the child's best interests.

Appeals - Record on Appeal - Obligation to Assemble Proper Record - Failure to Assemble Proper Record Results in Denial of Review

In *Taylor v Taylor*, --- N.Y.S.2d ----, 2014 WL 6778526 (N.Y.A.D. 2 Dept.) a marriage characterized by the Appellate Division as a long marriage, the Appellate Division found no merit to the defendant's contention that the Supreme Court should have equally distributed the parties' bank accounts as of the commencement of the action in 2008, since the parties had not functioned as an economic partnership for many years. The Appellate Division held that the defendant's contention that the Supreme Court improperly awarded the plaintiff a Florida condominium as her separate property could not be reviewed on this record. "It is the obligation of the appellant to assemble a proper record on appeal" (*Gaffney v. Gaffney*, 29 AD3d 857, 857). The plaintiff caused to be admitted into evidence at trial certain documentation in support of her contention that the money used to purchase the condominium was a gift from her father and son. The defendant's failure to provide this Court with copies of that evidence precludes it from rendering an informed decision on the merits on the issue of whether the plaintiff sustained her burden of proving that the Florida condominium was her separate property.

Custody - Visitation - Visitation with Noncustodial Parent in Prison Presumed to Be in Best Interests of Child

In *Matter of Georghakis v. Matarazzo*, --- N.Y.S.2d ----, 2014 WL 6779113 (N.Y.A.D. 2 Dept.), the Family Court declined to sign the mother's order to show cause accompanying her petition for visitation. The Appellate Division, on its own motion,

deemed the notice of appeal an application for leave to appeal, and granted leave to appeal is granted (see CPLR 5701[c]). It pointed out that generally, since visitation with a noncustodial parent is presumed to be in the best interests of a child, even when that parent is incarcerated (Matter of Granger v. Misercola, 21 N.Y.3d 86, 90, 967 N.Y.S.2d 872, 990 N.E.2d 110) the Family Court erred in declining to sign the mother's order to show cause accompanying her petition for visitation. It reversed the order, on the law, and remitted to the Family Court, to sign the mother's order to show cause commencing a visitation proceeding.

Appellate Division, Third Department

Family Offenses - Violation Proceeding - Burden of Proof - Third Department Adopts Beyond a Reasonable Doubt Rule

In Matter of Stuart LL v Aimee KK, 995 N.Y.S.2d 317, 2014 N.Y. Slip Op. 07222 (3d Dept, 2014) the contentious breakup of the parties' relationship resulted in Family Court ordering each party, in September 2012, to refrain from any communication with the other party for two years. Respondent thereafter attempted on several occasions to call petitioner at his various phone numbers. An enforcement proceeding ensued and, at the hearing, proof included documentation and a witness from the phone company establishing calls made during the time the protective order was in effect from respondent's phone to petitioner's phones. Family Court determined that clear and convincing evidence established that respondent had willfully violated the order of protection and, among other things, ordered a mental health evaluation and sentenced her to 75 days in jail. The Appellate Division reversed. It held that where, as here, a person who has violated an order of protection is incarcerated as a punitive remedy for a definite period-with no avenue to shorten the term by acts that extinguish the contempt-then that aspect of the Family Court Act article 8 proceeding "is one involving criminal contempt and the standard of proof that must be met to establish that the individual willfully violated the court's order is beyond a reasonable doubt" (citing Matter of Rubackin v. Rubackin, 62 A.D.3d at 21, 875 N.Y.S.2d 90). It held that its cases indicating otherwise should no longer be followed. Its review of the record reveals proof of a willful violation beyond a reasonable doubt. Nonetheless, under the particular circumstances of this case, it found that a sentence of time served with the remaining days of respondent's sentence suspended was appropriate, provided that respondent complete within 30 days-if not already completed-the ordered mental health evaluation and otherwise comply with Family Court's order.

December 1, 2014

Omission or Redaction of Confidential Personal Information

The Uniform Civil Rules of the Supreme and County Courts were amended to require the omission or redaction of Confidential Personal Information from papers filed with the court. See 22 NYCRR 202.5(e), relating to the omission or redaction of confidential personal information, effective January 1, 2015. Compliance with this rule is voluntary from January 1 through February 28, 2015, and mandatory thereafter. See 2014 New York Court Order (C.O. 00290), NY Order 14-0029. The rules do not apply to a matrimonial action. 22 NYCRR 202.5(e)(1). In addition, the rules do not apply in a proceeding in surrogate's court, or a proceeding pursuant to article 81 of the mental hygiene law, or as otherwise provided by rule or law or court order.

The Civil Practice Law and Rules defines the term "matrimonial action" to include actions for a separation, for an annulment or dissolution of a marriage, for a divorce, for a declaration of the nullity of a void marriage, for a declaration of the validity or nullity of a foreign judgment of divorce and for a declaration of the validity or nullity of a marriage.⁷⁸ The definition of "matrimonial action" in the civil practice law and rules does not include an action to set aside or declare void a prenuptial agreement, separation agreement or postnuptial agreement, an action to declare the validity of such an agreement, nor an action for a declaratory judgment with regards to, specific enforcement or breach of such an agreement. Nor does it include an action to declare the legitimacy of a child commenced in the Supreme Court, a visitation proceeding commenced pursuant to Domestic Relations Law § 72, or an action for child support. Thus, parties in such actions are required to comply with this rule.

The parties are required to omit or redact confidential personal information ("CPI") in papers submitted to the court for filing as defined in the rules Confidential personal information ("CPI") means: the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof; the date of an individual's birth, except the year thereof; the full name of an individual known to be a minor, except the minor's initials; and a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number, except the last four digits or letters thereof. 22 NYCRR 202.5(e)(1).

Appellate Division, Second Department

Family Offense Proceedings - Subject Matter Jurisdiction - Family Court Act § 812(1)(E) - Intimate Relationship - Proceeding Dismissed Where No Intimate Relationship Against Respondent, Petitioner's Former Girlfriend's Live-in-boyfriend.

In Matter of Johnson v Carter,--- N.Y.S.2d ----, 2014 WL 6462097 (N.Y.A.D. 2 Dept.), petitioner commenced a proceeding seeking an order of protection against the respondent, his former girlfriend's live-in-boyfriend. The petitioner and his former girlfriend had a child in common who resided with the respondent and the petitioner's former girlfriend. The petition alleged, among other things, that the respondent threatened to shoot the petitioner and his current girlfriend. Family Court, in effect, dismissed the petition on the ground that the petitioner had failed to establish that the parties had an "intimate relationship" pursuant to Family Court Act § 812(1)(e). The Appellate Division affirmed. Pursuant to Family Court Act § 812(1), the Family Court's jurisdiction in family offense proceedings is limited to certain enumerated acts that occur "between spouses or former spouses, or between parent and child or between members of the same family or household." Included within the definition of "members of the same family or household" is, 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]). The Legislature expressly excluded from the definition of "intimate relationship" a "casual acquaintance" and "ordinary fraternization between two individuals in business or social contexts". Beyond those delineated exclusions, the Legislature left it to the courts to determine, on a case-by-case basis, what qualifies as an intimate relationship. Here, the evidence adduced at the hearing demonstrated that the parties had no direct relationship and were connected solely through the child. The contact between the parties was minimal and only related to the child. Accordingly, the Family Court properly concluded that the parties did not have an "intimate relationship" with the meaning of Family Court Act § 812(1)(e), and properly, in effect, dismissed the petition for lack of subject matter jurisdiction.

Appellate Division, Third Department

Child Support - Interference with Visitation - Domestic Relations Law § 241 - Not an Abuse of Discretion to permit child support payments to be held in escrow pending determination of the issue of interference, and then Retroactively Suspend Child Support for Interference with Visitation and refunding escrow payments.

In Whitaker v Case. --- N.Y.S.2d ----, 2014 WL 5856837 (N.Y.A.D. 3 Dept.), the parties were married in September 1994 and had a daughter (born in 1995) and a son (born in 1998). Shortly after defendant (wife) left the marital residence in April 2008, plaintiff (husband) commenced a divorce action. After trial, Supreme Court issued an order in September 2012 which, as pertinent here, granted the parties a divorce, classified and ordered the equitable distribution of the parties' marital property, granted the husband sole legal and physical custody of the children without any award of visitation to the wife, retroactively suspended the wife's obligation to pay child support, directed that certain

child support payments be returned to the wife, and directed the husband to pay the wife limited costs.

The Appellate Division affirmed Supreme Court's directive retroactively suspending the wife's child support obligation and refunding certain child support made. It observed that a noncustodial parent's duty to support his or her children until the age of 21 (see Family Ct Act § 413[1][a]) may be suspended where he or she establishes that the custodial parent "wrongfully interfered with or withheld visitation" (Matter of Luke v. Luke, 90 AD3d 1179 [2011]; Domestic Relations Law § 241; Usack v. Usack, 17 AD3d 736). Supreme Court's decision described a household rife with animosity and overtones of domestic violence. The protracted hostility between the parties led the court to grant a mutual divorce pursuant to Domestic Relations Law §170(1) because "both [were] batterers and BOTH [were] victims." After one particularly abusive event, the wife left the household and the court ordered her and the children to engage in therapeutic visitation, with the husband's assistance. These sessions failed and were discontinued in March 2010, and the children refused further contact with the wife. The husband behaved badly in both his demeanor and his efforts to promote therapeutic counseling. The initial therapeutic counselor asserted that he undermined the therapeutic process, and the court-appointed psychologist went even further, describing the husband as a "parent alienator" who "brainwashed" the children against the wife. Accordingly, it found a a reasoned basis in this record for Supreme Court's determination to suspend the wife's child support obligations pending the husband's demonstration of a good faith effort to assist in the therapeutic process needed to reunite the wife with the children. There was no indication that this remedy presented any risk to the children becoming public charges. Upon its finding of interference, Supreme Court was authorized to suspend child support payments. Here, during the pendency of her application to suspend her child support obligation, the wife paid child support directly to the husband from November 2009 through April 22, 2011. Thereafter, pursuant to an order entered May 5, 2011, the wife paid child support to the support collection unit to be held pending resolution of her interference claim. Under the circumstances presented, there was no abuse of discretion in the court's determination to permit the wife's child support payments to be held in escrow during the pendency of the issue (see Matter of Lew v. Sobel, 91 AD3d 648, 648 [2012]). Similarly, we find that, under the circumstances, the court properly suspended her child support obligation retroactively, but only to the date the escrow fund was established (compare Matter of Luke v. Luke, 90 AD3d at 1182; Matter of Alexander v. Alexander, 129 A.D.2d 882, 884 [1987]) and directed the return of the escrowed monies to her. In contrast, it found that Supreme Court improperly adjusted the distributive award payable to the wife to reimburse her for the child support payments that she actually made to the husband for the benefit of the children during the pendency of her application. This adjustment violated the strong public policy against restitution or recoupment of support overpayments.

Family Offense Proceedings - Subject Matter Jurisdiction - Family Court Act § 812(1)(E) - Intimate Relationship - Intimate Relationship Found Where Respondent and Daughter Were

Each 13 Years Old When Petition Was Filed, and They Had Been in an On-and-off Dating Relationship for Several Years.

In Matter of Samantha I. ex. rel. Emily K v Lisa K.,--- N.Y.S.2d ----, 2014 WL 6475474 (N.Y.A.D. 3 Dept.), petitioner commenced an article 8 proceeding on behalf of her daughter (born in 1999), alleging that respondent had committed various family offenses against the daughter. Respondent and the daughter were each 13 years old when the petition was filed, and they had been in an on-and-off dating relationship for several years. Family Court granted the petition, finding that the daughter and respondent were in an intimate relationship within the meaning of Family Ct Act § 812(1)(e) and that respondent had committed the family offenses of forcible touching and sexual misconduct, and issued a two-year order of protection in the daughter's favor. The Appellate Division affirmed. It rejected respondent argument that his relationship with the daughter did not fall within the parameters of Family Ct Act § 812(1). This provision, as pertinent here, provides that Family Court has jurisdiction

over family offense proceedings arising from certain acts committed by a respondent against a "member[] of the same family or household." That definition includes "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 s 812[1][e]). Where, as here, a parent brings a family offense proceeding on behalf of a child, the focus of the jurisdictional analysis is on the child's relationship with the respondent, rather than that of the parent. The daughter testified that she and respondent had been classmates since kindergarten and began a "boyfriend-girlfriend" relationship in fifth grade that continued, on and off, through eighth grade. At first, the relationship consisted of holding hands, kissing and exchanging texts and phone calls. By sixth grade, according to the daughter, respondent was texting or calling her 5 or 10 times daily and becoming jealous, "controlling" and "isolat[ing]." The daughter testified that she and respondent had some sexual contact in sixth grade, including an incident in which he allegedly caused her to touch his erect penis at school in the presence of other students, and another in which he put his hand down her shirt to touch her breasts without her permission. According to the daughter, she and respondent did not date for most of seventh grade. However, late in that year they began talking again, and in eighth grade they met twice, each time at respondent's request. The daughter testified that during the first encounter, she reluctantly acceded to respondent's request for oral sex, believing that he would "leave [her] alone" if she did so. When they met the second time, they had sexual intercourse; the daughter testified that she asked respondent to stop and that he complied at first, but then continued. The daughter distanced herself from respondent after these events, and reported them to petitioner after she began having suicidal thoughts. Respondent did not dispute the factual accuracy of this testimony. The Appellate Division held that the youth of the participants does not preclude a determination that their relationship was intimate within the meaning of the statute; Family Ct Act § 812(1) expressly extends its jurisdiction to include respondents who are too young to be held criminally responsible, and nothing in the statutory language excludes young victims as participants in intimate relationships (Family Ct Act § 812[1]). Further, as the legislation expressly directs that such a relationship may exist between persons who have never lived together, the fact that the participants lived in their parents' separate households did not

exclude them from the ambit of the statute (Family Ct Act § 812[1][e]). The record supported Family Court's determination that the intermittent dating relationship between respondent and the daughter qualified as an intimate relationship within the expanded reach of the revised statute. Accordingly, Family Court had subject matter jurisdiction to entertain the proceeding.

Appellate Division, Fourth Department

Child Support - Modification - Not Error to Deny Application to Modify Where Defendant Failed to Provide Updated Statement of Net Worth

In *Rech v Rech*, --- N.Y.S.2d ----, 2014 WL 5903137 (N.Y.A.D. 4 Dept.), the Appellate Division held that the court did not err in summarily denying defendant's motion to reduce his child support obligation inasmuch as defendant failed to provide an updated statement of net worth in support of his motion (22 NYCRR 202.16[k][2]; *Garcia v. Garcia*, 104 AD3d 806, 806).

Divorce - Grounds - Domestic Relations Law § 170 (7) - opposing spouse in divorce action pursuant to Domestic Relations Law § 170(7) not entitled to litigate the other spouse's sworn statement under Oath That the Marriage Was Irretrievably Broken for a Period of Six Months

Temporary Maintenance - Express Waiver of Temporary Alimony in Prenuptial Agreement Bars Award of Temporary Maintenance

In *Trbovich v Trbovich*,--- N.Y.S.2d ----, 2014 WL 6497983 (N.Y.A.D. 4 Dept.) the Appellate Division affirmed an order which denied the plaintiff's motion for summary judgment seeking a divorce pursuant to Domestic Relations Law § 170(7). It agreed with plaintiff that the relationship has broken down irretrievably for a period of at least six months opposing spouse in a no-fault divorce action pursuant to Domestic Relations Law § 170(7) is not entitled to litigate the other spouse's sworn statement (citing *Palermo v. Palermo*, 35 Misc.3d 1211[A], 2011 N.Y. Slip Op 52506[U], *affd* for reasons stated 100 AD3d 1453; see e.g. *Rinzler v. Rinzler*, 97 AD3d 215, 218; *A.C. v. D.R.*, 32 Misc.3d 293, 306), and indicated that to the extent that its decision in *Tuper v. Tuper* (98 AD3d 55, 59 n) suggested otherwise, it declined to follow it. Nevertheless, plaintiff was not entitled to summary judgment under Domestic Relations Law § 170(7) at this juncture of the litigation because the ancillary issues had not been resolved by the parties or determined by the court. The Appellate Division observed that the parties prenuptial agreement provided that "[i]n the event of an action for dissolution of the contemplated marriage, [defendant] and [plaintiff] each waives and releases any right she or he may have under the law now or

hereinafter in effect for temporary alimony or attorneys' fees." Thus, the parties entered into a prenuptial agreement in which each waived and released any right to temporary maintenance and attorneys' fees after the institution of an action for dissolution of the marriage. That agreement was controlling unless and until it is set aside. Thus, the court erred in awarding temporary maintenance and attorneys' fees inasmuch as such awards are barred by the plain terms of the valid agreement.

November 16, 2014

Appellate Division, First Department

Divorce - Grounds - Domestic Relations Law § 170 (7) -Statement under Oath That the Marriage Was Irretrievably Broken for a Period of Six Months Was Sufficient to Establish Cause of Action for Divorce. Non-compliance with Separation Agreement Is Not an Element of Domestic Relations Law §170(7).

In *Hoffer-Adou v. Adou*, --- N.Y.S.2d ----, 2014 WL 5471501 (N.Y.A.D. 1 Dept.)the Appellate Division affirmed an order which sustained the validity of the parties separation agreement. It also held that contrary to the husband's contention, the wife was entitled to a judgment of divorce under the no-fault provision of DRL § 170(7), since her statement under oath that the marriage was irretrievably broken for a period of six months was sufficient to establish her cause of action for divorce as a matter of law (citing *Townes v. Coker*, 35 Misc.3d 543, 547 [Sup Ct, Nassau County 2012]). Supreme Court's granting of the divorce did not contradict DRL § 170(7)'s requirement that "[n]o 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." The parties' separation agreement resolved the issues of child custody and support. Their subsequent commencement in the Family Court of proceedings concerning these issues did not render the court without authority to grant the divorce, since non-compliance with/or enforcement of, the separation agreement is not an element of Domestic Relations Law §170(7).

Appellate Division, Second Department

Family Offenses - Evidence - Judicial Notice - Improper to Reject Mother's Request to Take Judicial Notice of Determination in Parties' Prior Custody Proceeding, in Same Court, in Which Father Made False Allegations.

In *Spooner-Boyke v. Charles*--- N.Y.S.2d ----, 2014 WL 5461581 (N.Y.A.D. 2 Dept.), Family Court found that the mother committed the family offenses of assault in the third degree, menacing in the third degree, disorderly conduct, and harassment in the second degree, and issued an order of protection directing the mother to, inter alia, stay away from the child. The Appellate Division reversed. It found that Family Court improperly rejected the mother's request that it take judicial notice of the determination in the parties' prior custody proceeding, in the same court, in which the father admittedly made false allegations. That proceeding, and the court's findings regarding the father, were relevant to the court's assessment of the father's credibility in this matter. It held that the court improvidently exercised its discretion in declining to take judicial notice of the prior custody proceeding. Additionally, the Family Court erred in drawing a negative inference based on the mother's failure to call the child's maternal grandmother as a witness. A party is entitled to a missing witness charge when the party establishes that an uncalled witness possessing information on a material issue would be expected to provide noncumulative testimony in favor of the opposing party and is under the control of and available to that party. The court sua sponte drew a negative inference based on the mother's failure to call the grandmother as a witness, and failed to advise the mother that it intended to do so. The mother, therefore, lacked the opportunity to explain her failure to call the grandmother as a witness, or to discuss whether the grandmother was even available to testify or under her control. It held that the evidence proffered at the hearing was insufficient to establish by a fair preponderance of the evidence that the mother committed the family offense of assault in the third degree. A person is guilty of assault in the third degree when with intent to cause physical injury to another person, he [or she] causes such injury to such person (Penal Law § 120.00[1]). Physical injury is defined as impairment of physical condition or substantial pain (Penal Law § 10.00 [9]). No evidence was presented that the child's physical condition was impaired, and there was insufficient evidence to establish that the child suffered substantial pain. The branch of the petition which alleged that the mother committed the family offense of assault in the third degree was dismissed, and the matter remitted to the Family Court, for a hearing and new determination of the remaining branches of the petition.

Supreme Court

Custody - Disclosure - Forensic Evaluation Report - Raw Data - Forensic Evaluator's Raw Data, Recordings, Notes, Tests, Test Results, and All Material Relied upon and Created During the Evaluation Process Are Discoverable

In *J.F.D v J.D.*, 2014 WL 5471648 (N.Y.Sup.), 2014 N.Y. Slip Op. 51547(U) plaintiff Husband moved for an order, inter alia, directing the Court appointed forensic evaluator, to release

her entire file in connection with her forensic evaluation, and the report issued further thereto, of the parties and their children to a forensic expert he retained. The Court had appointed the Forensic Evaluator to conduct a forensic examination regarding the parties and their children. The Court noted that New York courts have generally not allowed pretrial discovery of the notes, raw data and tests results of the forensic evaluator, absent special circumstances (citing CP v. AP, 32 Misc.3d 1210(A) [Sup. Ct, New York County 2011]; Ochs v. Ochs, 193 Misc.2d 502 [Sup.Ct., Westchester County 2002, Spolzino, J.]). Such "Special circumstances" would include a showing of bias on the part of the evaluator, or a deficiency in the report (Ochs, supra)." The court pointed out that limitations on access to the reports raised serious due process concerns including the inability of parents to adequately and effectively challenge the quality and trustworthiness of forensic reports. The Court held that the forensic evaluator's raw data, recordings, notes, tests, test results, and all material relied upon and created during the evaluation process were discoverable by both parties and by the Attorney for the Children. The court stated that it would " from this day forward", allow the parties themselves to read the report, as well as the raw material. However, the parties will not be provided a copy of the report or the raw materials, but will be allowed to review the report and raw materials in their attorney's office with an attorney present. They will be permitted to take notes, but will be precluded from taking photos and/or copies of the report and/or the raw data. This Court's orders appointing forensic evaluators for custody purposes will address the evaluator's responsibility to maintain and provide copies of all the raw data materials to the Court, which in turn, will provide same to counsel as set forth above with the signing of a Stipulation for Release and Use of Forensic Reports and Order as outlined above. The Husband's motion was granted in that the Forensic Evaluator was directed to provide the Court with copies of her raw data and material. Once received by the Court, the Court said it would notify counsel, who shall execute a confidentiality agreement, to be So-Ordered by the Court, allowing them to take a copy of the material, show it to the litigants, (only in counsel's office), allow the litigant to take notes, but not take any pictures or copies of any kind of the material, so they can assist with trial preparation. It was further order that the husband could provide a copy of the Forensic Evaluator's notes and raw material to his privately retained expert. However, the expert would have to execute a confidentiality agreement likened to the one executed by counsel for the parties, which must be filed with the Court prior to the release of the report and/or the Forensic Evaluator's raw data.

November 1, 2014

Court of Appeals

Marriage - Domestic Relations Law §5(3) -Incest - Court of Appeals Holds that Marriage Where husband half-brother of wife's mother is not incestuous

In Nguyen v Holder, --- N.E.3d ----, 2014 WL 5431014 (N.Y.), 2014 N.Y. Slip Op. 07290 following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by the Court of Appeals pursuant to section 500.27 of this Court's Rules of Practice, the Court of Appeals held that a marriage where a husband is the half-brother of the wife's mother is not void as incestuous under Domestic Relations Law § 5(3).

Appellate Division, Second Department

Appeals - Child Support - Second Department Adopts Fugitive Disentitlement Doctrine to Dismiss Child Support Appeal By Mother.

In Allain v Allain, --- N.Y.S.2d ----, 2014 WL 5350479 (N.Y.A.D. 2 Dept.), the Appellate Division, Second Department, dismissed the appeal, and in an opinion by Judge Roman, held that it was proper in the context of this child support proceeding to apply the fugitive disentitlement doctrine, which permits a court, under certain circumstances, to dismiss an appeal where the party seeking relief is a fugitive while the matter is pending.

In December 2009, the Family Court issued an order increasing the mother's monthly child support obligation to \$1,467. In October 2011, the Commissioner of the Department of Social Services petitioned the Family Court on behalf of the father, alleging, inter alia, that the mother had willfully failed to obey the December 2009 support order, and that she then owed \$46,184.18 in child support arrears. Pursuant to a summons dated November 4, 2011, the mother was summoned to appear at an initial hearing scheduled for November 21, 2011. On April 19, 2012 a Support Magistrate conducted a hearing on the petition, at which the mother was permitted to appear by telephone from Nigeria. Following the hearing, the Support Magistrate found that the mother had willfully violated the December 2009 order. The mother was directed to pay \$28,363.31 in child support arrears as of April 15, 2012, and the Support Magistrate recommended that she be incarcerated. The matter was referred to a Family Court Judge for confirmation.

The mother filed written objections to the Support Magistrate's findings, which which Family Court determined were improper, inasmuch as the Support Magistrate's findings and recommendation were not final determinations to which objections could be made but were, respectively, a nonfinal finding and a recommendation that would only become binding upon confirmation by a Family Court Judge. The Family Court also denied the mother's application for further adjournment "due to the extensive and protracted history of litigation" and the mother's "repeated attempts to create undue delay of the resolution of this matter." The Family Court issued a warrant for the mother's arrest, based on her failure to appear, but stayed the issuance of the warrant until August 17, 2012, in order to

provide the mother with an opportunity to appear before the court for a hearing. The mother never personally appeared.

The Appellate Division dismissed the appeal pursuant to the fugitive disentitlement doctrine, since the mother continued to evade the jurisdiction of the New York State courts. It held that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his or her appeal. To apply the fugitive disentitlement doctrine, there must be a connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response. The doctrine has been extended to the dismissal of appeals in civil cases provided there is likewise a nexus between the appellant's fugitive status and the appellate proceedings. The nexus requirement is satisfied in civil cases where the appellant's absence frustrates enforcement of the civil judgment. It noted that the "fugitive disentitlement doctrine" has been adopted by the Third and Fourth Judicial Departments. (see *Matter of Shehatou v. Louka*, 118 AD3d 1357; *Matter of Skiff-Murray v. Murray*, 305 A.D.2d at 752-753). Judge Roman pointed out that the Second Department, like the Court of Appeals and the Appellate Division in each of the other judicial departments, has dismissed appeals by fugitives in criminal proceedings "on the comparable ground that '[the] appellant is not presently available to obey the mandate of the Court in the event of an affirmance. The Court noted that it had also employed the "unavailable-to-obey" paradigm in dismissing an appeal in a juvenile delinquency proceeding, which, in contrast to a criminal prosecution, is civil in nature. In *Matter of Magdalene N.* (180 A.D.2d 799), the juvenile appellant had absconded from her placement, and a warrant was issued for her arrest. The Court concluded that dismissal of the juvenile's appeal was appropriate since she was "unavailable to obey the mandate of the court" (see *Matter of Skiff-Murray v. Murray*, 305 A.D.2d at 753 [noting that the Court of Appeals and the Appellate Division, First Department, have also used the "unavailable-to-obey" paradigm to dismiss fugitives' appeals in civil proceedings]).

The Court noted that the Appellate Division, Third Department, in *Matter of Skiff-Murray v. Murray* (305 A.D.2d at 751) became the first New York appellate court to apply the doctrine in a case involving child support. In *Matter of Christie S. v. Marqueo S.* (106 AD3d 592), the Appellate Division, First Department, dismissed an appeal from an order confirming a Support Magistrate's finding that the appellant had willfully violated an order of support. The Court, citing *Matter of Skiff-Murray*, noted that the appellant was presently a fugitive who was unavailable to obey the Family Court's mandate in the event of an affirmance, and concluded that "his appeal may not be heard". The Appellate Division, Fourth Department, also relied on the fugitive disentitlement doctrine to dismiss an appeal by a California resident subject to arrest for the willful violation of a New York support order who refused to return to this State (*Matter of Shehatou v. Louka*, 118 AD3d 1357).

Applying these principles here, the Appellate Division found that dismissal of the appeal was warranted pursuant to the fugitive disentitlement doctrine. The mother deliberately removed herself from the jurisdiction of the New York courts concomitant with the filing of a October 2011 violation petition, which alleged that she had willfully failed to

obey the December 2009 child support order. She thereafter failed to personally appear before the Family Court, and a bench warrant was issued to secure her return. However, the mother continued to evade the court, rendering her a fugitive.

Additionally, there was a nexus between the mother's fugitive status and the appellate proceedings, since her fugitive status related to her failure to comply with the Family Court's prior orders and her refusal to personally appear before that court. By her default and absence, the mother was evading the very orders from which she sought appellate relief. The mother's absence from New York frustrated the father's efforts to enforce the prior child support orders (see *Wechsler v.*

Wechsler, 45 AD3d at 473-474). Application of the doctrine is appropriate where the appellant has willfully made himself or herself unavailable to obey a court's mandate in the event of affirmance. It is the flight or refusal to return in the face of judicial action that is the critical predicate to fugitive disentitlement". Following the Commissioner's filing of the enforcement petition, the Family Court attempted to secure the mother's appearance before it on several occasions, but the mother failed to appear. The the mother willfully and deliberately removed herself from the jurisdiction of the New York courts by leaving the state and failing to appear in subsequent proceedings to enforce the support orders. Under the circumstances of this case, "the principal rationales for the doctrine-imposing a penalty for flouting the judicial process, discouraging flights from justice and promoting the efficient operation of the courts, and avoiding prejudice to the nonfugitive party-would be vindicated by dismissing the appeal" (*Wechsler v. Wechsler*, 45 AD3d at 474).

Agreements - Prenuptial - Validity - Temporary Maintenance - Waiver of Maintenance in Agreement Does Not Bar Pendente Lite Maintenance During the Pendency of the Litigation Absent Express Provision in Agreement

In *McKenna v Mckenna*, --- N.Y.S.2d ----, 2014 WL 5151377 (N.Y.A.D. 2 Dept.) the parties were married on February 14, 1997. Shortly before their marriage, they entered into a prenuptial agreement which provided, inter alia, that, in the event of separation or divorce, each party waived the right to the other's separate property, including property acquired from the proceeds of separate property acquired during marriage; the defendant waived any interest in the marital home, which had been owned by the plaintiff before the marriage, as well as any interest in the plaintiff's annual bonus and retirement account; and the plaintiff's maintenance obligation would be limited to a lump sum payment of between \$5,000 and \$25,000, depending on the length of the marriage. The agreement further provided that the plaintiff would pay the defendant's reasonable counsel fees in any matrimonial action, unless the defendant challenged the agreement. In December 2011, the plaintiff commenced the action for a divorce. Defendant moved to vacate the prenuptial agreement on the basis that it was unenforceable on the ground, among others, that the plaintiff never disclosed the value of his assets, and for an award of pendente lite maintenance and counsel fees. The plaintiff cross-moved for summary judgment declaring that the prenuptial agreement was valid and enforceable. The Supreme Court denied the defendant's motion, and granted the plaintiff's cross motion.

The Appellate Division modified by denying the cross motion, and remitting for a determination of defendant's motion for an award of pendente lite maintenance and counsel fees. It found that plaintiff demonstrated his prima facie entitlement to judgment as a matter of law by submitting, inter alia, the agreement, which appeared fair on its face and set forth express representations stating that, among other things, it was not a product of fraud or duress, each party had made full disclosure to the other and was represented by independent counsel, and they had fully discussed and understood its terms. In opposition, the defendant raised triable issues of fact with regard to, inter alia, the fairness of the agreement, the circumstances surrounding the negotiation and execution of the agreement, and the absence of any meaningful financial disclosure by the plaintiff. It was not possible to evaluate the fairness of the prenuptial agreement on its face, inasmuch as the plaintiff provided no financial disclosure as part of the agreement. The plaintiff's disclosure made in support of his motion was not sufficient to enable the Court to determine the fairness of the agreement at the time of its execution. Thus, notwithstanding that the agreement recited that there had been "full disclosure" and that it is "a fair Agreement" which "is not the result of any fraud, duress or undue influence," triable issues of fact existed.

Plaintiff's purported financial disclosure to the defendant during the five years the parties lived together prior to the execution of the prenuptial agreement was precluded from consideration pursuant to the merger clause in the agreement, since the representations were not included in and were extrinsic to the agreement (see *Schron v. Troutman Sanders LLP*, 20 NY3d 430, 433-434; *Matter of Primex Intl. Corp. v. Wal-Mart Stores*, 89 N.Y.2d 594, 599). The defendant's attorney was selected by the plaintiff and paid by him, and, according to the defendant, met with her only a short time before the execution of the agreement and failed to advise her of the legal consequences of the terms of agreement. Given the parties' conflicting claims as to the negotiation and execution of the prenuptial agreement summary judgment in favor of either party was unwarranted.

The Appellate Division found that notwithstanding that the prenuptial agreement contained a waiver of maintenance and equitable distribution, there was no provision for the waiver of pendente lite maintenance during the pendency of this litigation. While the parties' premarital agreement limited the defendant's rights to obtain spousal support and waived her rights to counsel fees, it did not bar temporary relief, including pendente lite maintenance and counsel fees. It remitted the matter to the Supreme Court for a new determination of those branches of the defendant's motion.

Appellate Division, Third Department

Paternity - Child Support - Full Faith and Credit and Res Judicata Bars Paternity Proceeding in New York after Dismissal with Prejudice of Alabama Paternity Proceeding

In Matter of Starla D. V Jeremy E, --- N.Y.S.2d ----, 2014 WL 5285598 (N.Y.A.D. 3 Dept.) in December 2001, petitioner, a resident of Alabama, commenced a proceeding in the District Court of Colbert County, Alabama against respondent, a New York resident, alleging that respondent was the biological father of the subject child (born in 2001) and seeking an award of child support. Respondent, appearing pro se, answered and thereafter underwent DNA testing. Petitioner, who did not complete her portion of the DNA testing, subsequently moved to dismiss the proceeding "with prejudice" and, in July 2004, the Alabama court granted her request. In January 2011, petitioner commenced a proceeding in New York against respondent pursuant to the Uniform Interstate Family Support Act (Family Ct Act art 5-B), seeking to establish paternity and, in conjunction therewith, an award of child support. Respondent moved to dismiss the petition contending, among other things, that the proceeding was barred by res judicata and/or equitable estoppel. Family Court dismissed respondent's equitable estoppel defense. Respondent answered and moved for summary judgment, again contending that this proceeding was barred by res judicata and equitable estoppel. The Support Magistrate rejected respondent's affirmative defenses and, based upon the evidence adduced at the hearing, issued the requested order of filiation and awarded child support. Family Court affirmed the Support Magistrate's orders in their entirety.

The Appellate Division reversed. It agreed with respondent's argument upon appeal that Family Court erred in failing to apply the Full Faith and Credit Clause and principles of res judicata to bar petitioner from maintaining the proceeding. It observed that "In New York, res judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action [or proceeding], or in privity with a party who was" (Matter of People v. Applied Card Sys., Inc., 11 NY3d 105, 122 [2008]. There was no dispute that the Alabama proceeding involved the same parties and underlying issues, i.e., paternity and child support. Additionally, under both Alabama and New York law, a dismissal "with prejudice" indeed constitutes an adjudication "on the merits" (see Matter of Coleman v. Coleman, 1 AD3d 833, 834 [2003]. Further, there was no question that the Alabama court had subject matter jurisdiction over the paternity and support proceeding. Accordingly, the only remaining issue was whether the Alabama court acquired personal jurisdiction over respondent. Personal jurisdiction is-under both New York and Alabama law-a waivable defense (CPLR 3211[a][8]; [e])). In this regard, although respondent raised lack of personal jurisdiction in his pro se answer, respondent testified at the paternity hearing that he did so only to avoid entry of a default judgment against him, and that he expressly advised the Alabama court that if there was going to be "a hearing with genetic testing that [he] would be a full participant." Respondent further testified that when the Alabama court declined to dismiss the proceeding for improper service, he affirmatively requested that he be allowed to undergo genetic testing in New York, that the Alabama court granted his request and that he subsequently underwent such testing. Under these circumstances, respondent waived his right to assert that the Alabama court lacked personal jurisdiction

over him and expressly consented thereto. Accordingly, as all of the elements of res judicata were present, and Family Court erred in failing to dismiss petitioner's application upon this ground.

Supreme Court

Temporary Custody, Child Support and Maintenance - Supreme Court Holds it Need Not Make Temporary Custody Determination Where No Exigent Circumstances - Non-custodial Parent Is Not Entitled to Receive Child Support from a Custodial Parent, Irrespective of Financial Positions of Parties - Custodial Parent Is Parent Who Has More Overnights - DRL § 236[B] (5-a)(e)(1)(c), and (e) Considered in Awarding Maintenance

In *Joseph M v Lauren J*, 2014 WL 5420618 (N.Y.Sup.), 2014 N.Y. Slip Op. 51536(U) the parties were married in 1997 and had one child, a daughter, born in 2009. The couple separated eight months after the child's birth when, in May 2010, defendant left the marital residence in Yonkers to live with a man with whom she had been involved since before the pregnancy. They recently stopped living together because their church objected to them continuing to cohabit while she was still married to plaintiff. As a result, defendant had been living in a hostel in upper Manhattan. Plaintiff was a property manager of an office building in midtown Manhattan, earning, according to his most recently filed tax return, an annual salary of \$150,880. Plaintiff continued to reside in the marital residence in Yonkers, and voluntarily paid defendant \$650 per month in support since their separation. According to plaintiff, the \$650 was intended to be used by defendant for the child's needs when the child is with her. Since the parties' separation, they agreed upon and followed a temporary parenting arrangement. Plaintiff commenced the action for divorce in 2013. Defendant filed her pendente lite motion on July 15, 2014, over four years after she left the marital residence.

Supreme Court held that custody is an ultimate issue to be determined after a full trial, and that a determination of custody on a temporary basis shall only be made when there are exigent circumstances (*Acquard v. Acquard*, 244 A.D.2d 1010, 1010, 666 N.Y.S.2d 57 [4th Dept 1997]). It found that no exigent circumstances were present here. Any allegations that the parties made against each other were not of such magnitude to necessitate an immediate change in the current parenting arrangement. Accordingly, the motions seeking temporary custody were denied without prejudice.

Defendant sought temporary child support of \$2,019 per month. The Court found that in the First Department a non-custodial parent is not entitled to receive child support from a custodial parent, irrespective of the financial positions of the parties. DRL § 240(1-b)(f)(10) states: "the court shall order the non-custodial parent to pay his or her pro-rata share of the basic child support obligation." The First Department has held that a custodial parent who has the child a majority of the time cannot be directed to pay child support to a

non-custodial parent (*Rubin v. Della Salla*, 107 A.D.3d 60, 62, [1st Dept 2013])." The Court found that neither party could be said to have legal custody of the child inasmuch as a custody determination may only be made following a full trial. Thus, for the purposes of determining temporary child support, the "custodial parent" must be deemed to be that parent who has the child "the majority of the time." In *Rubin v. Della Salla*, the First Department held that overnights, not "waking hours," dictate which parent has more time for purposes of determining the custodial and non-custodial parent. Based solely on the actual amount of overnights that the child spent with each party, Supreme Court concluded that plaintiff was the custodial parent and defendant was the non-custodial parent for the purposes of determining child support on a pendente lite basis. Defendant's request for temporary child support was denied.

Pursuant to DRL § 236[B] (5-a) the court arrived at a presumptive award of temporary maintenance. Plaintiff's income was \$140,237 and defendant's income was \$0. As such, plaintiff was deemed the "payor" spouse, and defendant was deemed the "payee" spouse. In accordance with DRL § 236[B](5-a)(c)(1), the Defendant, as the payee spouse, was presumptively entitled to \$3,506 per month.

Two of the statutory factors for deviation listed under DRL §236 [B](5-a)(e)(1) required the court's consideration. The first was DRL § 236[B] (5-a)(e)(1)(c), "the earning capacity of the parties." The Court noted that in the more than four years since defendant has left the marital home, she made no attempt to re-enter the workforce. Instead, she proclaimed that it was her choice to do volunteer work rather than earn an income. Moreover, rather than teaching people about health and nutrition on an unpaid basis while seeking employment elsewhere, defendant spent her days, including many of her days with the child, outside of a Planned Parenthood health clinic, praying for patients and attempting to convince them not to obtain abortions. By dedicating herself to church and anti-abortion related activities, while at the same time demanding that plaintiff support her, defendant was in effect seeking to have plaintiff subsidize those activities. Moreover, she purposefully reduced her ability to be self-supporting, or at least to contribute towards her own support, by choosing not to take payment for health and nutrition services she provided, and by spending her days protesting outside of Planned Parenthood rather than obtaining or seeking to obtain meaningful employment (see DRL § 236B[5-a][e][1][k] ["the inability of one party to obtain meaningful employment due to age or absence from the workforce"]).

The other relevant factor was DRL § 236[B](5-a)(e)(1)(g), the "the existence and duration of a pre-marital joint household or a pre-divorce separate household." For the past four years defendant lived with and was supported by another man. Because of this relationship, she was able to live comfortably in an upscale neighborhood in Manhattan. She traveled extensively across the country and abroad, admitting that "[f]or the most part my travel has been paid for by the man I have been with". It was only now, after she was no longer living with the other man and, presumably, no longer being supported by him, that she looked to plaintiff to make up for the shortfall occasioned by the disruption of her "pre-divorce separate household."

Taking into consideration the relevant statutory factors, the court found ample reason to deviate from the presumptive award of \$3,506 per month. Bearing in mind that the overriding purpose of temporary maintenance is "to maintain the status of the parties as far as can be accurately ascertained", the court concluded that, as plaintiff's temporary maintenance obligation, he must continue to pay defendant the \$650 he had been voluntarily paying.

October 16, 2014

Recent Legislation

ICARA

The International Child Abduction Remedies Act, 42 USC §§11601 - 11611 was editorially reclassified as sections 9001-9011 of Title 22. It can now be found in 22 U.S.C. §§ 9001-9011.

Family Court Act §451

Family Court Act §451(1), which was amended, effective December 22, 2014, provided that an application to modify an order of child support must be accompanied by "an affidavit and other evidentiary material sufficient to establish a prima facie case for the relief requested" in order to entitle the petitioner to a hearing on any material issues of fact. No hearing is required if an affidavit has not been submitted even if material issues are present in the case. The amendment removed the requirement of filing an affidavit with the petition by removing word "modify" from subdivision 1 and adding a new subdivision 2, which provides: "A proceeding to modify an order of support shall be commenced by the filing of a petition which shall allege facts sufficient to meet one or more of the grounds enumerated in subdivision three of this section. Former subdivision 2 has been renumbered subdivision 3. See Laws of 2014, Ch 373, effective December 22, 2014.

CPLR 2106

CPLR 2106 which previously allowed unsworn affirmations only by attorneys, physicians, osteopaths or dentists, was amended, effective January 1, 2015, to allow New York courts to consider unsworn affirmations by any person, when that person is physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The affirmation must be in substantially the following form: "I affirm this ... day of, .., under the penalties of perjury under the laws of New

York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law. (Signature) See Laws of 2014, Ch 380.

CPLR 3122-a

The Civil Practice Law and Rules was amended to provide that the certification authorized by CPLR 3122-a may be used as to business records produced by non-parties whether or not pursuant to a subpoena so long as the custodian or other qualified witness attests to the facts set forth in CPLR 3122-a, (1), (2) and (4) of subdivision (a) of this rule. Formerly CPLR 3122-a applied only to business records produced pursuant to a subpoena duces tecum under CPLR 3120. CPLR 3122-a was amended to add subdivision (d) allowing its certification procedures to apply to all business records produced by non-parties whether or not pursuant to subpoena. According to the legislative memorandum in support of the amendment, any party may object to the procedure set forth in CPLR 3122-a after receiving notice from the party intending to use that procedure to introduce business records at trial. If the court sustains the objection, the introducing party will need to bring in a witness at trial to testify to lay the foundation for admission of the documents. CPLR 3122-a does not supplant the procedure set forth in CPLR 2306 as to the introduction of hospital and municipal records at trial. A party seeking to introduce those records may still rely upon the procedure set forth in section 2306 or, alternatively, may follow the rule CPLR 3122-a procedures. CPLR 3122-a (d) added by Laws of 2014, Ch 314, § 2, effective immediately.

CPLR 3113 (1)

CPLR 3113 (1) (c) was amended to provide that a non-party deponent's counsel may participate in the deposition and make objections on behalf of his or her client in the same manner as counsel for a party. Laws of 2014, Ch 379, effective September 23, 2014

Appellate Division, Second Department

Temporary Maintenance - Award - Imputed Income - Court Is Justified in Imputing Income to a Spouse to Establish His Support Obligations When it Is Shown That His Account of His Finances Is Not Believable, and Lifestyle Was Such That There Was a Basis to Conclude That His Actual Income and Financial Resources Were Greater than What He Reported on His Tax Returns.

In *Weitzner v Weitzner*, --- N.Y.S.2d ----, 2014 WL 4723312 (N.Y.A.D. 2 Dept.), the Appellate Division affirmed an order which directed the defendant to pay temporary maintenance in the sum of \$4,604 per month, interim child support in the sum of \$3,530 per month, interim counsel fees in the sum of \$30,000, and his pro rata share of playgroup fees for the youngest child. The Appellate Division stated that 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 defendant did not demonstrate that any exigent circumstances exist, or that justice otherwise required modification of the pendente lite award. The proper mechanism to correct an error in a temporary award is a quick trial (*Malik v. Malik*, 66 A.D.3d at 968, 886 N.Y.S.2d 826; *Levakis v. Levakis*, 7 A.D.3d at 678, 776 N.Y.S.2d 510). The Supreme Court providently exercised its discretion in imputing income of \$200,000 per year to the defendant for the purposes of computing pendente lite awards of maintenance and child support. A court is justified in imputing income to a spouse to establish a party's support obligations when it is shown that the marital lifestyle was such that, under the circumstances, there was a basis for the court to conclude that the spouse's actual income and financial resources were greater than what he or she reported on his or her tax returns. Supreme Court, in effect, found the defendant's account of his own finances was not believable, and was justified in imputing income to him that was far higher than he reported. Supreme Court did not err in imputing income to the plaintiff equivalent to only a ten-hour work week as an accountant for the purpose of calculating maintenance and child support. The plaintiff had custody of the parties' five children, then aged 16 and under, the youngest of whom was three at the time of the court's order. In addition, the plaintiff had not worked during the parties' marriage (*Margaret A. v. Shawn B.*, 31 Misc.3d 769, 921 N.Y.S.2d 476 [Sup Ct.]).

Maintenance - Enforcement - Dismissal of Cause of Action for a Divorce Did Not Divest Supreme Court of Jurisdiction to Award Child Support Add-ons and Enforce Support Awards . Defaults in Child Support and Maintenance Obligations, but Not Counsel Fees, May Be Enforced by QDRO Against Pension and Retirement Plans.

In *Lundon v Lundon*, --- N.Y.S.2d ----, 2014 WL 4723475 (N.Y.A.D. 2 Dept.), the parties were married and had one child. In a judgment in 2009 Supreme Court, dismissed, in effect, the cause of action for a divorce, and awarded the defendant permanent maintenance and child support, including a portion of child support add-ons. After the plaintiff failed to make the agreed-upon payments, the defendant moved for enforcement relief. Supreme Court granted those branches of the defendant's motion which were for judgments for the unpaid counsel fees and arrears of child support and maintenance, and denied the remaining branches of the motion. The Appellate Division held that the dismissal, in effect, of the cause of action for a divorce did not divest the Supreme Court of jurisdiction to award child support add-ons and entertain the defendant's motion to enforce the award. The Appellate Division held that Supreme Court also should have granted that the defendant's motion for a QDRO directing payments from the plaintiff's retirement plan to the defendant to satisfy the judgments for the arrears of child support and maintenance. Defaults in child support and maintenance obligations may be enforced

by QDRO against pension and retirement plans. The requested order in favor of the defendant met the definitional requirements for a QDRO under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code, as QDRO relate "to the provision of child support [and] alimony payments" and would assign to the defendant spouse, an "alternate payee," the right to receive benefits payable under the plaintiff's retirement plan. Moreover, since the awards of child support and maintenance in the 2009 judgment were authorized by Domestic Relations Law § 236(B)(8)(b), the order aiding enforcement of those awards would be "made pursuant to a State domestic relations law" (26 USC § 414[p][1][B][iii]; 29 USC § 1056 [d][3][B][ii][II]; *Boylan v. Dodge*, 42 AD3d 632, 633; *Adler v. Adler*, 224 A.D.2d at 282-283). The Appellate Division also held that Supreme Court properly denied that branch of the defendant's motion which was for a QDRO directing payments from the plaintiff's retirement account to the defendant's attorney to satisfy unpaid counsel fees, since the attorney does not qualify as an "alternate payee" (26 USC § 414[p][8]; 29 USC § 1056[d] [3][K]; *J.K.C. v. T.W.C.*, 39 Misc.3d 899, 913 [Sup Ct, Monroe County]).

Appellate Division, Fourth Department

Child Support - Award - Child Care Payments must Be in a Fixed Sum.

In *Matter of Pitka v Pitka*,--- N.Y.S.2d ----, 2014 WL 4938029 (N.Y.A.D. 4 Dept.), the Appellate Division rejected the fathers argument that the Family Court Act requires payments for daycare expenses as a percentage, and the Support Magistrate therefore erred in requiring him to pay a sum certain for such expenses citing FCA § 413[c][6]).
Family Court

Family Court - International Child Abduction Remedies Act - Hague Convention - Dominican Republic - Habitual Residence

In *Matter of MG v WZ*, --- N.Y.S.2d ----, 2014 WL 5026267 (N.Y.Fam.Ct.), 2014 N.Y. Slip Op. 24296, the Family Court granted the motion of Respondent for an order reopening an Order of Custody on Default and allowing him to proceed on his petition for return of the Child to the Dominican Republic pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, as implemented by the International Child Abduction Remedies Act, 42 United States Code § 11601, et seq. Upon Respondent's application, the Court permitted Respondent to testify and participate in the hearing via video hook-up from the Dominican Republic. The Court denied the petition for return. It found that the parties started residing together in 2004 in the Dominican Republic and Petitioner had a three year old non-subject son, A. The Child was born in March, 2004. In September, 2004, Petitioner immigrated to the United States where she was now a legal resident, leaving the Child and A in the Paternal Grandmother's care. In the beginning of 2006, the parties ended their relationship and shortly thereafter,

Petitioner returned to the Dominican Republic for three weeks to a month and stayed with the maternal great grandmother. While Petitioner was in the Dominican Republic in 2006, the Paternal Grandmother petitioned for and was granted guardianship of the Child. Petitioner consented to the Paternal Grandmother having guardianship of the Child but Respondent did not consent. In May, 2010 Petitioner traveled to the Dominican Republic and returned to the United States with the Child. Petitioner testified that she needed Respondent's permission in order to leave the Dominican Republic with the Child and Respondent gave his written consent for the Child to travel to the United States. The night before Petitioner left the Dominican Republic with the Child, she and Respondent agreed not to make a final decision on whether the Child would remain in the United States rather than returning to the Dominican Republic. Instead the agreement was that they would wait to see if the Child obtained his permanent residency and whether he was adjusting to and liked life in the United States. The Child has been living in New York with Petitioner and A since May, 2010, and obtained his permanent residency status in October, 2010. The Child had not been back to the Dominican Republic since he left in May, 2010. The Child had been enrolled in P.S. 227 in the Bronx since 2010 where he has been consistently receiving high grades. The Child has been enrolled in a community based baseball league. The Child also enjoys playing basketball and will be enrolled in a community based baseball league. English is now the Child's dominant language although Petitioner and the Child more often communicate in Spanish. The Child has many school friends, and enjoys watching cartoons in English. Petitioner worked as a cashier and receives food stamps and medicaid for herself and the children. Petitioner's mother (the Child's maternal grandmother) lives five blocks from Petitioner and the Child with two of the Child's uncles and cousins. The Child has an aunt who has two children who live in the Bronx and another married aunt who has three children. All of these family members are on Petitioner's side of the family and live in the Bronx. The Child spends a great deal of time with his extended family.

The Family Court observed that where proceedings for return of a child have been commenced after the expiration of the period of one year [from the date of wrongful removal or retention], the court shall [] order the return of the child, unless it is demonstrated that the child is now settled in its new environment." *Lozano v. Alvarez*, 134 S Ct 1224, 1229 (2014) (quoting Article 12 of the Hague Convention). The "abducting parent" must establish that the exception to the return applies by a preponderance of the evidence. *Id.* Thus, the one year period is not a statute of limitations. It also observed that courts apply a two-part test to determine a child's country of habitual residence. "First, the court should inquire into the shared intent of [the parents] at the latest time that their intent was shared. In making this determination the court should look, as always in determining intent, at actions as well as declarations. Normally the shared intent of the parents should control the habitual residence of the child. Second, the court should inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent. *Hofmann v. Sender*, 716 F3d at 291-92,

quoting *Gitter v. Gitter*, 396 F3d at 34. The Court found that the the habitual residence of the Child was the United States. Initially, the parties agreed that Petitioner would precede the Child to the United States and that Respondent would follow by means of marrying a United States citizen who would then petition for he and the Child to come to the United States. Respondent eventually did marry a United States citizen who petitioned for Respondent to immigrate to the United States but according to Respondent that petition was never granted and in 2012 he and his wife divorced. Meanwhile, Petitioner grew frustrated with Respondent's lack of progress with his plans for immigrating to the United States via marriage to a United States citizen and initiated the process to petition for the Child to join her in the United States. While Respondent was initially upset that Petitioner filed a petition to have the Child join her in the United States, he gave his written, unqualified consent for Petitioner to travel with the Child to the United States on May 20, 2010. However, the night before Petitioner left the Dominican Republic with the Child in May, 2010, Respondent's unqualified or unconditional consent became conditional when the parties agreed that they would make a final determination on the Child's residency based on whether the Child obtained his permanent residency and whether he was adjusting to and liked life in the United States. Thus, the last time the parties shared their intent for the Child's place of residence, they conditionally agreed that it would be the United States. The condition on the Child residing in the United States was that he would have to be granted permanent residency and he would have to be adjusting to and liking his life in the United States. See *Abbott v. Abbott*, 560 U.S. at 11; *Hoffmann v. Sender*, 716 F3d at 293. The conditions placed on whether the Child would permanently reside in the United States have been met. The Child obtained his permanent residency status in the United States and he has fully adjusted to and enjoys his life in the United States. The Court found that the Child had fully adjusted to and enjoys his life in the United States because he consistently receives high grades in school, plays community based league sports, speaks predominantly English, and lives with his half brother A and has many relatives within close proximity with whom he spends a great deal of time. Consequently, the Child's habitual residence is the United States since the last time the parties' intent was shared, their shared intent was for the Child to reside in the United States upon his obtaining that which he now has obtained, permanent residency and a settled, enjoyable life in the United States. *Hoffmann v. Sender*, 716 F3d at 293.

The Family Court pointed out that where proceedings for return of a child have been commenced after the expiration of the period of one year from the date of wrongful removal or retention, the court shall order the return of the child, unless it is demonstrated that the child is now settled in its new environment." *Lozano v. Alvarez*, 134 S Ct 1224, 1229 (2014) (quoting Article 12 of the Hague Convention). The "abducting parent" must establish that the exception to the return applies by a preponderance of the evidence. Thus, the one year period is not a statute of limitations. The Family Court held that even if Respondent had established a prima facie case for return to the Dominican Republic it would not order the Child's return to the Dominican Republic because more than a year had passed since Petitioner "retained" the Child in the United States and the child was now settled in his new environment. See

Taveras v. Morales, 2014 U.S. Dist Lexis 67892; 2014 WL 2038318 (SDNY, August 26, 2014); Jakubik v. Schmirer, 956 F Supp 2d 523 (SDNY 2013).

Editors comment:

In footnote 1 the court indicated that it had advised counsel that this “was not a custody hearing.” Hague Convention cases are not custody cases. The court is limited to adjudicating “only rights under the Convention” and may not decide “the merits of any underlying child custody claims. See *Ozaltin v. Ozaltin*, 708 F.3d 355, 360 (2d Cir. 2013). A petition for the return of a child commencing a civil action for the return of a child must be filed “in any court which has jurisdiction of such action.” 22 U.S.C. § 9003 (b), formerly cited as 42 USC § 11603 (b).

The Supreme Court has jurisdiction to hear these proceedings. N.Y. Const, art VI, § 7[a]. On the other hand, the Family Court is a court of limited jurisdiction, whose jurisdiction is proscribed by Article VI, § 13 of the New York State Constitution. It has not been conferred with jurisdiction under Article VI, § 13 of the New York state constitution to determine such cases. A court hearing a Hague Convention proceeding must have jurisdiction of the action and must be authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed. 22 U.S.C. § 9003 (b), formerly cited as 42 USC § 11603 (b). Family Court is not authorized to exercise such jurisdiction. While 22 U.S.C. § 9003, formerly cited as 42 USC § 11603, grants original jurisdiction of these proceedings to State and federal district courts, it does not grant jurisdiction to state courts of limited jurisdiction, such as the family court and surrogates court, nor does it purport to do so.

Moreover, Domestic Relations Law §77-a, the Uniform Child Custody Jurisdiction and Enforcement Act, which provides that a “court of this state may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child custody determination”, does not authorize the commencement of a civil action for the return of a child.

It appears that the Family Court lacks subject matter jurisdiction to hear Hague Convention cases. This has been confirmed by the U.S. Court of Appeals for the Second Circuit, which has held that “ [t]he phrase “in any court which has jurisdiction of such action,” 42 U.S.C. § 11603(b), underscores that while § 11603(a) confers jurisdiction in a particular federal forum (i.e., in United States district courts), it does not confer jurisdiction in particular state courts (e.g., a family-law court; a juvenile court; or a court of general jurisdiction); the appropriate state forum for an action under the Hague Convention is an issue of state law. The court in which the petition is filed must also be “authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.” *Ozaltin v. Ozaltin*, 708 F.3d 355, 360 (2d Cir. 2013). See footnote 25

October 1, 2014

Appellate Division, First Department

Maintenance- Award - Domestic Relations Law §236 [B][6] - Defendant Awarded Maintenance Despite Her Refusal to Submit to a Complete Cross-examination on Financial Issues. When a Party, Through No Fault of its Own, "Is Deprived of the Benefit of the Cross-examination of a Witness," a Court May Strike That Witness's Direct Testimony in Whole or in Part

In *Cohen v Cohen*,--- N.Y.S.2d ----, 2014 WL 4452645 (N.Y.A.D. 1 Dept.) the Plaintiff husband was 79, and defendant was 54. Defendant was a documentary film maker and assistant director, and a citizen of Belgium and France. The parties met in France. In 1998, defendant became pregnant and stopped working. On April 30, 1999, plaintiff created the Second Stanley Cohen Irrevocable 1999 Family Trust (1999 Trust), primarily for the benefit of defendant and their issue. On June 7, 1999, the parties executed a prenuptial agreement in France, which provided that upon marriage, each party's premarital property would remain his or her separate property, that property titled in individual names acquired during the marriage would be the property of the person in whose name it was titled, and that jointly titled property acquired during the marriage would be jointly owned marital property. The parties married on June 14, 1999, and on July 10, 1999, their son was born. The parties separated in 2006, but plaintiff continued to provide defendant with financial support. Plaintiff commenced this divorce action in March 2009. In a prior appeal (93 AD3d 506 [1st Dept 2012]), the Court affirmed the order of the trial court that held that the French prenuptial agreement was valid. The trial was bifurcated, with specific days reserved for testimony regarding custody and other days for testimony about finances. Although defendant was cross-examined during the financial phase of the trial, on May 18, 2011, in the midst of her cross-examination on custody issues, she left New York and returned to Paris. Despite a three-week adjournment, defendant did not return to court, claiming that she was under doctor's orders not to travel. The court ended the trial on June 7, 2013. The court drew an adverse inference against defendant with respect to custody issues based on her failure to complete her cross-examination, but refused to default her or to strike her testimony in its entirety.

Defendant's net worth statement, excluding housing costs, listed monthly expenses of more than \$62,000. The Appellate Division found that the award of \$26,000 per month in non-durational maintenance was excessive, and reduced it to \$22,500 per month. It observed that generally, the determination of maintenance is within the sound discretion of the trial court upon consideration of the relevant factors enumerated in Domestic Relations Law § 236(B)(6)(a) and the parties' pre-divorce standard of living. Defendant had the primary homemaking and child-raising responsibilities during the marriage. The parties enjoyed a lavish lifestyle, both before and, significantly, after their separation, and plaintiff assumed the role of financial provider, acquiescing in defendant's financial dependency. Defendant was not going to receive a distributive award, her own assets were limited, and the record did not contain evidence of the amount of income that she would receive from the 1999 Trust. Defendant also suffered from a mild cognitive impairment that compromised her ability to work, both within and outside of the film industry, and she was incapable of supporting herself at a standard of living approximating the marital standard. The defendant's assets were substantial and, along with plaintiff's annual income, were

more than sufficient to provide for defendant's reasonable needs. On the other hand, defendant made little or no financial contribution to the marriage, and her efforts as a mother were diminished by her manipulation of the child. The costs listed in defendant's statement of net worth were based on her life in New York, including expenses for the child. Defendant failed to provide a specific account of the money she alone required, and the court improvidently made certain assumptions in that regard. Thus, taking into consideration the statutory factors, including the parties' extravagant lifestyle, defendant's dependence on plaintiff, the absence of a distributive award, and defendant's cognitive impairment insofar as it detrimentally affected her ability to become self-supporting, an award of non-durational maintenance of \$22,500 per month was appropriate.

The Court rejected plaintiff's argument that defendant should not be awarded maintenance because of her refusal to submit to a complete cross-examination, which prevented the court from ascertaining her standard of living at the time of the divorce action, in contrast to the time earlier in the marriage when the parties co-resided. It held that when a party, through no fault of its own, "is deprived of the benefit of the cross-examination of a witness," a court may strike that witness's direct testimony in whole or in part (*Gallagher v. Gallagher*, 92 App.Div. 138, 140 [1904]; *Diocese of Buffalo v. McCarthy*, 91 A.D.2d 213, 220 [4th Dept 1983]. Although it did not condone defendant's failure to return to court to complete her cross-examination during the custody phase of the trial, it found that the court providently exercised its discretion when it drew a negative inference against defendant with respect to custody issues but declined to strike her testimony in its entirety. The court was familiar with the parties' lavish standard of living during the marriage and defendant testified and was cross-examined for a number of days during the financial phase of the trial. During this testimony, defendant acknowledged that her food and unreimbursed medical expenses had decreased, that many of the amounts in her net worth statement reflected the way the parties lived before separating, and that she had reduced her spending on many of these items. Accordingly, plaintiff's claims of prejudice were overstated, and a negative inference with respect to custody was an adequate sanction for defendant's misconduct.

Sanctions - 22 NYCRR 130-1.1 et seq. - Sanctions Reversed Where No Finding that Conduct Was Frivolous

In *Nimkoff v Nimkoff*, --- N.Y.S.2d ----, 2014 WL 4637880 (N.Y.A.D. 1 Dept.), the Appellate Division held that the court improperly imposed on defendant, "as sanctions," plaintiff's costs in responding to his motion for sanctions against her, since it set forth no finding that defendant's conduct was frivolous (22 NYCRR 130-1.2). Nor, assuming it intended to award costs, rather than sanctions, did the court provide the requisite explanation why the amount awarded was appropriate.

Appellate Division, Second Department

Counsel Fees - Award - Domestic Relations Law §237 - Improper to Award Counsel Fees Without Any Application for Such Relief, and Without Any Supporting Evidence

In *McMahon v McMahon*, --- N.Y.S.2d ----, 2014 WL 4627692 (N.Y.A.D. 2 Dept.), the Appellate Division found that the Supreme Court providently exercised its discretion in awarding the principal sums of \$22,480 and \$22,520, respectively, for the plaintiff's counsel fees pursuant to DRL 237(a) in two money judgments. It noted that the plaintiff earned considerably less than the defendant, that the plaintiff was not receiving any significant equitable distributive award, and that the defendant's conduct throughout the proceedings, including his failure to abide by a pendente lite order, unnecessarily protracted the litigation. However, the Supreme Court improvidently exercised its discretion in, sua sponte, awarding an additional \$3,500 in counsel fees to the plaintiff for having had to defend against the defendant's motion for leave to reargue. The additional counsel fees were awarded without any application by the plaintiff for such relief, and without any supporting documentation or other evidence demonstrating the propriety thereof.

Supreme Court

Maintenance - Award - Domestic Relations Law §236[B][6] - Temporary Guidelines Are Inapplicable to a Permanent Award of Maintenance

In *Pratt v Pratt*, 2014 WL 4548441 (N.Y.Sup.), 2014 N.Y. Slip Op. 51383(U) the parties were married in 2004, while the wife was a medical resident at the University of Rochester. The husband, at the time of the marriage, was employed as a finance representative for a local money managing business. Soon after the wedding, while the wife was working and completing her medical training, the husband left his job, remained at home, caring for the first child (five years old) and eventually the second child (two years old). Both parents had advanced degrees. The wife held a medical degree, earned prior to the marriage. The husband held a master's degree in music education, obtained during the marriage. The couple had a wide disparity in their incomes: the wife's, at the time of the commencement, exceeded \$160,000 and the husband, admittedly working only part-time, earned less than \$8,000. In considering the maintenance factors set forth in the Domestic Relations Law, the Court concluded that the wife (approximately \$160,000 annually) made substantially more income than the husband (less than \$15,000 annually); the marriage was of a relatively short duration and during it, the wife completed her medical training and the husband changed jobs. He left a career in the financial industry to become a teacher, a move that was, in part, a reflection of the wife's higher potential earnings as a physician. Both parents were young and in good health; The wife's earning capacity was sizable, given her medical training. The husband had a capacity for a reasonable and sustainable future income, especially with a bachelor's and master's degree; the pre-divorce household was largely supported by the wife's income, at least at its later stages. The husband lived in a new residence, in the same community as the marital home, with a comparable-although not identical-standard of living; the husband did provide parenting

services while the wife completed her medical education. He withdrew from the employment market and provided at-home child care services to support his wife's education and career. The husband, in arguing for maintenance, cited the temporary guidelines for maintenance enshrined in Domestic Relations Law § 236(B)(5-a). Under these guidelines, the maintenance would total \$3,801 per month, for a total of more than \$47,000 annually. Supreme Court held that the temporary guidelines were inapplicable to a permanent award of maintenance. *V.M. v. N.M.*, 43 Misc.3d 1204(A) at 13 (Sup.Ct. Albany Cty.2014). It directed that the husband be paid maintenance by the wife for a period of 40 months at the rate of \$1,500 per month or \$60,000. The wife was entitled to credit for the payments already made.

September 16, 2014

No Cases

September 1, 2014

Appellate Division, Second Department

Custody - Award - Factors - Religion - Courts May Consider Religion but it May Not Be a Determinative Factor

In *Gribeluk v Gribeluk*, --- N.Y.S.2d ----, 2014 WL 3929084 (N.Y.A.D. 2 Dept.), the Appellate Division affirmed an order which awarded custody to the father. It observed that courts may consider religion as one of the factors in determining the best interests of a child, but religion alone may not be the determinative factor (*Matter of Gago v. Acevedo*, 214 A.D.2d 565, 566; *Aldous v. Aldous*, 99 A.D.2d 197). New York courts will consider religion in a custody dispute when a child has developed actual religious ties to a specific religion and those needs can be served better by one parent than the other (*Aldous v. Aldous*, 99 A.D.2d at 199; *Spring v. Glawon*, 89 A.D.2d 980). It found that Family Court did not rely solely on religion and the mother's decision to leave the Hasidic Jewish community in making the determination to award the father custody of the parties' children. The Family Court expressly stated that it passed no judgment on either parent's religious beliefs and practices. The children's need for stability, and the potential impact of uprooting them from the only lifestyle which they had known, are important factors in making a custody determination. The Family Court also found the mother's repeated allegations of sexual abuse of the children by the father to be unfounded, which subjected the children to numerous interviews and examinations, casting doubt upon her fitness to be the custodial parent. Although the children expressed a preference to reside with the mother, and the attorney for the children advocated awarding custody to the mother, the children's preference and the recommendation of the attorney for the children are not determinative and do not usurp the judgment of the Family Court.

Custody - Award - Modification - Relocation - Amount of Time Between Mother's Filing of Petition and Court's Determination Should Not Be Weighed Against Mother Who Promptly Filed Petition for Custody

In Matter of Doyle v Debe, --- N.Y.S.2d ----, 2014 WL 4086283 (N.Y.A.D. 2 Dept.) the parties married in 2002. They had a child in 2006. The parties separated in May 2008. After this separation, the child initially lived with the mother, but, in August 2008, the child began living with the father. On or about September 12, 2008, the mother filed a petition for sole physical custody of the child. In her petition, the mother alleged that she had a letter from the father in which he stated that the mother could have sole custody of the child. On or about September 16, 2008, the father filed his own petition for sole physical custody of the child. In April 2010, while the petitions were pending, the mother moved to Georgia and began living with her then-fiance, whom she later married. In October 2010, the mother filed a petition for permission to relocate to Georgia with the child, alleging that she had moved due to the long history of domestic violence between the parties. She also alleged that, in Georgia, she would be able to provide housing and amenities for the child which were superior to those which she or the father could provide in New York. In December 2012, the Family Court held a fact-finding hearing. The mother testified that, when the parties separated in 2008, the father signed an "agreement," which was admitted into evidence. The document, entitled "Separation Agreement," provided that the mother would have sole physical custody of the child, that the father would pay child support in a certain amount, and that the father acknowledged that the mother would be relocating with the child. The document, signed by the parties, stated that the father "D[id] Not Want Custody of [the child]," and that the mother agreed to forego maintenance from him. The mother testified that the parties' divorce was finalized on July 26, 2010. She explained that, on the day they were in court with respect to their matrimonial action, the father approached her to resolve the outstanding custody issues. The parties entered into a "Custody Agreement," which was also admitted into evidence at the fact-finding hearing. That agreement, which was signed by the parties and notarized, provided, inter alia, that the child would "be in her mother's care during Georgia school year. [The child] will have visits with her father ... during summer [break] and spring [b]reak and every other Christmas." The mother testified that she filed her custody petition in September 2008 when the father refused to return the child after a visit, despite the parties' prior informal custody arrangement set forth in the "Separation Agreement." The mother explained that she attempted to have the police intervene, but that the father told them that the mother was trying to kidnap the child and the police instructed the mother to go to Family Court to find out if a custody proceeding had been commenced. She stated that the father had kept the child ever since that time.

Family Court denied the mother's custody and relocation petitions and granted the father's custody petition on the grounds that, although both parents were fit, the child should not be uprooted from the home she had known since 2008. The Appellate Division reversed. It found that the Family Court did not give appropriate weight to the credible evidence before it, including the testimony of the parties and witnesses, one of whom was

a forensic evaluator. In determining that the child should remain with the father, the family court found that, while both parents were fit, the home atmosphere provided by the father was warm and congenial, with relatives residing within the home and nearby. The Appellate Division found that while the father had relatives living in the area, the living conditions provided by the father raised a significant concern since the child shared a bedroom with the grandmother in a one-bedroom apartment and lived with her father and two adult uncles. This situation was far from being in the child's best interests, especially as she grows older, in view of the fact that the child had her own bedroom in her mother's three-bedroom house which the child shared only with her mother and her mother's husband. Although the child had been residing with the father since 2008, the mother immediately filed a petition for sole physical custody in 2008. Thus, the fact that the child had been residing with the father and not the mother since that time was not a factor which weighed in favor of awarding custody to the father since the amount of time that elapsed between the filing of the mother's petition and the Family Court's determination on the petitions should not be weighed against the mother. The mother, who did not have custody during that time period, visited with the child in New York, and the child spent the summer of 2012 in Georgia with the mother. The mother also mailed the child packages of clothing, school supplies, and toys. While the recommendation of a court-appointed evaluator is not determinative, it is a factor to be considered and is entitled to some weight. Thus, the Family Court should have given more than minimal weight to the report and testimony of the forensic evaluator who interviewed the parties and the child, and conducted psychological testing. The forensic evaluator found that the child was at ease with her mother despite their separation, and concluded that the mother was the more appropriate custodial parent because she was in a stable relationship, employed, had gone to great lengths to regain custody, and would provide a stable home for the child. Significantly, the psychologist expressed detailed concerns about the father's psychological state, and the impact of his psychological state upon his parenting abilities, and noted that he minimized past incidents of domestic violence between the parties. In the forensic report, which was admitted in evidence, there were statements that, at the last minute, the father would cancel activities that the mother had planned in advance for the child. This evidence called into question the father's ability to continue to foster the child's relationship with the mother. Moreover, the parties entered into a "Custody Agreement" whereby they agreed that the child would live in Georgia during the school year. The father acknowledged that he executed this agreement. It did not appear that the Family Court gave any consideration to this agreement. In addition, the father's testimony as to why he did not abide by the agreement concerned the Court as to the father's ability to assure that there would continue to be meaningful contact between the mother and the child. Finally, the mother established by a preponderance of the evidence that moving to Georgia was in the child's best interests. In addition to being able to provide superior living conditions, the mother had already chosen a school and a medical care provider for the child, and she testified that she would promote liberal visitation with the father over almost all of the school breaks. The Appellate Division held that Family Court should have granted the mother's petitions for sole physical custody of the child and for permission to relocate to Georgia with the child.

August 16, 2014

Appellate Division, Second Department

Attorney's Fees - Charging Lien Available to Extent That Equitable Distribution Award Reflects Creation of a New Fund - Law Firm Not Entitled to a Money Judgment Absent Commencement of Plenary Action

In *Wasserman v Wasserman*, --- N.Y.S.2d ----, 2014 WL 3732449 (N.Y.A.D. 2 Dept.) the judgment of divorce directed that the defendant would receive a distributive award of \$1,841,500. The law firm that represented the defendant in the matrimonial action, alleging that the defendant still owed it legal fees of \$47,236.73 and that the defendant was about to sell the former marital residence, moved to establish a charging lien pursuant to Judiciary Law § 475 of \$47,236.73, for leave to enter a money judgment in its favor and against the defendant, which included interest, in the sum of \$69,133.86, and, upon the closing of sale of the former marital residence, to direct the defendant's real estate attorney, her agent, title company, or anyone acting on the defendant's behalf to hold in escrow the sum of \$69,133.86 to be paid to the law firm. The defendant acknowledged that she owed the law firm money, but argued that she was waiting to receive her entire distributive award before paying the law firm. Supreme Court denied the law firm's motion. The Appellate Division modified the order. It observed that in a matrimonial action, a charging lien will be available 'to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interest already held by the client. It found that the firm established its prima facie entitlement to a charging lien of \$47,236.73. It demonstrated that it entered into a retainer agreement with the defendant, which explained the term of its compensation and the nature of services; the firm showed that it regularly sent invoices to the defendant and that the defendant never objected to them; that the attorney client relationship ended upon mutual consent, with the entry of the judgment of divorce and that the defendant's award of the net proceeds from the sale of the former marital residence, which included an award for the defendant's interest in the plaintiff's business, was obtained during its representation of the defendant and was not an interest already held by the defendant. Therefore, Supreme Court should have granted the law firm's motion to establish a charging lien of \$47,236.73. and an order directing, upon the closing of sale of the former marital residence, it be paid the sum of \$47,236.73. The Appellate Division held that an attorney may enforce a charging lien simply by making a petition to the court in the proceeding where he or she appeared, rather than having to bring a separate plenary action. However, a law firm is not entitled to a money judgment against a former client pursuant to Judiciary Law § 475, absent the commencement of a plenary action. Therefore, the Court properly denied the law firm's motion for leave to enter a money judgment against the defendant, which included interest, in the sum of \$69,133.86.

Supreme Court

Divorce - Grounds - Domestic Relations Law §170(7) - Wife Judicially Estopped from Claiming Breakdown Not Irretrievable Based upon Sworn Admission in Complaint - Counsel Fees for Outstanding Fees Denied for Lack of Documentation

In *Alvarado v Alvarado*, --- N.Y.S.2d ----, 2014 WL 3718509 (N.Y.Sup.) the husband moved for summary judgment on the ground that the parties' marriage has broken down irretrievably for a period in excess of six months. He submitted an affidavit that the marriage had broken down irretrievably for a period of at least six months. He stated in his affidavit that there is "absolutely no chance of a reconciliation" and that the marriage has been over for years. In his Verified Answer and Counterclaim he swore that the marriage has been irretrievably broken since October 1, 2011. The wife opposed the motion claiming that the marriage had not broken down irretrievably, and argued that this raised a triable question of fact. Supreme Court held that the wife was judicially estopped from making this claim. The doctrine of judicial estoppel prevents a party from taking an adverse or inconsistent position on an issue simply because their interests have changed. The wife argued that she was a religious Catholic and was opposed to divorce. However, in the her Verified Complaint she swore that the parties' marriage had broken down irretrievably for a period of at least six months prior to the commencement of the action. This sworn to admission was repeated in the Preliminary Conference Order, which stated that the issue of grounds was resolved in wife's favor under DRL §170(7). In addition, the parties' entered into a separate "Grounds Order", which reaffirmed that the issue of grounds was resolved with the understanding that a judgment could not be issued until the resolution of maintenance, equitable distribution and counsel fees. Supreme Court observed that under DRL§170(7) one party's sworn statement that the marriage has broken down irretrievably for a period of six months is sufficient to establish grounds. See *Townes v. Coker*, 35 Misc.3d 543 (Sup.Ct. Nassau County 2012); See also *Filstein v. Bromberg*, 36 Misc. 404 (Sup.Ct. New York County 2011); See also DRL § 170(7). The husband's motion for summary judgment was granted. The Court directed that judgment shall be held in abeyance until the issues of maintenance, equitable distribution, counsel fees, costs, and disbursements of this action have been resolved.

The Court denied the wife's requests for counsel fees relating to this motion on the ground that neither Wife, nor her counsel provided adequate documentation to show the nature of the legal services rendered. Thus, there was insufficient evidence to support an award for outstanding fees already incurred. *Mimran v. Mimran*, 83 AD3d 550 (1st Dept.2011). The retainer agreement alone is insufficient to obtain counsel fees. The wife's attorney provided an approximation of time spent in relation to the Motion. In order to receive an award of counsel fees there must be sufficient documentation in the form of time records, including the time expended relative to each service. *Barson v. Barson*, 32 AD3d 872 (2d Dept.2006); See also, *Darvas v. Darvas*, 242 A.D.2d 554 (2d Dept.1997). Counsel's affirmation in support of Wife's application, without supporting billing documentation, was insufficient to meet this burden. See *Reynolds v. Reynolds*, 300

A.D.2d 645 (2d Dept.2002). Therefore, the application for counsel fees was denied without prejudice to renew upon a proper showing at or before trial.

Maintenance Pendente Lite - Domestic Relations Law § 236[B][5-a] - Award - Court Holds That Maintaining Status Quo (Pre-separation Standard of Living)Not a Basis for Maintenance Award in Case of this Magnitude.

In *Westreich v Westreich*, 2014 WL 3817585 (N.Y.Sup.), 2014 N.Y. Slip Op. 51170(U) the parties were married in 2001 and had two unemancipated boys. The action was commenced on May 14, 2013 and on October 8, 2013 the parties executed a custody agreement where it was agreed that the parties would share parenting time and residential custody of the Children on a 50/50 basis. In the Custody Agreement, the parties agreed that the "Father shall pendente lite pay all house and home related bills consistent with the pre-separation past practices of the parties ...". Supreme Court found that the parties, during the marriage, amassed a substantial portfolio of real estate holdings as well as other significant assets. The parties lifestyle was described by the court as one of extreme excess. There was no limitation to the parties' spending. The Husband sought an order directing the Wife to return \$2,053,976.35 removed from the parties joint account on April 12, 2013 to be utilized for the parties' living expenses and providing that those funds be placed back in the joint 237 Account and utilized solely by the Husband for the family's living expenses. Approximately one year prior to commencement, the Husband, at the Wife's request, transferred \$1 million dollars from the 237 Park Account into the Wife's name alone. 32 days before the commencement of the action the Wife removed more than \$2 million dollars from the 237 Park Account. The wife had over \$3 million dollars in her control and possession, leaving \$1.5 million dollars for the Husband to pay all of the family expenses from the 237 Park Account. The Husband claimed that the money has been exhausted which forced him to liquidate bonds purchased with 237 Park monies to fund the family expenses during this litigation. The Wife requested that the Husband maintain the status quo during the course of the litigation from his earnings. She further argued that the Husband was not providing sufficient spousal and child support to have the "lifestyle commensurate with their pre-separation lifestyle and that was forced to utilize her equitable distribution. The Wife alleged that the parties enjoyed an approximate \$2.8 million dollar yearly lifestyle, not inclusive of the costs paid through the Husband's businesses. The Wife acknowledged that their lavish lifestyle was mainly funded by liquidation events and not typical yearly earnings. The Husband's request for an order directing the Wife to return and deposit \$2,053,976.35 of the funds removed from the parties' 237 Park Account to be utilized solely by the Husband for family living expenses was denied. The Court calculated temporary maintenance based upon the statutory income cap using the payor's income of \$543,000.00 to arrive at \$162,900.00. The court considered the disparity in the parties income and the parties' pre-separation lifestyle, as well as the transfer of over \$2 million dollars made by the Wife from the parties' 237 Park Account. It stated that the money removed by the Wife from the 237 Park Account was an advance of the Wife's equitable distribution, regardless of the fact that the parties' both admitted that they used the funds in this account, derived from the liquidation event of the

sale of 237 Park Avenue, to fund their lifestyle. This was the reason why the Husband's motion seeking the return of the funds from the Wife was denied. The husband consented to pay a long list of expenses set forth in the courts decision on behalf of the wife and children, which cost approximately \$136,000 a month, in amounts consistent with prior practice, without prejudice and on a pendente lite basis, which the Court directed him to pay .

The court, cognizant of the fact that the parties lived a lifestyle most people could hardly fathom, pointed out that the wife argued that the status quo must be maintained during this litigation. It was this Court's belief that the legislative intent of making the status quo a factor in determining temporary maintenance was not meant for a case of this magnitude. It was this Court's belief that the status quo was meant to maintain the comforts of the lifestyle to which one has become accustomed; however, there must be a limit to such comforts. The court directed that the Husband provide the Wife with temporary maintenance of \$30,000.00 per month in direct spousal support. The Husband was ordered to pay the Wife's JP Morgan and American Express credit card in a timely manner, each month at \$10,000.00 each per month. In addition, the Husband was directed to provide the Wife, on the first of each month with an additional \$10,000.00. The Husband had been making all payments for all items for the Children. Since the Husband was making all payments for the Children, the Wife's request for child support was denied. The Husband was directed to pay and maintain all club memberships to which the parties were currently members.

August 1, 2014

Appellate Division, Second Department

Counsel Fees - Award - Improper to Direct Nonmonied Spouse, Pay a Substantial Portion of the Counsel Fees of the Monied Spouse.

Property Determination - Where a Party Fails to Trace Sources of Money Claimed to Be Separate Property, a Court May Treat it as Marital Property.

In Hymowitz v Hymowitz, --- N.Y.S.2d ----, 2014 WL 3445051 (N.Y.A.D. 2 Dept.), plaintiff and the defendant were married on April 10, 1988, and had two children, both over the age of 21. Following 20 years of marriage, the plaintiff commenced this action for a

divorce. The Appellate Division found that the transfer of a 1/3 interest in Weinstein & Holtzman, Inc., a family-owned hardware store, to the plaintiff from his father and uncle which occurred during the marriage was tantamount to a "gift from a party other than the spouse" and, thus, was the separate property of the plaintiff not subject to equitable distribution (Domestic Relations Law s 236[B][1][d][1]). However, it found that the Supreme Court should have awarded the defendant a 25% share of the appreciation in the value of the plaintiff's interest in Weinstein & Holtzman to take into account the defendant's limited involvement in the plaintiff's business, while not ignoring the direct and indirect contributions she made as the primary caretaker of the parties' children, as a homemaker, and as a social companion to the plaintiff, while foregoing her career.

The Appellate Division held that Supreme Court improperly classified the plaintiff's 1/3 interest in BSHPark Row, LLC, a holding company whose sole asset is a building located at 29 Park Row in lower Manhattan in which the hardware store was situated, as his separate property not subject to equitable distribution. 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. BSH was formed and the building was acquired during the marriage, and the plaintiff failed to meet his burden of tracing the use of claimed separate funds to establish that they were used for the purchase of his portion of the property's acquisition costs. Where, as here, a party fails to trace sources of money claimed to be separate property, a court may treat it as marital property. The Appellate Division held that Supreme Court should have awarded the defendant a 25% share of the plaintiff's interest in BSH.

The Appellate Division held that Supreme Court improvidently exercised its discretion in awarding the plaintiff a credit against the proceeds of the sale of the marital residence for 100% of the payments he made to reduce the principal balance of the mortgage during the divorce proceedings. The plaintiff was entitled to a credit of only 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.

The Appellate Division held that Supreme Court should have awarded the defendant a credit against the proceeds of the sale of the marital residence for the amount of money the plaintiff withdrew from the parties' home equity line of credit account to pay his attorney's fees and expert's fees. This effectively made the defendant, the nonmonied spouse, pay a substantial portion of the counsel fees of the monied spouse, the plaintiff, in violation of Domestic Relations Law § 237 and, therefore, was improper.

The parties received a tax refund for tax year 2008 in the amount of \$4,652, which was placed in escrow. The Appellate Division held that since the matrimonial action was commenced on October 27, 2008, 82.2% of the refund was marital property and that the

distribution should be 50% to each party. Therefore, the defendant was entitled to a credit in the sum of \$1,911.97.

The Appellate Division held that Supreme Court erred in failing to direct that the plaintiff contribute his pro rata share of the younger child's unreimbursed reasonable health care expenses (Domestic Relations Law § 240[1-b][c][5], and erred in refusing to award the defendant retroactive child support for the periods of time when the older child resided with her prior to the older child's emancipation and when the younger child resided with her. By statute, child support should be awarded retroactive to the date an application for such support was made, which, in this case, was the date upon which the defendant served her motion for pendente lite child support. It noted that in calculating the plaintiff's retroactive support obligation, the court should determine the amount of payments made by him on behalf of the defendant and children under the pendente lite order, which required him to pay the carrying charges for the marital residence. To the extent that these payments can appropriately be allocated to temporary child support rather than temporary maintenance, the plaintiff should be permitted to offset such payments against accrued arrears.

Counsel Fees - Award - Timeliness - under Domestic Relations Law §237, a Motion for an Award of Attorney's Fees must Be Made Prior to Final Judgment

In *Matter of Silver v Green*,--- N.Y.S.2d ----, 2014 WL 3450029 (N.Y.A.D. 2 Dept.), after a final order was rendered in connection with the father's petition to modify the visitation provisions of a so-ordered stipulation of settlement, the father moved for an award of an attorney's fee, mostly for services rendered after the proceeding for the modification of visitation had been determined. The mother cross-moved for an award of an attorney's fee for legal expenses that she incurred in opposing the petition seeking modification of visitation, as well as for legal services rendered after the proceeding had been determined. Family Court denied the father's motion, awarded the mother \$40,000 "as and for the fees attributed to the modification of visitation" proceeding, and otherwise denied the mother's cross motion. The Appellate Division observed that Domestic Relations Law § 237(b) provides, that applications for the award of fees and expenses may be made at any time or times prior to final judgment. Under Domestic Relations Law §237, a motion for an award of attorney's fees must be made prior to final judgment. Postjudgment applications for fees may only be granted for legal services and expenses incurred after rendition of the final judgment. (*Taylor v. Taylor*, 120 A.D.2d 355, 356; see *LeVigne v. LeVigne*, 220 A.D.2d 561). It held that the mother's cross motion for an award of an attorney's fee in connection with her opposition to the petition seeking modification of visitation should have been denied as untimely, since the cross motion was made after a final order of visitation had been entered in the modification proceeding. To the extent that the mother also sought an award of an attorney's fee for services rendered in connection with matters that postdated the issuance of the final order of visitation in the modification proceeding, the Family Court

did not improvidently deny that request. The father's motion for an award of an attorney's fee was properly denied, based on his failure to substantially comply with 22 NYCRR 1400.3 (Sherman v. Sherman, 34 AD3d 670, 671; Wagman v. Wagman, 8 AD3d 263).

Counsel Fees - Award - Although Plaintiff Wife's Income Was Higher than Defendants Income Judicial Hearing Officer Properly Awarded the Plaintiff Attorneys' Fees Where the Delays in Bringing the Action to Conclusion Were Directly Attributable to the Defendant.

In *Odermatt v Odermatt*,--- N.Y.S.2d ----, 2014 WL 3450168 (N.Y.A.D. 2 Dept.), under the parties 2010 agreement settling their divorce action, the parties waived a hearing on the plaintiff's prospective application for attorneys' fees. The plaintiff's attorney submitted an affirmation and invoices detailing the legal services provided to the plaintiff, and reflecting charges totaling \$57,479. The plaintiff's attorney noted in his affirmation that the plaintiff had paid her previous attorney the sum of \$5,420, raising her total legal fees to \$62,899. The plaintiff also submitted an affidavit alleging that the defendant's conduct had delayed the litigation and caused her to incur substantial fees, and requesting that she be awarded the sum of \$30,000, representing approximately one-half of the attorneys' fees she had expended in prosecuting the action. The defendant opposed the plaintiff's application for attorneys' fees, pointing out that her income was higher than his income, and alleging that it was her conduct that delayed the litigation. The Judicial Hearing Officer awarded the plaintiff attorneys' fees of \$62,899, the full sum expended, finding that the delays in bringing the action to conclusion were directly attributable to the defendant. The Appellate Division observed that an award of attorney's fees pursuant to Domestic Relations Law § 237(a) is controlled by the equities and circumstances of each particular case. In determining whether to award fees, the court should review the financial circumstances of the case, which may include the relative merit of the parties' positions and whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation. It held that although the plaintiff's income was higher than the defendant's, the Judicial Hearing Officer providently exercised his discretion in determining that she was entitled to attorneys' fees based on his finding that the defendant's conduct delayed the litigation. However, in light of the relative financial circumstances of the parties, the Judicial Hearing Officer should not have determined that the plaintiff was entitled to the full \$62,899 in legal fees she incurred, rather than the \$30,000 she requested. It modified the order appealed from, and the money judgment, by awarding the plaintiff the principal sum of \$20,000, representing the \$30,000 she requested minus a \$10,000 credit to which the parties stipulated the defendant was entitled.

Appellate Division, Third Department

Agreements - Construction - "Cohabits" - Appellate Division Rejects Argument That "Cohabits" Should Be Read to Mean Merely That the Wife Reside with Any Other Person for the Requisite Time Period, with No Showing of Any Sexual, Romantic or Economic Relationship Required

In *Vega v Papaleo*, --- N.Y.S.2d ----, 2014 WL 3360341 (N.Y.A.D. 3 Dept.), Plaintiff (wife) and defendant (husband) were divorced in 2012 pursuant to a judgment that incorporated a September 2008 memorandum of understanding. The MOU included a provision by which the husband would make maintenance payments, scheduled to terminate after a set period or upon certain occurrences, including the wife's remarriage or cohabitation with another individual. In October 2012, the husband moved to cease making these payments based upon the wife's alleged cohabitation with her mother and stepfather. Supreme Court denied the motion. The Appellate affirmed. It observed that the agreement provided for maintenance payments in a specified sum until, as pertinent here, "[the wife] cohabits with an individual for any period in excess of 75 days within any 6-month period of time." The agreement failed to provide any definition of the term "cohabits." The husband contended that this provision unambiguously stated the parties' intention, and that "cohabits" should be read in this context to mean merely that the wife reside with any other person for the requisite time period, with no showing of any sexual, romantic or economic relationship required. The Appellate Division held that Supreme Court properly rejected this argument, finding that the term could not be fairly read to encompass the husband's broad interpretation. It noted that the parties entered into this agreement following *Graev v. Graev* (11 NY3d 262 [2008]), in which the Court of Appeals carefully reviewed several potential definitions of the term "cohabitation." The Court held that neither case law nor dictionary usage provided an authoritative or plain meaning. However, while no single factor—such as residing at the same address, functioning as a single economic unit, or involvement in a romantic or sexual relationship, is determinative, the Court found that a "common element" in the various dictionary definitions is that they refer to people living together "in a relationship or manner resembling or suggestive of marriage". It found that there is no authoritative definition or customary usage of the term that could include residing with a parent. The husband's assertion that the phrase "with an individual" informs the term "cohabits" in such a manner as to omit a requirement of any showing of an intimate or romantic relationship was wholly contrary to the governing precedent, and unavailing.

Property Determination - Marital Property - Wife's Separate Property Became Marital Property Subject to Equitable Distribution upon Her Transfer of the Deed into the Parties' Joint Names. The Decision to Award a Separate Property Origination Credit in Such a Situation Is a Determination Left to the Sound Discretion of Supreme Court.

In *Myers v Myers*, --- N.Y.S.2d ----, 2014 WL 3360378 (N.Y.A.D. 3 Dept.), six years before the parties' marriage in June 2000, plaintiff (wife) became the sole owner of real

property, which would later become the parties' marital residence. At the time of marriage, the wife owned the property free and clear of any liens or encumbrances. In 2005, in an effort to consolidate debt, defendant (husband) and the wife jointly applied for a mortgage on the property. To satisfy the requirements of the mortgage lender, the husband's name had to appear on the deed to the residence. On March 31, 2005, the wife executed a deed conveying ownership of the residence from her alone to both her and the husband. A mortgage was issued jointly to the parties that same day. In December 2011, the wife commenced the action for divorce on the basis that the parties' marriage was irretrievably broken. The parties executed an interim agreement, as well as a subsequent stipulation and opting out agreement, resolving all issues but the distribution of the marital residence and the debt attached thereto, which had amounted to approximately \$160,000. After trial Supreme Court found that the marital residence and its accompanying debt should be equally divided between the parties. A judgment of divorce incorporated Supreme Court's findings. In denying the wife a separate property origination credit in the amount of \$165,000 for the estimated value of the marital residence at the time that she transferred it to herself and the husband jointly Supreme Court indicated that it was bound by the decision in *Campfield v. Campfield* (95 AD3d 1429 [2012]). Supreme Court referred to the portion of *Campfield* that differentiated between a credit for marital property that is "acqui[red]" from separate property, i.e., by using the proceeds of the sale of separate property to purchase marital property, and marital property that originates from the "transmut[ation]" of separate property, i.e., by transferring the deed of separately held property into joint names (id. at 1430).

The wife appealed arguing that this portion of *Campfield* was inconsistent with the general principles of equitable distribution law. The Appellate Division observed that unlike the appellant in *Campfield*, the wife here admitted that the property in question was marital. She agreed that the residence became marital property subject to equitable distribution upon her transfer of the deed into the parties' joint names in 2005. Therefore, the case was distinguishable from *Campfield*. As such, the court did not have to address the wife's argument that transfer of the deed was intended " 'solely for the purpose of convenience,' " a consideration that is relevant only in determining whether property is marital or separate in the first instance. However, the Appellate Division held that to the limited extent that *Campfield* may be read to limit a court's discretion to award a separate property credit to a spouse, like the wife, who transmutes separate property into marital property without changing the nature of the property itself, it should no longer be followed. As the court subsequently noted without reference to the way in which a marital asset was acquired, credits are often given for the value of the former separate property. It had also subsequently explained that the decision to award a separate property origination credit in such a situation is a determination left to the sound discretion of Supreme Court (see *Alecca v. Alecca*, 111 AD3d at 1128; *Murray v. Murray*, 101 AD3d at 1321). Therefore, the Court's own jurisprudence subsequent to *Campfield* indicated that such credit is not precluded as a matter of law when separate property has been transmuted into marital property.

Despite the foregoing, the Appellate Division was unpersuaded that the denial of the wife's request for a separate property origination credit constituted an abuse of discretion. Supreme Court found that the overall picture was of the parties engaging generally in a financial partnership, of which the marital residence, and the loans thereupon, was simply one agreed-upon portion. The funds received from the mortgage, as well as the subsequent refinancing and home equity loan, enabled the wife and the husband to consolidate their debts, go on numerous family vacations, make improvements to the marital residence and, generally, live a lifestyle that may have been above their means. Notably, the wife's individual debt was eliminated by the proceeds of a new, jointly-held debt which, in turn, was primarily paid from the husband's income for a number of years. Inasmuch as a separate property origination credit "is not strictly mandated since the property is no longer separate, but is part of the total marital property it could not say that Supreme Court improperly denied the wife a credit. If also found no error in Supreme Court's determination that the marital residence and its associated debt should be equally divided between the parties.

Appellate Division, Fourth Department

Judgments - Required Notice - Domestic Relations Law § 236(B)(7)(d) - Failure to Provide Required Notice Does Not Require Reversal.

In *Fridmann-Harkiewicz v. Harkiewicz*--- N.Y.S.2d ----, 2014 WL 3377271 (N.Y.A.D. 4 Dept.), the Appellate Division held that although defendant was correct that the court failed to include the required notice pursuant to Domestic Relations Law § 236(B)(7)(d) in the judgment, the court's failure does not require reversal (see *Mejia v. Mejia*, 106 A.D.3d 786, 789, 964 N.Y.S.2d 607). Rather, it modified by including that notice and added a provision pursuant to Domestic Relations Law §236(B)(7)(d) notifying the parties of their right to seek a modification of the child support.

July 16, 2014

Appellate Division, Second Department

Divorce - Consent - Divorce Properly Granted on Consent of the Parties, Based upon So-ordered Stipulation Entered into Prior to Trial and an Affidavit of the Plaintiff

In *Lewis v Lewis*, --- N.Y.S.2d ----, 2014 WL 2869065 (N.Y.A.D. 2 Dept.), the defendant appealed from a judgment which awarded plaintiff a divorce on the ground of

constructive abandonment, allocated the marital personal property and debt between the parties after directing the equitable distribution of marital personal property and debt, failed to equitably distribute the parties' real property, failed to award him maintenance, and directed him to pay 27% of the college costs of the parties' daughter.

The Appellate Division held that contrary to the plaintiff's contentions, the divorce was properly granted on the consent of the parties, based upon a so-ordered stipulation that had been entered into prior to trial and an affidavit of the plaintiff acknowledging that, for a period of at least one year prior to the commencement of this divorce action, the defendant willfully, unjustifiably, and continuously refused to engage in sexual relations with him despite his repeated requests.

It remitted the matter to the Supreme Court, for a new determination on the issue of the allocation of marital personal property and marital debt and a determination on the issue of the allocation of marital real property and for a new determination on the issue of maintenance.

It held that Supreme Court erred in directing defendant to pay college expenses for the parties' daughter, who was only 15 years old at the time of trial. While the court may direct a parent to contribute to a child's college education pursuant to Domestic Relations Law § 240(1-b)(c)(7), under the circumstances of this case, based upon the child's age, and the lack of evidence presented as to her interest in and possible choice of college, a directive compelling the plaintiff to pay for those expenses was premature and not supported by the evidence.

Family Offense Proceedings - Family Court Act § 262(a) - Right to Counsel - Order of Protection Reversed Where Father Denied Right to Counsel

In Matter of Cerquin v Visintin--- N.Y.S.2d ----, 2014 WL 2869415 (N.Y.A.D. 2 Dept.) the Appellate Division reversed an order of protection where the appellant was denied his right to counsel. The appellant was advised of his right to counsel, in accordance with Family Court Act § 262(a), at his first court appearance on August 27, 2012. However, on August 30, 2012, after the Family Court determined that the appellant was ineligible for the assignment of counsel, he was advised that he would have to represent himself. When the hearing commenced on March 12, 2013, the appellant requested the assistance of counsel to defend himself against the petitioner's "strong accusations." The Family Court ascertained the petitioner's weekly salary, and advised him that he was ineligible for the assignment of counsel. The Family Court then proceeded with the hearing without conducting an inquiry to determine whether the appellant wished to represent himself, advising the appellant of the risks of proceeding pro se, or informing him that he could request an adjournment in order to attempt to secure counsel. The record indicated that the appellant clearly did not wish to proceed without counsel, did not initially realize that he was being required to

represent himself, and did not have a basic understanding of court proceedings. Under these circumstances, the appellant was deprived of his statutory right to counsel.

Child Support - Downward Modification - Loss of Employment - Court Modifies Child Support Order but Denies Restitution Based upon Strong Public Policy

In *Matter of Jaffie v Wickline*, --- N.Y.S.2d ----, 2014 WL 2958438 (N.Y.A.D. 2 Dept.), the Appellate Division observed that in order to establish his entitlement to a downward modification of his child support obligation, the father had the burden of showing a substantial and unanticipated change in circumstances since the time the parties executed their stipulation of settlement in 2006 (Family Ct. Act § 451[2][a]; L. 2010, ch. 182, s 13). A parent seeking a downward modification based upon loss of employment must submit evidence demonstrating that the termination occurred through no fault of the parent and that the parent has diligently sought re-employment. Here, the father demonstrated that his loss of employment and obtainment of new employment at a lesser salary constituted a substantial and unanticipated 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 was supported by the evidence.

The Appellate Division held that in light of the circumstances of this case and the strong public policy against restitution or recoupment of support overpayments, the Family Court did not improvidently exercise its discretion in sustaining the mother's objection to the Support Magistrate's determination that the father was entitled to a credit against his child support arrears based on his prior voluntary overpayments and, thereupon, in effect, granting the mother's enforcement petition to the extent of directing the entry of a money judgment in favor of the mother and against him in the principal sum of \$8,950.

Appellate Division, Third Department

Custody - Award - Ineffective Assistance of Counsel Requires Reversal of Custody Order

In *Matter of William O. v Michele A.*, --- N.Y.S.2d ----, 2014 WL 2973418 (N.Y.A.D. 3 Dept.), Petitioner (father) and respondent Michele A. were the unmarried parents of three children (born in 2006, 2007 and 2009). While the father was incarcerated, custody of the children was awarded to the children's maternal grandparents, respondents John A. and Wanda A.. In anticipation of his release from prison, the father commenced a proceeding seeking custody of the youngest child. During subsequent appearances before Family Court, the court continued custody with the grandparents, but awarded the father

supervised visitation with all three children. Finally, after an appearance before Family Court in July 2012, the court determined, without holding a fact-finding hearing, that the father was an untreated sex offender and entered an order that modified the supervised visitation schedule, but conditioned any consideration of future custody modification petitions filed by the father on his completing sex offender treatment.

The Appellate Division agreed with the father that he had been denied the effective assistance of counsel. Family Court continued supervised visitation and denied the father's custody application, without holding a fact-finding hearing, based upon its belief that he was an untreated sex offender. This belief came from information provided to Family Court by the attorney for the children that was based on evidence outside of the record, the accuracy of which was challenged by the father, and with no evidence presented as to whether a lack of treatment would be detrimental to the children. The record demonstrated that Family Court improperly relied upon the attorney for the children as both an investigative arm of the court and as an advisor, referring to her as the court's "quarterback" and regularly deferring to her recommendations in reaching its determinations (see *Weiglhofer v. Weiglhofer*, 1 AD3d 786, 788 n [2003]). The failure of the father's counsel to object to this improper use of the attorney for the children or to request a fact-finding hearing regarding the issues of sex offender treatment and the best interests of the children rendered the representation less than meaningful. Accordingly, Family Court's order had to be reversed and the matter remitted to the Family Court for further proceedings.

July 1, 2014

Appellate Division, Second Department

Special Relief - Life Insurance - Not an Abuse of Discretion to Direct a Party to Obtain Life Insurance in Absence of Evidence at Trial That the Party Was Currently Uninsurable Due to a Pre-existing Medical Condition

In *Hainsworth v Hainsworth*, --- N.Y.S.2d ----, 2014 WL 2594812 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court properly considered the relevant factors, which included the long duration of the marriage, the disparity in the parties' incomes, the plaintiff's limited earning potential, the plaintiff's limited assets, the insignificant distributive award, and the parties' predivorce standard of living, and providently exercised its discretion in awarding the plaintiff maintenance of \$1,500 per month until the earlier of the plaintiff attaining the age of 62, her remarriage, or her death.

The Appellate Division observed 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. It held that Supreme Court did not improvidently exercise its discretion in imputing defendant's 2008 reported income to him for the purpose of determining his child support obligation, as that amount was reflective of his "past income" and "demonstrated earning potential".

In the absence of any evidence at trial that the defendant was currently uninsurable due to a pre-existing medical condition, the Supreme Court providently exercised its discretion in directing the defendant to maintain a life insurance policy to secure his maintenance and child support obligations. However, the judgment was modified to provide that the defendant's life insurance obligation shall terminate upon the termination of his maintenance and child support obligations.

Appellate Division, Fourth Department

Maintenance - Award - Durational - Although Plaintiff Did Not Submit Medical Evidence or Testimony Concerning Her Disability, Fact That the Social Security Administration Determined That She Was Disabled Coupled with Her Testimony Was Sufficient to Support Maintenance Determination

In Myers v Myers, --- N.Y.S.2d ----, 2014 WL 2619911 (N.Y.A.D. 4 Dept.) the Appellate Division rejected defendant's contention that Supreme Court abused its discretion in awarding maintenance for a 10-year period. As the court noted, there was a "vast discrepancy" in the incomes of the parties, with plaintiff's sole source of income consisting of Social Security Disability payments. During most of the 13-year marriage, plaintiff raised the parties' two children while defendant was the sole wage earner. The parties enjoyed a relatively comfortable standard of living during the marriage. In setting the duration of maintenance, the court determined that, even if plaintiff were able to find a job, she would never approach her pre-divorce standard of living, while defendant "clearly can." Plaintiff testified at trial that she was permanently disabled as a result of bilateral carpal tunnel syndrome and a severed nerve in her left hand. Although plaintiff did not submit medical evidence or testimony concerning her disability, the undisputed fact that the Social Security Administration determined that she was disabled as of 2000 and that she continued to receive SSD, coupled with her testimony, was sufficient to support the court's maintenance determination.

Fugitive Disentitlement Doctrine Applied to Family Court Application to Vacate Default and to Appeal from Denial of Motion

In Matter of Shehatou v Louka, --- N.Y.S.2d ----, 2014 WL 2620533 (N.Y.A.D. 4 Dept.), Family Court issued an order, entered upon respondent's default, in which it determined that respondent was in willful violation of a prior support order, and committing

respondent to six months of incarceration, and also issued a warrant for respondent's arrest. Respondent filed an application to vacate both orders. The court refused to sign the order to show cause seeking to vacate the orders and, in its "order of dismissal," determined that the fugitive disentitlement doctrine applied to respondent inasmuch as respondent, a California resident who was now the subject of an arrest warrant in this State, but who refused to return to this State, was attempting to "evade the law while simultaneously seeking its protection" (Matter of Skiff-Murray v. Murray, 305 A.D.2d 751) The Appellate Division affirmed. It held that the court properly determined that the fugitive disentitlement theory applied to his application and concluded that the fugitive disentitlement doctrine also applied to the appeal. By respondent's "default and absence, he was evading the very orders from which [he] seeks appellate relief and 'has willfully made [himself] unavailable to obey the mandate of the [court] in the event of an affirmance.'" It dismissed the appeal and granted leave to respondent to move to reinstate it on the condition that, within 60 days of service of a copy of the order of this Court with notice of entry, he posts an undertaking with the court in the amount of \$25,000, i.e., the amount of child support respondent owed at the time the court determined that he willfully violated the prior support order.

Child Support - Award - Calculation of Award - Error to Provide for Social Security Deduction on Full Amount of Imputed Income Which Was Higher than Social Security Wage Limit Allows

In *Belkhir v Amrane-Belkhir*,--- N.Y.S.2d ----, 2014 WL 2782129 (N.Y.A.D. 4 Dept.) the Appellate Division found that the court erred in two respects in the manner in which plaintiff's child support obligation was calculated. Pursuant to Domestic Relations Law § 240(1-b)(5)(vii)(H), "federal insurance contributions act (FICA) taxes actually paid" shall be deducted from income prior to determining the combined parental income. The social security part of FICA is paid by taxpayers up to a specific income cap, and the amount of that cap generally increases year to year. Here, the court erred in its FICA calculation for 2011 because, after the court had imputed income of \$140,000 to plaintiff for 2011, it calculated plaintiff's FICA deduction as if he would have paid the social security portion of FICA on the full amount of his imputed income, which was considerably higher than the social security wage limit in 2011. The Court also erred in deducting FICA from plaintiff's Canadian income before calculating child support given that those taxes were not paid on the income he earned in Canada. "Since FICA taxes should be deducted only from income upon which FICA taxes are actually paid' prior to applying the provisions of Domestic Relations Law § 240(1-b)(c) , the child support calculations based on plaintiff's Canadian income were erroneous. Plaintiff argues that deducting FICA from his Canadian income was appropriate because he paid taxes in Canada that are the equivalent of FICA. It modified by increasing the amount of plaintiff's child support obligation based on the court's FICA errors with respect to plaintiff's 2011 imputed income and the income he earned in Canada, in a sum to be determined upon remittal of the matter to Supreme Court for recalculation in accordance with our decision herein.

Supreme Court

Motion to Intervene -Cplr 1013 - Motion Denied Where Husband Judicially Estopped from Denying Ownership of Family Pizza Business

In *Zito v Zito*, 2014 WL 2776603 (N.Y.Sup.), 2014 N.Y. Slip Op. 50939(U) plaintiff commenced the action seeking a judgment of divorce on June 7, 2011. The parties were married on July 8, 2001 and had two children. During the marriage, the parties lived in a three-floor home that plaintiff purchased from his parents before the marriage; plaintiff vacated the premises in January 2013. Plaintiff worked at the family owned Pizzeria, the ownership of which was in issue. Defendant was a licensed pharmacist; she claimed that she has been a full time homemaker and caretaker for the children since they were born. The children attended private school and participate in piano lessons, art classes, Tae Kwon Do and soccer.

Smiling Pizzeria argued that it should be granted leave to intervene in this action pursuant to CPLR 1013, because there were common questions of law and fact, since it was seeking to establish that the business belongs to Santo Zito, the plaintiff's father, and was not subject to equitable distribution. Defendant argued that plaintiff always referred to Smiling Pizzeria as "his" since she first met him in 1994. Further, he had complete control over the operation of the business, including but not limited to hiring and firing employees, doing the payroll, signing documents, writing checks and ordering products. The wife averred that her father-in-law, Santo Zito, was involved in the business, but only "on a semi-retired, part-time basis." Defendant asserted that plaintiff himself swore to his ownership of Smiling Pizzeria in his two (2) affidavits of net worth dated September 16, 2010 and November 20, 2012. In addition, it was uncontroverted that he testified under oath at his deposition on June 10, 2013, that he was an owner of the business. Plaintiff also consented to have Brisbane do a forensic evaluation of the business and he himself paid the retainer, as ordered. Defendant also relied upon a stock certificate dated April 1, 1999, which indicated that plaintiff was the owner of 100 shares of the stock of Smiling Pizzeria, along with other documents that established that he was elected the Director, Vice-President and Secretary and that Santo Zito was resigning; she asserted that these documents were provided to her attorney by plaintiff's former counsel. Defendant further contended that New York Life issued a life insurance policy insuring plaintiff, in the amount of \$500,000, with Smiling Pizzeria as the beneficiary; she argued that this policy supported her assertion that plaintiff was an owner of the business. Plaintiff alleged that Smiling Pizzeria was an S corporation owned by his father. He further argued that this was corroborated by the testimony of the accountant for Smiling Pizzeria wherein he testified at a deposition that plaintiff's father received the K-1 tax forms regarding the corporation and that no shares of the business were ever passed to plaintiff.

The Supreme Court held that in view of plaintiff's continuing representation that he owned a 50% interest in Smiling Pizzeria in the two (2) affidavits of net worth that he prepared with counsel; in his deposition testimony; in his conduct in agreeing that Brisbane would value his interest in the business and in paying the appraiser; and in

supplying his former attorneys with documents that evidence his ownership interest, which documents were provided to defendant in discovery, plaintiff would not now be permitted to change his position and argue that Smiling Pizzeria was solely owned by his father. The court held that such conduct was not permitted pursuant to the doctrine of judicial estoppel. Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding" (Nestor v. Britt, 270 A.D.2d 192, 193, 707 N.Y.S.2d 11 [1 Dept., 2000], quoting Maas v. Cornell Univ., 253 A.D.2d 1, 5, 683 N.Y.S.2d 634 [3 Dept., 1999], affd 94 N.Y.2d 87, 699 N.Y.S.2d 716 [1999]).

Nevertheless, the court denied the motion to intervene. Since the court could consider the dollar amount of plaintiff's interest in Smiling Pizzeria, and was not required to make an award that gives defendant an ownership interest in the business, Smiling Pizzeria had no interests to protect that would warrant an order permitting it to intervene in this matrimonial action.

June 16, 2014

Appellate Division, Second Department

Appeals - Right to Appeal - No Appeal Lies from Dicta

In *Waldorf v Waldorf*, --- N.Y.S.2d ----, 2014 WL 2198799 (N.Y.A.D. 2 Dept.), the Appellate Division held that the statement challenged by the defendant in the order appealed from, that the plaintiff "should be given an opportunity to rebut the presumption that [his] separate asset[s] transmuted into marital property" upon being deposited into the parties' joint accounts, is dicta. It dismissed the appeal, as no appeal lies from dicta.

Child Support - Award - Income - Failure to Make FICA and Medicare Deductions Not Error Where Child Support Obligation Based Entirely on the "Statutory Cap" of \$130,000

In *Dochter v Tochter*, --- N.Y.S.2d ----, 2014 WL 2504576 (N.Y.A.D. 2 Dept.)

the Appellate Division held that Supreme Court providently exercised its discretion in awarding the plaintiff durational maintenance of \$5,000 per month until the parties' younger son graduates from high school in June 2014 and the marital residence is to be sold, and \$6,500 thereafter, for a total period of 83 ½ months, or approximately seven years. This award afforded the plaintiff an opportunity to become self-supporting, after having been the stay-at-home parent for approximately 15 years of the marriage.. Although the Supreme Court failed to make the appropriate FICA and Medicare deductions, as required by Domestic Relations Law § 240(1-b)(b)(5)(vii)(H), modification of the child support award was not warranted in view of the court's calculation of the defendant's child support obligation based entirely on the "statutory cap" of \$130,000, and not on his total gross income as imputed by the court.

Child Support - Award - Deductions - Where Supreme Court Did Not Apply CSSA in Fixing Pendente Lite Child Support, There Is No Requirement That the Court Deduct the Amount Awarded for Carrying Charges Before Determining the Appropriate Amount of Child Support.

In Margolin v Margolin, --- N.Y.S.2d ----, 2014 WL 2198439 (N.Y.A.D. 2 Dept.), the plaintiff contend on appeal that the Supreme Court erred in directing him to pay both child support and the carrying charges on the marital residence because this resulted in a double shelter allowance. The Appellate Division found plaintiff's argument without merit. Since the Supreme Court did not apply the Child Support Standards Act in fixing pendente lite child support, there is no requirement that the court deduct the amount awarded for carrying charges before determining the appropriate amount of child support.

Agreements - Equitable Distribution - Property Distribution - QDRO and Retirement Benefits Cases - Where DRO Inconsistent with the Provisions of a Stipulation or Judgment Courts Possess Authority to Amend the DRO to Accurately Reflect Provisions of the Stipulation Pertaining Pension Benefits

In Mondshein v Mondshien, --- N.Y.S.2d ----, 2014 WL 2198460 (N.Y.A.D. 2 Dept.), the Appellate Division observed that where a domestic relations order is inconsistent with the provisions of a stipulation or judgment of divorce, courts possess the authority to amend the domestic relations order to accurately reflect the provisions of the stipulation pertaining to the pension benefits. A proper domestic relations order obtained pursuant to a stipulation of settlement can convey only those rights to which the parties stipulated as a basis for the judgment. Pension benefits to the extent that they are earned or acquired before marriage or after commencement of a matrimonial action, constitute marital property. It found that the plain language of the stipulation of settlement governing the defendant's pension stated, in effect, that the plaintiff was entitled to receive 50% of the defendant's "accrued benefits," multiplied by a fraction, which the parties did not dispute was 11.92/14.30, and which represented the benefits the

defendant earned during the marriage. However, the subject domestic relations order directed that the plaintiff was to receive 50% of that same fraction of the defendant's "maximum accrued benefits," without any reference to a limitation based on the benefits which accrued to the defendant during the marriage. Thus, Supreme Court erred in denying the defendant's motion to conform the domestic relations order to the stipulation of settlement.

Child Custody - Award - Jurisdiction - Domestic Relations Law §76 - Denial By Dominican Republic Court of Father's Hague Convention Petition for a Return of Child to New York Did Not Preempt New York Custody Proceeding

In *Matter of Katz v Katz*, --- N.Y.S.2d ----, 2014 WL 2198516 (N.Y.A.D. 2 Dept.) the father filed a petition for custody in the Family Court alleging that, on October 2, 2011, the mother took the parties' child, who had been residing in the Bronx, to the Dominican Republic without his permission. The Family Court held the matter in abeyance pending a determination in the Dominican Republic with regard to the father's application there for a return of the child pursuant to the Convention on the Civil Aspects of International Child Abduction. On October 5, 2012, the Civil Chamber of the Court of Children and Adolescents of the Judicial District of Santo Domingo rejected the father's request for a return of the child, and directed that the child remain in the company of the mother in the Dominican Republic, finding that if the child were returned to the United States she would be exposed to a violation of her fundamental rights due to issues of domestic violence. Family Court dismissed the father's petition for custody, concluding that it was bound to do so pursuant to the order issued by the court in the Dominican Republic.

The Appellate Division reversed. It observed that the Uniform Child Custody Jurisdiction and Enforcement Act (Domestic Relations Law art 5-A) governs a New York State court's jurisdiction in international child custody matters. Domestic Relations Law § 76, which establishes initial child custody jurisdiction, provides, *inter alia*, that a court of this State has jurisdiction to make an initial child custody determination if this State is the home state of the child on the date of the commencement of the proceeding (Domestic Relations Law §76[a]). "Home state" is defined 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 (Domestic Relations Law § 75-a[7]). Pursuant to Domestic Relations Law § 75-d[1], a "court of this state shall treat a foreign country as if it were a state of the United States". The Convention provides that a child abducted in violation of rights of custody must be returned to his or her country of habitual residence, unless certain exceptions apply. A decision under the Convention is not a determination on the merits of any custody issue, but leaves custodial decisions to the courts of the country of habitual residence. It was undisputed that the United States was the child's country of habitual residence, and that, at the time the petition was filed, New York was the child's "home state." Thus, the Family Court had jurisdiction to determine the father's petition for custody. Moreover, the denial, by the court in the Dominican Republic, of the father's application for a return of the child pursuant to the Convention, did not preempt his

custody proceeding (see *In re T.L.B.*, 272 P3d 1148 [Colo App]). Accordingly, it held that the Family Court erred in dismissing the father's petition.

Child Custody - Award - Jurisdiction - Domestic Relations Law §76-f(3) - Inconvenient Forum - Upon Finding New York Is Inconvenient Forum Court Must Stay Proceedings on Condition That Custody Proceeding Be Commenced in More Convenient Forum

In Matter of McCarthy v. Brittingham-Bank, --- N.Y.S.2d ----, 2014 WL 2198533 (N.Y.A.D. 2 Dept.) Family Court, upon finding that the State of North Carolina was the more appropriate forum to determine any custody and visitation matters, dismissed the petition. The Appellate Division reversed. It agreed with the Family Court that North Carolina was the more appropriate and convenient forum. The child had been living in North Carolina since at least October 2012, and any evidence as to his care, well-being, and personal relationships was more readily available in North Carolina. It noted that Domestic Relations Law § 76-f(3) specifies that "[i]f a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state." It held that Family Court erred in dismissing the petition. The petition was reinstated, and the matter was remitted to the Family Court, for further proceedings pursuant to Domestic Relations Law §76-f(3), including entry of an order staying all proceedings on condition that a child custody proceeding be promptly commenced in North Carolina.

Appeals - Failure to Preserve Argument for Review Results in Affirmance Without Review

In Matter of Bray v Bray, --- N.Y.S.2d ----, 2014 WL 2516662 (N.Y.A.D. 3 Dept.), a child support proceeding, the father filed an objection with Family Court, specifically contending that the Support Magistrate erred in imputing \$100,000 income to the father. Family Court denied the objection. The father appealed, arguing that the court erred in basing the child support award on the children's needs, as the record contained sufficient evidence of his income. The Appellate Division affirmed without addressing the merits of the father's appeal. It held that the father did not preserve this argument for review, as he did not include it as a specific objection to Family Court from the Support Magistrate's findings.

Appeals - Appellate Division Considers Appeal Despite Defects in Notice -Although Appeal Does Not Lie from a Support Magistrate's Order Notice of Appeal Treated as Validly Appealing from Family Court's Order Dismissing Objections - Error to Dismiss Objections for Lack of Signature Without Giving Opportunity to Correct Error.

In Matter of Fifield v Whiting,--- N.Y.S.2d ----, 2014 WL 2516699 (N.Y.A.D. 3 Dept.), under the parties' custody and child support agreement, which was later incorporated into their judgment of divorce, respondent (father) was required to pay, among other things, 50% of the child-care expenses incurred by petitioner (mother) that were related to her education or employment. The mother filed a petition alleging that the father violated the child support agreement by failing to pay for child-care expenses. Following a hearing, the Support Magistrate required that he pay \$3,300 plus interest for overdue child-care expenses, and required that he pay the mother's counsel fees. In an amended order, the Support Magistrate specified the exact amount of counsel fees. Before the amended order was entered, the father's counsel filed a notice of appeal from the Support Magistrate's original order. The father's counsel filed written objections to the Support Magistrate's original order and the father, who was dissatisfied with his representation, filed his own objections. By order entered March 4, 2013, Family Court dismissed the objections filed by the father's counsel, because counsel failed to file proof of service with the court. The court dismissed the father's pro se objections, because they were not signed by counsel. The father did not file a notice of appeal from that order.

The Appellate Division considered the father's appeal despite the defects in his notice of appeal. Although no appeal lies from an order that has been amended-because the amended order supercedes the original order-dismissal of the appeal was unnecessary where the amendment is immaterial to the appeal. It ignored that defect here, because the order was only amended to include the specific amount of counsel fees and that aspect of the order was not at issue on appeal (CPLR 5520[c]). More problematic was that an appeal does not lie from a Support Magistrate's order; the proper procedure is to file objections and then, if necessary, appeal from Family Court's order ruling on the objections (Family Ct Act § 439[e]). This Court indicated that it has the discretion to treat a notice of appeal as valid despite the notice being premature or containing an inaccurate description of the order being appealed (CPLR 5520[c]; see CPLR 5512 [permitting court to deem appeal taken from proper order if timely appeal is taken from something other than an appealable paper, no prejudice results and the proper paper is furnished to the appellate court]). Under the circumstances here, and inasmuch as the errors in filing an inaccurate notice of appeal were attributable to the father's counsel, it treated the notice of appeal as validly appealing from Family Court's order dismissing the objections.

It held that Family Court did not abuse its discretion in dismissing the objections filed by the father's counsel. While the court had discretion to overlook counsel's failure to timely file proof of service of objections on the opposing party-despite such filing being required by statute (Family Ct Act § 439[e])- it could not find it to be an abuse of discretion for a court to demand that a party adhere to the statutory requirements. On the other hand, the court improperly dismissed the father's pro se objections. The court apparently relied upon 22 NYCRR 130-1.1a, which requires every paper served on a party or filed with the court to be signed by an attorney or by the pro se party (see 22 NYCRR 130-1.1a [a]). The rule requires the court to "strike any unsigned paper if the omission of the signature is not corrected promptly after being called to the attention of the attorney or party" (22 NYCRR 130-1.1a [a]). Because the record did not indicate that Family Court gave the father or his counsel an opportunity to correct the error through the simple addition of a signature, the

court should not have dismissed the objections on this ground. As Family Court dismissed the objections on procedural grounds and never reviewed the merits, it remitted to allow the court to conduct such a review.

Supreme Court

Marriage - Validity - Supreme Court holds that Marriage Void Where Contracted is Void in New York

In *Ponorovskaya v. Stecklow*, --- N.Y.S.2d ----, 2014 WL 2463042 (N.Y.Sup.), the couple had a wedding ceremony on a Mexican resort's beach. The ceremony was performed under a canopy. Certain Hebrew prayers were recited, vows were exchanged, and there was a glass-breaking ritual, as is customary at Jewish weddings. The ceremony was not performed by a rabbi, but was conducted by defendant's cousin, Dr. Keith Arbeitman, a dentist who lived in New York. In 2003, in order to perform a marriage for friends, he became an ordained minister of the Universal Life Church. Defendant argued that the Mexican wedding was purely symbolic and without any legal effect. He offered evidence that the parties filled out forms at the resort indicating it was a symbolic marriage. He moved to dismiss plaintiff's divorce action on the ground that the complaint failed to state a cause of action.

The Supreme Court observed that the wedding ceremony did not comply with the dictates of the law of Mexico. The Civil Code of the State of Quintana Roo, at section 769(I), states: "When the marriage is not celebrated before an officer of the Civil Registry it is an absolute nullity." Defendant, relying on principles of comity, contended that since the marriage was not valid in Mexico, it is not valid in New York. Plaintiff argued that Section 25 of the New York State Domestic Relations Law nevertheless requires this court to recognize their Mexican wedding ceremony as having created a valid marriage. Section 25 states, in relevant part: "Nothing in this article contained shall be construed to render void by reason of a failure to procure a marriage license any marriage solemnized between persons of full age." According to plaintiff, in light of this section the parties need not have obtained a marriage license and need not have complied in any respect with the law of the jurisdiction where the wedding took place; so long as the marriage was solemnized in accordance with the DRL, the marriage is valid.

Supreme Court held that DRL §25 is not meant to apply to a marriage ceremony performed outside of New York, even when such a ceremony does not create a valid marriage under local law. New York has long recognized that, barring public policy concerns, the validity of a marriage is determined by the laws of the state or country in which it was performed (*Matter of May*, 305 N.Y. 486 [1953]; *Moore v. Hegeman*, 92 N.Y. 521 [1883]; *Thorp v. Thorp*, 90 N.Y. 602 [1882]; *Van Voorhis v. Brintnall*, 86 N.Y. 18 [1881]). Thus, a marriage which is valid under the law of the state or country in which it is contracted will generally be recognized as valid. Conversely, if a marriage is invalid

under the law of the place where contracted, it will generally be invalid wherever the question of its validity may arise. Thus, by applying the general rule to the facts presented, the purported marriage between the parties, a marriage which was "an absolute nullity" under Mexican law, is likewise invalid under New York law. The Court distinguished a decision from the Appellate Division, Second Department, in *Matter of Farraj*, 72 A.D.3d 1082, 900 N.Y.S.2d 340 (2d Dept, 2010) which involved an appeal from a decision of the County Surrogate's Court in a proceeding for a compulsory accounting in which the validity of the petitioner's marital status to the decedent was at issue (*Matter of Farraj*, 23 Misc.3d 1109(A) [Surr Ct, Kings County 2009]). It found no basis to apply either the holding in *Farraj* or Restatement of Conflicts section 283 to circumvent the general rule of comity. Accordingly, the validity of their marriage had to be determined by applicable Mexican law and not by DRL §25 or any other provision of New York law. Given these findings it is not of great moment whether Dr. Arbeitman was legally entitled under New York law to solemnize the marriage. All that mattered was that he was not an officer of the Civil Registry, the only officiant permitted to legally marry anybody in Quintana Roo, Mexico.

June 1, 2014

Appellate Division, First Department

Equitable Distribution - Factors Considered - (11) the Tax Consequences to Each Party; tax Liability Should Be Borne in the Same Proportion as Each Party's Share of the Asset. Good Cause Existed to Deny That Part of Plaintiff's Motion Seeking a Money Judgment for Arrears.

In *Theophilova v. Dentchev*, --- N.Y.S.2d ----, 2014 WL 1924157 (N.Y.A.D. 1 Dept.), the parties judgment of divorce ordered defendant former to pay plaintiff former wife an enhanced earning capacity award of \$653,000 over a period of five years without interest, with the first payment of \$130,600 due within 30 days of entry of the judgment; to pay plaintiff her equitable share of other marital assets, as well as \$22,616 in child support arrears; and directed the parties to cooperate in equally dividing all cash and securities contained in the parties' jointly-held Ameriprise brokerage account. In November plaintiff moved, pursuant to Domestic Relations Law § 244 , for a money judgment on the ground that defendant had failed to pay certain amounts required by the divorce judgment. Defendant contended that he could not pay the amounts due unless the Ameriprise account was liquidated and that plaintiff had failed to cooperate in dividing the account, and cross moved for an order directing plaintiff to sign the forms necessary to effect the division. The court orally denied plaintiff's motion for a money judgment, and made an order which directed Ameriprise to equally divide the cash and securities in the joint

brokerage account into two separate accounts, one in plaintiff's sole name and the other in defendant's sole name. In a second order, the court directed defendant, upon the division of the joint account, to liquidate securities in his separate account sufficient to pay plaintiff the arrears. The second order directed the parties to share equally the capital gains tax assessed on the \$339,035.89, and did not direct payment of any postjudgment interest.

The Appellate Division modified the second order to provide that defendant was solely responsible for the capital gains tax arising from the liquidation of the securities in his separate account. Upon the division of the joint account, each party will have a separate account containing half of the assets in the former joint account. Thus, each party should be responsible for payment of capital gains tax with respect to his or her sole account (see *Teitler v. Teitler*, 156 A.D.2d 314, 316 [1st Dept 1989], appeal dismissed 75 N.Y.2d 963 [1990] [tax liability should be borne in the same proportion as each party's share of the asset]). If and when plaintiff liquidates the securities in her separate account, she must bear any resulting tax liability herself.

The Appellate Division held that the motion court should have granted that part of plaintiff's motion seeking a money judgment for the \$22,616 in child support arrears. Domestic Relations Law §244 mandates that [upon a default in paying] the court shall make an order directing the entry of judgment for the amount of arrears of child support, with no exception". Because the record did not reflect that defendant's default in paying the child support arrears was willful, an award of interest from the date payment was due was not warranted. In light of the parties' attempt to enter a stipulation as to the division of the Ameriprise account, good cause existed to deny that part of plaintiff's motion seeking a money judgment for the remaining sums.

Appellate Division, Second Department

Equitable Distribution - Marital Residence - Exclusive Occupancy - Exclusive possession of the marital residence is generally granted to the custodial parent. need of the custodial parent to occupy the marital residence must be weighed against the financial need of the parties.

In *McCoy v McCoy*,--- N.Y.S.2d ----, 2014 WL 1910486 (N.Y.A.D. 2 Dept.), the parties were married in 2002, and had two children. The Appellate Division found that Supreme Court did not err in failing to award the mother arrears for pendente lite child support in the judgment of divorce. It observed that a party to a matrimonial action may make an application for a judgment directing payment of child support arrears at any time prior to or subsequent to the entry of a judgment of divorce. However, the application must be made "upon such notice to the spouse or other person as the court may direct" (Domestic Relations Law § 244). Plaintiff's application was not made in accordance with that requirement. Accordingly, the application was not proper.

The Appellate Division held that the court should have awarded the plaintiff exclusive possession of the former marital residence until the parties' younger child attains the age of 18 or is otherwise emancipated. Domestic Relations Law § 236(B)(5)(f) provides that the court may, in its discretion, make an order regarding the use and occupancy of the marital residence "without regard to the form of ownership of such property. Exclusive possession of the marital residence is generally granted to the custodial parent. In determining whether the custodial parent should be granted exclusive occupancy of the marital home, the trial court should consider, inter alia, the needs of the children, whether the noncustodial parent is in need of the proceeds from the sale of that home, whether comparable housing is available to the custodial parent in the same area at a lower cost, and whether the parties are financially capable of maintaining the residence. As one factor, the "need of the custodial parent to occupy the marital residence must be weighed against the financial need of the parties. In light of factors including the educational and other needs of the parties' two children and the parties' financial circumstances, the Supreme Court improvidently exercised its discretion in directing that the former marital residence be listed for immediate sale, or that the plaintiff could "buy out" the defendant's interest. It directed that during the period of exclusive occupancy of the residence, the plaintiff must pay the carrying charges for the home, including the first mortgage payments, property taxes, utilities, and upkeep costs.

Equitable Distribution - Property Distribution - Marital Debt - General Rule Is That Financial Obligations Incurred During Marriage Which Are Not Solely Responsibility of One Party Should Be Shared Equally by the Parties. However, a party is entitled to a credit for payments made to satisfy the other spouse's legal obligations.

In *McKay v Groesbeck*, --- N.Y.S.2d ----, 2014 WL 1910489 (N.Y.A.D. 2 Dept.), the Appellate Division pointed out that a party's maintenance and child support obligations are retroactive to the date of the application therefor, and except as otherwise provided, any retroactive amount due shall be paid, as the court directs, taking into account any amount of temporary maintenance or child support which has been paid (DRL § 236[B][6][a]; DRL § 236[B][7][a]). Generally, voluntary payments made by a parent for the benefit of his or her children may not be credited against amounts due pursuant to a judgment of divorce. A party is not entitled to a credit for payments made to satisfy that party's own legal obligations that were not made pursuant to a pendente lite order of support. In this case, there was a pendente lite order for temporary child support of \$1,000 per month issued in 2006, but no payments were made pursuant to that order. However, a party is entitled to a credit for payments made to satisfy the other spouse's legal obligations. It held that the defendant should have received a credit towards arrears for any payments he made toward the plaintiff's car payments and insurance, and for one half of the payments he made toward the mortgage and carrying charges on the marital home, as those payments were made to satisfy the plaintiff's legal obligations.

Appeals - Inadequate Record on Appeal - Effect upon Determination - Where Appendix Omitted Trial Transcripts, Appeal Dismissed Where Omission Inhibited Court's Ability to Render an Informed Decision Merits of the Appeal.

In *Matter of Kessler v Kessler*, --- N.Y.S.2d ----, 2014 WL 1924144 (N.Y.A.D. 2 Dept.), a support proceeding pursuant to Family Court Act article 4, the mother appeals from an order of the Family Court which denied her objections to a support order. The Appellate Division dismissed the appeal. It observed that it is the obligation of the appellant to assemble a proper record on appeal. The failure to provide necessary transcripts inhibited the Court's ability to render an informed decision on the merits of the appeal. The record submitted by the appellant to this Court included a transcript from a proceeding conducted on September 14, 2011, which included no testimony or evidence but, rather, only court colloquy. The appellant failed to include the transcript from the multiday fact-finding hearing held in connection with her petition. Since the papers provided were patently insufficient for the purpose of reviewing the issues that the appellant raised, the appeal was dismissed.

Supreme Court

Court May Meet with Children to Confirm That Attorney for Children Was Adequately Reporting Their Wishes. Supreme Court Distinguishes Between "Lincoln Hearing" and "In Camera Interview" with Child.

In *TEG v GTG*, --- N.Y.S.2d ----, 2014 WL 2016587 (N.Y.Sup.) plaintiff sought an order recusing the court from presiding over the matter because the court met in camera with the couple's children before trial to confirm whether the Attorney for the Children was accurately reporting their wishes. The plaintiff wife also sought a copy of the transcript of the in camera interview. The recusal motion was denied.

Supreme Court noted that although it repeatedly referred to the confidential closed-door interview with the two sons as a "Lincoln hearing." *Matter of Lincoln v. Lincoln*, 24 N.Y.2d 270, 273 (1969), its description of the confidential in camera meeting with two children in a contested custody matter, prior to trial, as a "Lincoln hearing" was incorrect. In *Matter of Rush v. Roscoe*, 99 AD3d 1053 (3rd Dept.2012) the court noted that there was confusion over whether an in camera interview with a child, conducted well before a trial, was a Lincoln hearing. The court held it was not a Lincoln hearing but, instead a permissive in camera interview with the child. 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 Spencer v. Spencer*, 85 AD3d 1244 (3rd Dept.2011) (a true Lincoln hearing is held after, or during, a

fact-finding hearing and adding there is no authority or legitimate purpose for courts to conduct such interviews in place of fact-finding hearings).The court stated that an in camera hearing is, by its terms, a conversation with the children in which they are questioned by the court and not subject to cross-examination by either counsel. The parents' attorneys do not attend: only the children's attorney attends.

The Court observed that the lesson from these cases is simple: the court may meet in camera with a child, in advance of a hearing, but the court, in deciding any question involving the children must hold a fact-finding hearing and thereafter, seek to corroborate any trial testimony by examining the children in a Lincoln hearing setting. In addition, as further case law suggests, the court should confer with the children if either counsel suggests-as occurred in this case-that the children's court-appointed attorney may not be accurately advocating for the children's preference in both temporary and permanent orders involving residence and visitation. *Matter of Jessica B. v. Robert B.*, 104 AD3d 1077 (3rd Dept.2013) (noting that an in camera interview was justified because there was strong support for the claim that the child's wishes were not in fact accurately or adequately conveyed by her trial counsel).

The Court held that its in camera meeting with the children did not violate any precepts of the Lincoln hearing doctrine or any other rule or statute and simply exercised its discretion to meet with the children to confirm their then-existing preferences in this contested custody matter. The request to release the transcript of the discussion with the children was denied. Appellate courts have cautioned trial judges not to divulge comments made during in camera interviews with children in custody proceedings and urged courts to protect the children's right to confidentiality by avoiding disclosure. *Matter of Spencer v. Spencer*, 85 AD3d 1244 (3rd Dept.2011); *Verry v. Verry*, 63 AD3d 1228 (3rd Dept.2009) (what transpires at a Lincoln hearing as a general rule is confidential and "the child's right to confidentiality should remain paramount absent a direction to the contrary"); *Matter of Carter v. Work*, 100 AD3d 1557 (4th Dept.2012) (we agree with the AFC that the court improperly disclosed the child's statement at the Lincoln hearing).

Counsel Fees - Award - Domestic Relations Law §237 - Spouses Conduct in Litigation - Concept That Defendant Should Be Denied Counsel Fees to Prevent Litigation Is Inapposite to Domestic Relations Law §237

In *Gutherz v. Gutherz*, 2014 WL 2016592 (N.Y.Sup.), 2014 N.Y. Slip Op. 50768(U) Defendant sought an order setting aside the parties Prenuptial Agreement. Supreme Court found that defendant failed to raise an issue of fact with regard to whether the Prenuptial Agreement should be invalidated on any ground. Plaintiff's cross motion seeking a judgment declaring the Prenuptial Agreement to be valid and enforcing its terms was granted. Defendant sought counsel fees pendente lite. Plaintiff argued that counsel fees may not be awarded in an action seeking to rescind the terms of a prenuptial agreement. The Court found that defendant's application included fees for legal work undertaken in her attempt to set aside the Prenuptial Agreement, work for which she could recover fees

from plaintiff. Further, the court was not provided with billing information that was sufficient to determine the amount of fees incurred with regard to this or any other issue; although defendant annexed a copy of her retainer agreement to her moving papers, no billing statements were provided. Accordingly, defendant was not entitled to an award of interim attorneys' fees, since her application was not in compliance with controlling court rules. Moreover, in the absence of any billing information, the court was unable to determine the reasonableness of the fees incurred. Accordingly, defendant's motion for an award of pendente lite attorneys' fees was denied with leave to renew upon papers addressing the above issues.

The Court noted that plaintiff's position that the defendant should not be granted legal fees because he believed that she would abuse the litigation process by filing baseless motions was rejected. The court stated that it would not punish defendant for not settling the matter; "she has her right to a day in court (citing *Comstock v. Comstock*, 1 AD3d 307, 766 N.Y.S.2d 220 [2 Dept.,2003])["... an award of an attorney's fee is designed to redress the economic disparity between spouses. It is not intended to address a party's decision to proceed to trial rather than agree to a settlement (see *O'Shea v. O'Shea*, 93 N.Y.2d 187 (1999)"]. While defendant certainly would be held accountable if she failed to litigate properly or abuses the process the concept that defendant should not be awarded counsel fees to prevent litigation is inapposite to Domestic Relations Law §237" and was rejected.

Authors Comment:

The Court of Appeals has held that a mere request for a hearing or trial should not carry with it a label of intransigence. An award of an attorney's fee is designed to redress the economic disparity between the spouses. It is not intended to address a party's decision to proceed to trial rather than agree to a settlement. Although the relative merit of the parties positions and a spouses conduct in the litigation are among the factors to be considered by the court in determining a counsel fee application, the financial circumstances of both parties is the primary consideration.

In *DeCabrera v. Cabrera-Rosete*, 70 N.Y.2d 879, 881, 518 N.E.2d 1168 (1987) the Court of Appeals held that "...in 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."

In *O'Shea v O'Shea*, 93 NY2d 187 [1999].., the Court of Appeals reversed an order of the Appellate Division which vacated, as a matter of law, a counsel fee award for the legal services rendered to obtain an award of counsel fees, and reinstated the award. The Court of Appeals held that "... courts have the discretion, in appropriate cases, to grant such awards, based on criteria that include the circumstances of the parties and the reasonableness of their positions. It further held that "the court had discretion to grant counsel fees to the wife for legal services in connection with the hearing to determine the amount of the fee award. This is not to say that awards for legal services for fee hearings should be routinely expected or freely granted any more than those for pre-action services.

Again, it is a matter of discretion, 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 litigationBecause a party is entitled to resist the opponent's fee application and has a right to a hearing ... a mere request for a hearing should not carry with it a label of intransigence. It is for the court to make such distinctions. Here Supreme Court acted as it did after concluding that the husband--the considerably more affluent spouse--was to blame for protracting the case." In Comstock v. Comstock, 1 A.D.3d 307, 308, 766 N.Y.S.2d 220 (2003) the Appellate Division stated: Under the circumstances of this case, the court improvidently exercised its discretion in awarding the defendant a \$45,144 credit against the plaintiff's distributive award for attorney's fees. The court concluded that the plaintiff unnecessarily exacerbated the cost of this litigation by proceeding to trial since "the evidence adduced . . . at trial merely bolstered the reasonableness of the [pre-trial] settlement proposal." However, an award of an attorney's fee is designed to redress the economic disparity between the spouses. It is not intended to address a party's decision to proceed to trial rather than agree to a settlement (see O'Shea v O'Shea, 93 NY2d 187 [1999])

May 16, 2014

Appellate Division, First Department

Custody - Award - Although Express Wishes of the Child Are Not Controlling, They Are Entitled to Great Weight, Particularly Where the Child's Age and Maturity Would Make His or Her Input Particularly Meaningful. Supreme Court Failed to Give Sufficient Weight to the Mother's Role in the Alienation of Children's Affections, as Well as Her Inability to Accept Any Responsibility for the Deterioration of Her Relationship with Them.

In Melissa C.D. v. Rene I. D., Jr.,--- N.Y.S.2d ----, 2014 WL 1699092 (N.Y.A.D. 1 Dept.), the parties had three children, Pascal, born July 15, 1996, Scarlet, born March 21, 2000, and Tallulah, born December 11, 2008. On October 23, 2010, the mother left the marital home in Manhattan to move in with her lover on Long Island, taking Tallulah with her. Pascal and Scarlet continued to live with the father in Manhattan, and expressed a very strong preference to remain in his custody. Supreme Court awarded plaintiff mother sole physical and legal custody of Tallulah and Scarlet, and allowed Pascal to continue to live with defendant father, with the parties having joint decision-making authority with respect to Pascal's education and serious medical care, provided that plaintiff would have final decision-making authority in the event of a conflict or defendant's failure or refusal to communicate with plaintiff, and granted plaintiff the authority to change the children's therapists. The Appellate Division modified. It held that sole legal and physical custody of Scarlet should be awarded to the father, and the mother should be granted meaningful

interaction and regular visitation. It vacated the award to the mother of final decision-making authority with respect to the selection of the children's therapist and medical and educational issues relating to Pascal, now 17, and awarded the father sole legal and physical custody of Pascal. It held that sole legal and physical custody of Tallulah would remain with the mother.

The Appellate Division observed that in considering issues of child custody, although the express wishes of the child are not controlling, they are entitled to great weight, particularly where the child's age and maturity would make his or her input particularly meaningful. It held that the court's finding that the best interests of Scarlet would be served by immediately awarding sole legal and physical custody to her mother, and that Scarlet be forbidden from having any contact with her brother and father for six weeks after the transfer of custody, lacked a sound and substantial basis in the record. It found it would not be in the best interests of Scarlet, now 14, to disrupt her life by removing her, against her wishes, from her father and brother in Manhattan, where she had always lived, and placing her with her mother and her mother's lover, a situation that she was not comfortable with, on Long Island, in a community that she did not know. In the absence of any expert testimony, Supreme Court's conclusion that this turmoil "will be temporary and far less emotionally destructive than abandoning her to an unfit parent, which may well leave her with permanent emotional scars," was speculative, as was the court's finding that "Scarlet still has a strong, albeit hidden, bond with her mother."

The Appellate Division found that in disregarding Scarlet's wishes and the importance of maintaining stability in her life, Supreme Court erred by placing undue emphasis on a single factor, the father's alleged alienation of Pascal and Scarlet, and erroneously found that Pascal and Scarlet were "vindictive, cruel, angry, and broken children," whose "expressed wishes ... are the product of Defendant's poisonous efforts to alienate them from their mother." The Court observed that a custodial parent's conduct may warrant a change of custody if it reaches "the level of deliberately frustrating, denying or interfering with" the parental rights of the noncustodial parent so as to raise doubts about the custodial parent's fitness (see *Matter of Lawrence C. v. Anthea P.*, 79 AD3d 577, 579 [1st Dept 2010]). However, even egregious conduct in this regard must be viewed within the context of the child's best interests (*Matter of Lew v. Sobel*, 46 AD3d 893, 895 [2d Dept 2007] ["While one parent's alienation of a child from the other parent is an act inconsistent with the best interests of the child, here, the children's bond to the alienating parent is so strong that a change of custody would be harmful to the children without extraordinary efforts by both parents and extensive therapeutic, psychological intervention"]; *Matter of Charpentier v. Rossman*, 264 A.D.2d 393 [2d Dept 1999][father properly awarded sole custody, notwithstanding his interference with relationship between mother and child, based on strong preference for father expressed by 17-year-old child]). It found that the father's conduct did not rise to the level of deliberately frustrating, denying or interfering with the parental rights of the mother so as to raise doubts about his custodial fitness.

The Appellate Division found that Supreme Court failed to give sufficient weight to the mother's role in the alienation of Pascal and Scarlet's affections, as well as her

inability to accept any responsibility for the deterioration of her relationship with them. (Matter of Muzzi v. Muzzi, 189 A.D.2d 1022, 1024 [3d Dept 1993] [it was inappropriate for Family Court to favor one party's contentions where neither party blameless]). The record demonstrated that while the mother was still married and living in the marital home, she confided to Pascal that she had rented a home with her lover on Long Island, and encouraged Pascal to keep it a secret, inappropriately placing him in the middle of the marital difficulties she had with the father. The mother also invited her lover to the marital home to meet Pascal, against his express wishes. When Scarlet asked the mother if she was going to move out, the mother falsely assured her that she would not be leaving.

The Supreme Court also failed to give any weight to the fact that during the course of visitation, the mother continued to engage in conduct that undermined Scarlet and Pascal's trust. For example, the mother assured Scarlet that she could continue to live with the father, while simultaneously seeking sole custody, and she used a visit that Pascal and Scarlet had with their sister Tallulah to secretly record their conversations. When Scarlet and Pascal discussed their feelings with the mother in therapy, the mother discounted those sentiments as the result of their father's brainwashing, which, as counsel for Tallulah recognized, "had to frustrate the older children and would make it reasonable for Scarlet to believe she wasn't being heard." In addition, the supervisor of therapeutic visitation testified that there were occasions when the mother made negative statements about the father, to which Pascal and Scarlet responded in a hurt manner. Although there were occasional problems with visitation, the record did not support a finding that they "the [father] intentionally interfered with visitation or that [his] conduct rose to such a level that [he] should be deprived of custody". The children attended 30 supervised visits with the mother, and the therapeutic visitation supervisor acknowledged that Pascal and Scarlet were not anxious to see her, and the father had to work very hard to get them to attend. While the children were occasionally late, the record supported the conclusion that this was due, at least in part, to their reluctance to engage with the mother, whose conduct, also contributed to the problems surrounding visitation. Furthermore, the court-appointed neutral forensic evaluator, the only disinterested witness who interviewed both parents and, the children, testified that there was no evidence that either Scarlet or Pascal had been subject to parental alienation, and the court improvidently disregarded her testimony and placed undue emphasis on the testimony of the mother's expert, who, unlike the court-appointed neutral evaluator, did not interview both parents and the children.

Insofar as Supreme Court found that the mother was virtually the exclusive caregiver for the children, the Court noted that Pascal and Scarlet were now mature teenagers who had lived with the father since October 2010. They had a very strong relationship, and the continuity and stability of the existing custody arrangement weighed in favor of the father.

Family Court - Article 10 Proceeding - Disclosure of Mental Health Treatment Records - Family Court Act § 1038(d) Requires the Court to Review Mental Health Records in Camera Before Making its Disclosure Ruling.

In re Dean T, Jr. --- N.Y.S.2d ----, 2014 WL 1884709 (N.Y.A.D. 1 Dept.), a neglect proceeding, Respondent father moved to subpoena the eldest child's (the child) mental health treatment records. The Family Court, without conducting an in camera review of the requested records, denied the motion. The Appellate Division observed that pursuant to Family Court Act § 1038(d), the court must conduct a balancing test (see Matter of B. Children, 23 Misc.3d 1119[A], 2009 N.Y. Slip Op 50841[U], *4 [Family Ct, Kings County 2009]). The statute requires that the court weigh "the need of the [moving] party for the discovery to assist in the preparation of the case" against "any potential harm to the child [arising] from the discovery." Here, the Family Court should have reviewed the child's mental health records in camera to determine if the records were relevant to the central issue of the child's credibility before making its disclosure ruling. The record indicated that the child's mental health records could be necessary to respondent's defense. The case was remanded for the Family Court to conduct an in camera review of the child's mental health treatment records in order to determine if there was any information in these records that supported the father's claim that the mother was coaching the child or that the child had mental issues that affected his truth-telling capacity, and to decide whether the potential harm arising from discovery outweighs respondent's need for the record.

Appellate Division, Second Department

Appeal - Appendix Method - Inadequate Appendix - Appeal Dismissed Because Inadequate Appendix Inhibited the Court's Ability to Render an Informed Decision on the Merits with Regard to Maintenance and Child Support.

In Deshuk-Flores v. Flores, --- N.Y.S.2d ----, 2014 WL 1687796 (N.Y.A.D. 2 Dept.), Supreme Court granted the plaintiff a divorce on the ground of abandonment, equitably distributed certain marital property, awarded the plaintiff weekly nondurational maintenance of \$300, and directed him to pay weekly child support of \$928.46. The Plaintiff -Respondent moved to dismiss the appeal on the grounds that the appellant's appendix contained an altered document and that the appendix was inadequate. After argument of the appeal the Appellate Division affirmed the judgment and granted the motion to dismiss the appeal, on the ground that the appendix was inadequate, to the extent the defendant challenged the weekly nondurational maintenance and child support awards. It observed that an appellant who perfects an appeal by using the appendix method must file an appendix that contains all the relevant portions of the record in order to enable the court to render an informed decision on the merits of the appeal. The appendix shall contain those portions of the record necessary to permit the court to fully consider the issues which will be raised by the appellant and the respondent. (22 NYCRR 670.10-b[c][1]; CPLR 5528[a][5]). The defendant omitted from his appendix relevant portions of the trial transcripts and trial exhibits. This omission

inhibited the court's ability to render an informed decision on the merits of the appeal with regard to the issues of child support and maintenance. Accordingly, the defendant's appeal from so much of the judgment as awarded the plaintiff weekly nondurational maintenance of \$300 and directed the defendant to pay weekly child support of \$928.46 was dismissed. The Appellate Division pointed out that the "defendant blatantly misrepresents that the complaint was not properly executed and verified by the plaintiff", and included in his appendix a copy of a complaint that had been altered so as to delete the plaintiff's signature. The defendant's contention that the "loss of the trial court record compels the dismissal of the present action" was devoid of merit and constituted a material falsehood. The Supreme Court records were not lost and, had been provided to the Court.

Action for a Divorce - Voluntary Discontinuance - CPLR 3217 - Motion Denied Where Motion Is an Attempt to Avoid an Adverse Order and Discontinuance Would Result in Prejudice to Defendant

In *Turco v Turco*--- N.Y.S.2d ----, 2014 WL 1798397 (N.Y.A.D. 2 Dept.), the Appellate Division observed that in the absence of special circumstances, such as prejudice to a substantial right of the defendant, or other improper consequences, a motion for a voluntary discontinuance should be granted" (*Wells Fargo Bank, N.A. v. Chaplin*, 107 A.D.3d at 883, 969 N.Y.S.2d 67). Supreme Court providently exercised its discretion in denying the plaintiff's application, in effect, to voluntarily discontinue the action, made on the first day of trial, since the record supported a finding that she was merely attempting to avoid an adverse order of the court, and there was a showing that the defendant would be prejudiced by such discontinuance.

Appellate Division, Fourth Department

Custody - Modification - Attorney for Child - Court Properly Denied Request to Appoint Separate Counsel Child Although Reasons for the Determination Could Not Be Stated in the Decision Given the Confidential Nature of the Lincoln Hearing.

In *Matter of Shaw v Bice*--- N.Y.S.2d ----, 2014 WL 1855552 (N.Y.A.D. 4 Dept.), a custody modification proceeding, the Appellate Division rejected the mother's contention that Family Court erred in failing to appoint separate attorneys for the children when, during the trial, the parties' son expressed a desire to reside with the mother, which was not consistent with the daughter's expressed wishes. Both children had previously informed the Attorney for the Children (AFC) that they wanted to continue residing with the father, who had been granted temporary custody. During the trial, however, the AFC advised the court that the son, age nine, wanted to live with his mother because at her

house "he can stay up late and he doesn't get in trouble."The AFC further stated that, in his view, the son's position was "immature and thus not controlling" upon the AFC. Following a Lincoln hearing, the court denied the mother's request to appoint a new attorney for the child for the son. At the conclusion of the trial, the court awarded custody of both children to the father, as advocated by the AFC. The Appellate Division affirmed. It observed that the Rules of the Chief Judge provide that "[w]hen 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" (22 NYCRR 7.2[d][3]). It held that the court properly denied the mother's request to appoint separate counsel for the son. Although the reasons for the determination could not be stated in this decision given the confidential nature of the Lincoln hearing, it noted that the AFC on appeal asks it to affirm, thereby indicating that the son did not object to the court's failure to appoint separate counsel on his behalf.

Supreme Court

Domestic Relations Law §24 (1) - Child Conceived by Consensual Artificial Insemination of Spouse of Same - Sex Marriage is legitimate Child of Both Parties

In *Wendy GM v Erin GM*, --- N.Y.S.2d ----, 2014 WL 1884485 (N.Y.Sup.), the birth mother and her spouse were married in a civil ceremony in Connecticut, before New York enacted its Marriage Equality Act. The couple decided to have a child and in October 2011, they both signed a consent form agreeing to artificial insemination procedures. In the consent form, the birth-mother authorized the physician to perform artificial insemination on her, and the spouse requested the doctor to perform the procedure. The document also reads: We declare that any child or children born as a result of a pregnancy following artificial insemination shall be accepted as the legal issue of our marriage. The document was signed by the birth-mother, the spouse, and the physician, but there was no acknowledgment to the signatures. The spouse paid for the sperm donation and executed a consent form that allowed the purchased sperm to be used for the artificial insemination of the birth-mother. Both parties underwent artificial insemination for almost two years, until the procedure succeeded on the birth-mother; the spouse then discontinued her treatments. The fertility clinic records demonstrate that the birth-mother and the spouse were both involved in appointments. The spouse attended the pre-birth classes, including breast feeding, baby care, and CPR classes. The spouse participated in the baby showers. The spouse was present at the birth of the child and the couple jointly decided the name of the child. When the hospital officials asked for information on the parents, both participated in the discussions and the birth mother acknowledged that the spouse was the parent of the child. The child was given a

hyphenated surname of the two women, with the spouse's name listed first. The birth certificate for the child listed both as the parents of the child.

After the birth of the child, citing marital trouble, the spouse left the household. The child only lived in the same household with the two women for one week before they established separate households. The action for divorce was commenced by the birth-mother less than then three months after the birth of the child. Before and after commencement, the birth-mother would not permit her spouse to visit with the child. The spouse then filed the request for a variety of relief, including access to the child.

Supreme Court pointed out that New York's public policy strongly favors the legitimacy of children, and that "the presumption that a child born to a marriage is the legitimate child of both parents is one of the strongest and persuasive known to law." In re Estate of Fay, 44 N.Y.2d 137, 141 (1978) (there is an established legal presumption that every person is born legitimate); Matter of Findlay, 253 N.Y. 1, 7 (1930). The common law presumption of "legitimacy" to children born in a marriage finds a corollary in Domestic Relations Law §24 (1), which provides that a child born to married parents "is the legitimate child of both parents." See Family Court Act § 417. The intent of these statutes, and the common law presumption, is unambiguous: a child born in a marriage is the child of the couple. The Court concluded that the partner with no biological connection to the child is a parent, including that (she and the child's biological mother) were in a valid legal union at the time of the child's birth. Supreme Court concluded that the Court of Appeals decision in Debra H. v. Janice R. 14 NY2d at 599 opens the door for New York to recognize a partner, in a civil union, as a parent of a child born by artificial insemination during the civil union. The spouse is presumed, by virtue of the marriage and the rule in Matter of Findlay, to be a "parent" of the child. The spouse and birth mother share the same sex. The Marriage Equality Act eliminates that distinction. The Court held that the common law presumptions that link both spouses in a marriage to a child born of the marriage, the presumption of legitimacy within a marriage and the presumption of a spouse's consent to artificial insemination, applied to this couple. The Court held that the non-biological spouse is a parent of this child under the common law of New York as much as the birth-mother.

May 1, 2014

Appellate Division, First Department

Supreme Court - Jurisdiction - Referees - Hear and Report - Authority of Referee Limited
By Order of Reference

In Karpov v Shiryaev, --- N.Y.S.2d ----, 2014 WL 1622370 (N.Y.A.D. 1 Dept.) Plaintiff commenced a divorce action on the ground of constructive abandonment. In a so-ordered

stipulation entered into at a preliminary conference, the parties agreed that defendant would assert a counterclaim for divorce on the ground of constructive abandonment, and plaintiff withdrew her claim. The outstanding financial matters were referred to a special referee to hear and determine. The parties then stipulated that the Referee would also hear and determine the issue of grounds, pursuant to the stipulation. At the hearing, over plaintiff's objection, the Referee granted the defendant's motion to withdraw the counterclaim, leaving plaintiff without a cause of action for divorce. The Referee then granted plaintiff's application to reinstate her claim for divorce, and conducted a full trial on grounds, at which defendant was permitted to interpose opposition. The Referee denied the divorce. The Appellate Division reversed. It held that the Referee exceeded his authority when he permitted defendant to withdraw his counterclaim for constructive abandonment, and conducted a fully contested trial on plaintiff's previously-withdrawn claim. The reference by the court, as thereafter expanded by the parties' stipulation, did not give the Referee authority to set aside any part of the parties' stipulation. By clear and unambiguous terms, defendant waived his right to withdraw his counterclaim.

Agreements - Construction - Forum Selection Clause - New York State's Public Policy with Regard Removal of Barriers to Remarriage (DRL § 253) Cannot Override Forum Selection Clause in Prenuptial Agreement

In *Ofer v Sirota*, --- N.Y.S.2d ----, 2014 WL 1386552 (N.Y.A.D. 1 Dept.) the Appellate Division held that Supreme Court properly found that the parties' prenuptial agreement was enforceable and that the forum selection clause in the agreement, which granted exclusive jurisdiction over any divorce litigation to a competent Israeli court, was also enforceable (*Sterling Natl. Bank v. Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept 2006]). Accordingly, Supreme Court properly dismissed this action. The fact that plaintiff alleged that defendant refused to grant her a get (Jewish divorce decree) as required by their agreement was irrelevant to determining whether to enforce the forum selection clause. There was no merit to plaintiff's claim that she would be deprived of her day in court in Israel because Israel does not provide for no fault divorce and defendant's consent to a divorce is required there. While litigation in Israel may be more challenging, plaintiff would have her day in court. It was inappropriate for plaintiff to attempt to avoid Israel's legal system because New York's legal system may treat her more favorably by permitting her to obtain a no fault divorce. Plaintiff, an Israeli citizen, was well aware that Jewish religious laws govern Israeli divorces when she consented to the forum selection clause in the agreement. This State's strong and important public policy with regard to compelling civil litigants to remove any barriers to remarriage (DRL § 253) cannot override the forum selection clause that the parties knowingly included in their prenuptial agreement, particularly because plaintiff will not be deprived of her day in court in the chosen forum.

Appellate Division, Second Department

Agreements - Construction - Attorneys Fee Provision - Agreement's Provisions, Rather than Statutory Provisions, Control

In Roth v Roth, --- N.Y.S.2d ----, 2014 WL 1465562 (N.Y.A.D. 2 Dept.) the parties divorce judgment entered August 18, 2010, which incorporated, but did not merge with, a stipulation of settlement dated April 26, 2010 contained a default provision that provided that if either party defaulted with respect to any obligation set forth in the stipulation, the defaulting party was required to pay the other party's attorney's fees and all other actual expenses incurred in any lawsuit or other proceeding to enforce the agreement, so long as the lawsuit or other proceeding resulted in a judgment or order in favor of the nondefaulting party, or the defaulting party agreed to cure the default after the commencement of the lawsuit or proceeding. Plaintiff moved to enforce the terms of the stipulation, alleging that the defendant had defaulted by failing to fulfill certain of his obligations under the stipulation. The plaintiff also sought an award of an attorney's fee. After a hearing, the Judicial Hearing Officer recommended that the plaintiff be awarded an attorney's fee of \$18,000, and the Supreme Court confirmed the award. The Appellate Division affirmed. Where the parties have agreed to provisions in a settlement agreement that govern the award of attorney's fees, the agreement's provisions, rather than statutory provisions, control. Here, the plaintiff's motion to enforce the terms of the stipulation resulted in the Supreme Court's order in her favor. Additionally, after the plaintiff filed her motion, the defendant agreed to cure certain defaults. Consequently, the defendant was contractually obligated to pay the plaintiff's attorney's fees incurred to enforce the stipulation.

Pendente Lite Maintenance - Domestic Relations Law § 236(b)(5-a) - Second Department Holds That Formula Amount Is Intended to Cover All of a Payee Spouse's Basic Living Expenses, Including Housing Costs, the Costs of Food and Clothing, and Other Usual Expenses. However, it May Be Appropriate to Direct Payment by the Monied Spouse of the Mortgage and Taxes on the Marital Residence and Other Expenses of the Nonmonied Spouse under Certain Circumstances

In Vistocco v Jardin--- N.Y.S.2d ----, 2014 WL 1465580 (N.Y.A.D. 2 Dept.), the parties were married in 1995 and had three unemancipated children. The Supreme Court awarded the defendant \$3,000 per week for child support and \$3,000 per week in temporary spousal maintenance, directed the plaintiff to pay the mortgage and taxes on the marital residence where the defendant resided with the parties' children, directed the plaintiff to pay the defendant's car insurance, and awarded the defendant interim counsel fees and expert fees in the sums of \$12,500 and \$3,500, respectively. The Appellate Division affirmed. The plaintiff argued, inter alia, that the Supreme Court erred in directing him to pay, in addition to spousal maintenance, the mortgage and taxes on the marital residence and the defendant's car insurance. He contends that the pendente lite maintenance award is intended to cover the defendant's basic living expenses, which include the mortgage, property taxes, and her car insurance. The Court observed that the formula to determine temporary spousal maintenance that is outlined in Domestic Relations Law § 236(B)(5-a)(c)

is intended to cover all of a payee spouse's basic living expenses, including housing costs, the costs of food and clothing, and other usual expenses (see *Khaira v. Khaira*, 93 AD3d 194). However, it may be appropriate to direct payment by the monied spouse of the mortgage and taxes on the marital residence and other expenses of the nonmonied spouse under certain circumstances (see *id.*). In light of the evidence that the plaintiff's income exceeded \$500,000 and the gross disparity between the plaintiff's income and the defendant's income, the Supreme Court properly awarded additional support in the form of a directive to the plaintiff to pay the mortgage and taxes on the marital residence (Domestic Relations Law § 236[B][5-a][c][2][a][ii]), as well as the defendant's car insurance (see e.g. *Goldberg v. Goldberg*, 98 AD3d 944; *Macagnone v. Macagnone*, 7 AD3d 680).

Income Execution For Support Enforcement - Mistake of Fact - Income Payor's alleged lack of authority to comply with the income execution is not a "mistake of fact"

In *Ciccotto v Ciccotto*, --- N.Y.S.2d ----, 2014 WL 1612978 (N.Y.A.D. 2 Dept.), the Court held that the defendant's contention that the income execution should have been vacated due to a mistake of fact was without merit. An Income Payor's alleged lack of authority to comply with the income execution is not a "mistake of fact" within the meaning of CPLR 5241(a)(8).

Family Court - Jurisdiction - Referees - Hear and Report - Authority of Referee Limited By Order of Reference - Improper Order Deemed A Report.

In *Matter of Aslan v Senturk*, --- N.Y.S.2d ----, 2014 WL 1613066 (N.Y.A.D. 2 Dept.), the petitioner commenced a proceeding against the respondent, his ex-wife, alleging that she committed family offenses against him. By administrative order of reference dated January 24, 2013, the Family Court, on its own initiative pursuant to CPLR 4212 and 4313, referred the matter to a Court Attorney Referee to hear and report. The Court Attorney Referee, in effect, made an order which denied the petition and dismissed the proceeding. The Appellate Division reversed. It observed that a referee derives authority from an order of reference by the court. The order of reference referred the matter to the Court Attorney Referee to hear and report only, not to hear and determine. Accordingly, the Court Attorney Referee lacked jurisdiction to issue the order appealed from. The Court Attorney Referee's decision was deemed a report and the matter was remitted for further proceedings pursuant to CPLR 4403 before a Judge of the Family Court.

Supreme Court

Sanctions - 22 NYCRR 130-1.1 - Sanctions and Counsel Fees Totaling \$60,000 Awarded For Commencing Frivolous Action

In Weissman v Weissman, --- N.Y.S.2d ----, 2014 WL 1465602 (N.Y.A.D. 2 Dept.) an action, inter alia, to set aside a stipulation of settlement the Appellate Division affirmed an order which directed the plaintiff to pay sanctions of \$17,500 to the Commissioner of Taxation and Finance and directed the entry of a judgment in favor of the defendant in the amount of \$42,707.29 for counsel fees and expenses. The Appellate Division observed that sanctions may be warranted where the party's arguments are belied by the record, and are completely without merit in law or fact. In a prior action for a divorce commenced by the plaintiff, the plaintiff repeatedly moved to vacate or set aside a stipulation of settlement dated May 25, 2004. Those motions were denied, and the denials were affirmed on appeal. Nevertheless, the plaintiff commenced a plenary action seeking the same relief, namely, to vacate the stipulation on grounds including fraud. In this action, despite being enjoined from making any additional motions without obtaining leave of court, the plaintiff made two motions without obtaining such leave. It held that Supreme Court properly directed the plaintiff to pay sanctions based on her frivolous conduct in bringing the plenary action and making two motions without obtaining leave of court. (22 NYCRR 130-1.1[c][2]). In light of evidence that the plaintiff was pressing a frivolous claim, thereby abusing the judicial process and creating unnecessary litigation, the court properly awarded counsel fees and expenses.

Counsel Fees - Award - Supreme Court Holds it Can Impose Attorney Fees Against a Party on the Grounds That They Declined a Reasonable Settlement Offer in Bad Faith to Delay the Action.

In Clements v Clements, 2014 WL 1419279 (N.Y.Sup.), 2014 N.Y. Slip Op. 50581(U) Supreme Court held that in exercising its broad discretion, Supreme Court can impose attorney fees against a party on the grounds that they declined a reasonable settlement offer in bad faith to delay the action. The husband declined to settle the case in August 2013, only to concede a settlement six months later on essentially the same terms. The court found it difficult to characterize the husband's refusal to accept the proffered settlement in August 2013 as "obstreperous conduct" that would justify additional fees. Yarinsky v. Yarinsky, 25 AD3d 1042 (3rd Dept.2006). There was no evidence that the husband "abused" the process or engaged in blatant misrepresentations. There was some evidence that the husband delayed providing needed financial disclosure, a factor that can justify additional legal fees. Holbrook v. Holbrook, 226 A.D.2d 831 (3rd Dept.1996) (party who was "less than forthcoming" regarding disclosure of assets and against whom a subpoena had to be issued was a factor in awarding fees). The court was required-more than three years after commencement-to order both parties to provide financial information. To disproportionately blame the husband for the lack of disclosure was unfair and inconsistent with the facts. The focus was narrowed to just whether the husband's rejection of the August 2013 settlement proposal was motivated by "bad faith" sufficient to justify additional fees. Based on the fact that the final settlement nearly mirrored the conference recommendation and that the feeble objections raised by the husband after the conference were on issues that had either been previously settled, or were factually unsustainable, the court concluded that the husband's rejection of the August 2013

settlement was a delay tactic. The husband was motivated solely to have the wife expend additional legal fees which had the practical effect of reducing her final pay out from this divorce. Because there appeared to be no other motive, the court concluded that the rejection of the settlement was motivated by "bad faith" to prolong the litigation and boost the wife's attorney fees, which would then reduce her overall net recovery from her husband. The Court observed that the mere fact that a party declines a reasonable settlement proposal should not, in all cases, justify legal fees.

April 16, 2014

Appellate Division, First Department

Equitable Distribution - Property Valuation - Court Properly Credited Neutral Appraiser's Valuation Based on Formula in the Shareholders' Agreement, Which Was the Only Evidence in the Record of its Actual Value

In *Alexander v Alexander*, --- N.Y.S.2d ----, 2014 WL 1356787 (N.Y.A.D. 1 Dept.), the Appellate Division affirmed a judgment which awarded defendant wife a 35% interest in plaintiff husband's corporate stock shares, valued as of the commencement date of the action, and awarded maintenance of \$7,500 per month until the earliest of either party's death, the wife's remarriage, or December 31, 2024. It found that the court properly accepted the neutral appraiser's valuation based on the formula in the shareholders' agreement. Among other things, the wife's expert "did not consider the stock transfer restrictions contained in the shareholders' agreement" (*Amodio v. Amodio*, 70 N.Y.2d 5, 8 [1987]). As the price in the shareholders' agreement was the only evidence in the record of its actual value, the court properly credited the neutral appraiser's report, which was based on that price. It held that the court properly exercised its discretion in determining that the wife was entitled to 35% of the value of those shares. The court properly considered the length of the marriage (nearly 25 years), the contribution by the wife in running the household and raising their two sons throughout the marriage, and the fact that most of the increase in corporate revenues, which resulted in the increased share price, occurred in the same year as the commencement of this action. It also found the maintenance to the wife, payable from September 1, 2012 through December 31, 2024 was adequate, notwithstanding her age at 56 years old, her lack of a work history, and her inability to support herself after being a homemaker throughout the nearly 25-year marriage. The court credited the husband's evidence that the parties lived relatively modestly, in contrast to the wife's statement of net worth, for which she failed to present sufficient evidence to substantiate her claims. The court also credited expert testimony that the husband could work for another 12 years, until age 67, with an earning capacity of \$275,000 to \$320,000 per year. In light of the wife's ability to keep the parties' marital home, valued at \$2 million, along with the equitable distribution award, which left her with

approximately \$750,000 in cash as of 2015, the durational maintenance of at most 12 years at \$7,500 per month was amply supported by the record. It also held that the trial court properly declined to award the wife expert fees or counsel fees in addition to the \$135,000 interim counsel fees that she had already received. Given the lack of evidence substantiating the wife's medical claims, the court properly exercised its discretion in declining to require the husband to pay the wife's unreimbursed medical expenses, or her health insurance, and it properly declined to require the husband to obtain life insurance to cover his obligations under the judgment, since the wife elicited no evidence relevant to the issue.

Appellate Division, Second Department

Equitable Distribution - Property Distribution - Valuation - Business Properly Valued at Date of Trial Light of Substantial Lapse of Time Between Commencement and Trial

In *Domino v Domino*, --- N.Y.S.2d ----, 2014 WL 1226678 (N.Y.A.D. 2 Dept.) the Appellate Division observed that once property is classified as marital or separate, the trial court has broad discretion to select an appropriate date for measuring the value of the property. In light of the substantial lapse of time between the commencement of this action in 2003, and the nonjury trial in 2007, the Supreme Court providently exercised its discretion in valuing both the husband's ambulette business and the real property as of the date of trial.

Equitable Distribution - Property Distribution - Marital Debt - General Rule Is That Financial Obligations Incurred During Marriage Which Are Not Solely Responsibility of One Party Should Be Shared Equally by the Parties.

In *Diaz v Gonzalez*--- N.Y.S.2d ----, 2014 WL 1228481 (N.Y.A.D. 2 Dept.), a new trial was necessary on the issue of equitable distribution of alleged marital debt. 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 the expenses represent marital expenses. Where a party has paid the other party's share of what proves to be marital debt, reimbursement is required. Supreme Court improperly refused to admit evidence offered by the defendant of alleged marital debt on the basis that the credit card statements she proffered related to credit cards in her name only, despite her testimony that the credit card accounts were opened during the marriage to pay the parties' expenses, and on the basis that the defendant did not show that the debt was not paid off prior to trial. It remitted the matter for, inter alia, a new trial on the issue of equitable distribution of alleged marital debt, and for the entry of an amended judgment thereafter.

Appellate Division, Third Department

Child Support - Award - Disparity in Income and Expenses, and Availability of Tax Deductions Rendered Presumptive Amount of Child Support Unjust or Inappropriate

In *Smith v Smith*, --- N.Y.S.2d ----, 2014 WL 1316325 (N.Y.A.D. 3 Dept.), Supreme Court calculated the mother's presumptive weekly child support obligation to be \$258.33, but concluded that it would be "just and appropriate" to reduce it to \$30 per week. The court also directed that child support be paid retroactive to the date of the judgment of divorce, excluding a nine-month period when the mother was unemployed and received inpatient treatment for alcohol dependency. Finally, the court denied the father's request for recoupment of the child support payments he made to the mother pursuant to the judgment of divorce. The Appellate Division found that father's income was twice that of the mother and such a disparity, alone, can justify a deviation. The father also received significant tax deductions and credits for the children, whereas the mother received none (Domestic Relations Law § 240[1-b][f][4]). Additionally, the mother was responsible for paying a significant portion of the children's uninsured health-related and child-care expenses, as well as other costs associated with her extended and substantial parenting time, all of which impacted the mother's financial resources (Domestic Relations Law § 240[1-b][f][1]). The mother purchased a home within the children's school district to facilitate the custodial arrangement, as a result of which she has a significant commute to work, with its attendant expenses. Giving careful consideration to the relevant factors, it found no abuse of Supreme Court's discretion in concluding that the presumptive amount of child support attributable to the mother was unjust or inappropriate. Nonetheless, Supreme Court's reduction to \$30 weekly was excessive and, it found \$150 per week to be "just and appropriate" under the circumstances present here (Domestic Relations Law § 240[1-b][g]). The Court agreed with the father that the mother's child support obligation should have been made retroactive to February 9, 2009, the date the father made a specific demand therefor in his complaint. (Domestic Relations Law § 236[B][7][a]).

Appellate Division, Fourth Department

Maintenance - Award - Adverse inference Properly drawn from failure to submit W-2 statements, or his 1099 statements, as required by 22 NYCRR 202.16.

Property Determination - Judicial Estoppel Applied to Support Determination that Farm is Marital Property

In *Winship v Winship*, --- N.Y.S.2d ----, 2014 WL 1258329 (N.Y.A.D. 4 Dept.), the Appellate Division rejected the argument that the court's award of maintenance was excessive. Plaintiff failed to submit a sworn financial statement, as required by Domestic Relations Law § 236(B). He also failed to submit copies of his recent tax returns, his W-2 statements, or his 1099 statements, as required by 22 NYCRR 202.16. Thus, plaintiff could not be heard to complain that the court erred in drawing inferences favorable to defendant with respect to the disputed financial issues, including maintenance. In any event, it did

not constitute an abuse of discretion. The judgment provided for a higher award of maintenance and child support than that set forth in the court's findings of fact, which control, and it modified the judgment accordingly by reducing both. Plaintiff's primary challenge to the equitable distribution award was the court's determination that Pine Top Plantation (Pine Top), a 128-acre Christmas tree farm formerly owned and operated by plaintiff's deceased father, was marital property subject to equitable distribution. In the joint tax returns filed from 2000 through 2008 the parties depreciated Pine Top's equipment and property, and identified plaintiff as its "proprietor." Plaintiff signed those tax returns. As the Court of Appeals has made clear, "[a] party to litigation may not take a position contrary to a position taken in an income tax return" (Mahoney-Buntzman v. Buntzman, 12 NY3d 415, 422). Here, plaintiff's tax returns were inconsistent with his position that his father owned Pine Top after 2000, inasmuch as a party cannot depreciate property that he or she does not own.

Family Court

Adoption - Effect of Surrogate Parenting Contracts - Surrogacy Contract, Which Is Against New York Public Policy, Does Not Foreclose an Adoption from Proceeding.

In Matter of Adoption of JJ, --- N.Y.S.2d ----, 2014 WL 1328184 (N.Y.Fam.Ct.), the Proposed Adoptive Children were twins, who were the biological children of the Proposed Adoptive Parent's spouse, M.H.-W. ("Birth Parent"). They were conceived with the Birth Parent's sperm and an anonymous donor's egg through in-vitro fertilization and were born through gestational surrogacy in Mumbai, India. On May 12, 2013, in accordance with a surrogacy agreement, Y .M.A.K. ("Gestational Surrogate") immediately placed the Proposed Adoptive Children post-birth with the Birth Parent. On May 28, 2013, the Proposed Adoptive Children were granted United States Citizenship and were permitted to return to the United States with the Birth Parent and the Proposed Adoptive Parent. The Proposed Adoptive Children had been living with the Birth Parent and Proposed Adoptive Parent since placement and the Proposed Adoptive Parent seeks the Court's approval for finalization of his adoption petition. The Family Court held that a court may approve an adoption for finalization where New York statutorily deems the underlying surrogacy contract against public policy, and void and unenforceable. See N.Y. Dom. Rel. L. § 122. The Court observed that surrogacy was outlawed in New York. See Dom. Rel. L. 121 et seq. It well-settled that a party to a surrogacy contract may not seek a court's assistance to enforce the agreement, nor will such contract be deemed viable for any other claims arising under its arrangement. See *Itskov v. N.Y. Fertility Institute, Inc.*, 11 Misc.3d 68 (2d Dep't 2006). Although it could find no relevant case law to support its determination the Court held that where a surrogacy contract exists and an adoption has been filed to establish legal parentage, the surrogacy contract does not foreclose an adoption from proceeding. The Court was not being asked to enforce the surrogacy contract that formed the basis for the adoption, nor did the relief sought include claims relating to the surrogacy agreement itself. In keeping with the Legislature's intent to encourage loving, happy families for children with parents who wish to accept that role, the best interests of the Proposed Adoptive Children under the totality of the circumstances, and reading § 124 broadly, the Court found that the surrogacy

contract's legality was of no consequence to the matter. If all other requirements were met, the Court held it would approve the adoption.

April 1, 2014

New Child Support Standards Chart released March 12, 2014

According to the Child Support Standards Chart, [LDSS 4515 (3/14)] released March 12, 2014, prepared by New York State Office of Temporary and Disability Assistance, Division of Child Support Enforcement, the 2014 poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services is \$11,670 and the 2012 self-support reserve is \$15,755.

The combined parental income amount is \$141,000. It is adjusted every two years (effective January 31st) based on the average annual percent changes to the federal Department of Labor's Consumer Price Index for Urban Consumers. 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://www.childsupport.ny.gov/dcse/pdfs/cssa_2014.pdf.

Appellate Division, Second Department

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Disorderly Conduct - Burden of Proof - Mens Rea Must Be Established

In Matter of Shiffman v Handler,--- N.Y.S.2d ----, 2014 WL 943172 (N.Y.A.D. 2 Dept.), the Appellate Division observed that the family offense of "disorderly conduct" is not limited to disorderly conduct in a public place (Family Ct Act § 812). Each of the requisite elements of that offense must be established by a preponderance of the evidence. This includes the mens rea of that offense, namely that, when engaging in certain defined conduct, the actor did so "with intent to cause public inconvenience, annoyance or alarm, or recklessly creat[ed] a risk thereof" (Penal Law § 240.20). Here, the mother did not sustain her burden. The evidence established that the daughter went to the mother's home, stood on the front

porch, knocked on the front door and windows for a period of nearly an hour, and telephoned the mother's home phone number twice, but it did not establish the daughter's requisite intent or recklessness with respect to causing public inconvenience, annoyance, or alarm. The mother presented no evidence in support of the mens rea element, such as the proximity of the porch to neighbors or other members of the public, or that the conduct otherwise could have caused public inconvenience, annoyance, or alarm. It reversed the order of protection, denied the petition, and dismissed the proceeding.

Child Custody - Conditions on Visitation - Court May Not Order That a Parent Undergo Counseling or Treatment as a Condition of Future Visitation - Error to Condition Visitation Upon Enrollment in Drug Testing Program

In *Matter of Welch v. Taylor*, --- N.Y.S.2d ----, 2014 WL 953633 (N.Y.A.D. 2 Dept.) Family Court awarded the mother sole legal and physical custody, conditioned father's visitation upon his enrollment in random drug testing program at a medical facility and his compliance with maintaining a certain medical prescription, and allowed the mother to suspend his visitation if he failed to supply proof of his prescription to the mother. The Appellate Division affirmed the custody award but reversed the balance of the order. It held that a court may not order that a parent undergo counseling or treatment as a condition of future visitation or reapplication for visitation rights, but may only direct a party to submit to counseling or treatment as a component of visitation. Family Court erred in conditioning the father's visitation upon his enrollment in a random drug testing program at a medical facility, and should have instead directed the father to enroll in such a program as a component of visitation. By authorizing the mother to suspend visitation upon the father's failure to provide proof of his prescription, the Family Court improperly delegated its responsibility to determine whether and when visitation rights should be suspended. It noted that directing the father to enroll in a random drug testing program at a medical facility did not improperly make the ordered treatment a prerequisite to his access to the child and the Family Court retains the responsibility to supervise and enforce this therapeutic component of its visitation order (see *Resnick v. Zoldan*, 134 A.D.2d 246, 520 N.Y.S.2d 434; *Zafran v. Zafran*, 28 A.D.3d at 757, 814 N.Y.S.2d 669).

Agreements - Stipulations - Reformation - Mutual Mistake - for Mutual Mistake to Form Basis for Reformation Mistake must Be So Material That it Goes to the Foundation of the Agreement

In *Hackett v Hackett*, --- N.Y.S.2d ----, 2014 WL 1041875 (N.Y.A.D. 2 Dept.), on January 12, 2006, the parties settled their divorce action and executed a written settlement agreement, which was incorporated but not merged into their judgment of divorce. Under the terms of the settlement agreement, the marital residence, which then had an estimated fair market value of \$465,000, was awarded to the defendant, and she assumed

responsibility for repayment of a first mortgage and a home equity loan with a combined outstanding balance of \$195,124. The plaintiff was awarded sole ownership of his restaurant business, which had an appraised value of between \$360,000 to \$385,000, but which the parties agreed to value, for purposes of the settlement, at only \$325,000. The defendant also agreed, inter alia, to waive her right to seek valuation of the plaintiff's certification as a public accountant, which he acquired during the marriage. An accompanying "Schedule A" listed the dollar values of the assets being allocated to each party, and purportedly equalized the division of assets by requiring the plaintiff to pay the defendant the sum of \$19,336. The parties acknowledged in open court that they had read and understood the terms of the settlement agreement, and had not been forced or coerced into signing it. In January 2008, the plaintiff commenced an action, seeking to reform the settlement agreement on the ground that an alleged mutual mistake had resulted in the unequal division of the marital assets. The plaintiff alleged that the settlement agreement contained a "computational error" on Schedule A that undervalued the defendant's share of the marital assets, resulting in a windfall to her in excess of \$100,000. The plaintiff maintained that this represented a mutual mistake because certain language in the agreement expressed an intent to equally divide the parties' assets. The defendant denied that the calculation of marital assets set forth in the settlement agreement was a mistake in light of, inter alia, her assumption of all of the marital debt and the parties' stipulation to undervalue the plaintiff's business. The defendant also requested an award of counsel fees in connection with her defense of the terms of the settlement agreement and her counterclaims for enforcement of certain of its provisions. After a hearing a court attorney referee issued a report and recommendations which, inter alia, recommended that the cause of action seeking reformation of the settlement agreement be denied and that the defendant be awarded a counsel fee in the sum of \$10,000. Supreme Court granted plaintiff's motion to reject the report and recommendations, and concluded that the settlement agreement should be reformed because there had been a mutual mistake in calculating the value of the assets allocated to each party that undermined their intent to divide their assets equally. The court reformed the settlement agreement to require the defendant to pay the plaintiff \$100,276.50.

The Appellate Division reversed. It observed that although a mutual mistake by the parties may form the basis for reformation of a marital settlement agreement, the mistake must be 'so material that it goes to the foundation of the agreement. To overcome the heavy presumption that a deliberately prepared and executed written instrument manifested the true intention of the parties, evidence of a very high order is required. The party seeking reformation must show clearly and beyond doubt that there has been a mutual mistake, and 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. It held that plaintiff failed to meet his high burden of proof of demonstrating that, as a result of a mutual mistake, the settlement agreement did not reflect the true intent of both parties with respect to the distribution of the marital estate, and that the precise form the agreement was intended to take would require the defendant to pay the plaintiff the sum of \$100,276.50. The plaintiff testified at the hearing that the parties intended to divide their assets equally, and that this intention was not fulfilled because a

computational error resulted in the defendant's receipt of assets that exceeded the stipulated value of the assets he received. According to the defendant, however, the settlement agreement, which was the product of extensive negotiations, conformed to her expectation that she would be awarded title to the marital residence in exchange for her assumption of marital debt and relinquishment of her claims to the plaintiff's business, an interest in his certification as a public accountant, and spousal maintenance. The defendant testified that she would not have entered into the agreement had she been aware that she would be required to pay the plaintiff the sum of \$100,276.50 to precisely equalize the stipulated value of the assets allocated to each party. Under these circumstances, the plaintiff did not show, clearly and beyond doubt, that the settlement agreement was the result of mutual rather than unilateral mistake, and that it must be reformed to require the defendant to pay him \$100,276.50 in order to effectuate the true intent of both parties.

Child Custody - Award - Standing - Natural Parent Has Standing to Seek Legal Custody of His or Her Child

In *Matter of Sanchez v Bonilla*, --- N.Y.S.2d ----, 2014 WL 1043094 (N.Y.A.D. 2 Dept.) the Appellate Division held that Family Court erred in dismissing the petition in which the mother sought orders of custody for her two teenaged children. A natural parent has standing to seek legal custody of his or her child (see Domestic Relations Law § 70 [a]. According to the petitioner, the children's father abandoned the children and, due to their immigration status, they could be returned to El Salvador where they had been subjected to abuse by family members and threats by gang members. The petitioner alleged that awarding her custody would be in the best interests of the children, since it would enable the children to apply for special immigrant juvenile status. Since the Family Court dismissed the petition without conducting a hearing or considering the best interests of the children, it remitted the matter to the Family Court for a hearing and a new determination of the custody petition thereafter.

March 17, 2014

Appellate Division, Second Department

Child Support - Award - Emancipation - Conduct of Child in Refusing Relationship Constitutes Emancipation

In *Matter of Jurgielewicz v Johnson*,--- N.Y.S.2d ----, 2014 WL 715382 (N.Y.A.D. 2 Dept.), the Appellate Division observed that under the doctrine of constructive

emancipation, a child of employable age who actively abandons the noncustodial parent by refusing all contact and visitation may forfeit any entitlement to support. A child's mere reluctance to see a parent is not abandonment. The Appellate Division held that contrary to the Family Court's determination, the father met his burden of establishing that the child was constructively emancipated. The father established that a substantial change had taken place in his relationship with the child. The child had attained the age of 18, rendering her of employable age and, thus, capable of becoming constructively emancipated. The evidence at the hearing established that the father consistently made a serious effort to maintain a relationship with the child during the relevant time period. The father regularly called the child at the mother's home, but his calls would either go unanswered, or, according to the mother, the child would refuse to speak with him. The father testified that he left messages indicating his willingness to participate in counseling with the child, but these offers were not accepted. On special occasions, the father left gifts and cards for the child that the child did not acknowledge. The father also contacted the child's therapist and suggested therapeutic visitation with the child. The child refused this offer. The evidence demonstrated that, during the relevant period of time, the father's behavior was not a primary cause of the deterioration in his relationship with the child. Accordingly, the Family Court should have granted the father's petition to terminate his child support obligation on the ground of constructive emancipation.

Child Support - Modification - Upward - Substantial Change in Circumstances - Change of Circumstance Established Where Visitation Ceased, and the Mother's Expenses Related to the Child Increased Significantly

In *Matter of Kay v DeSantis*, --- N.Y.S.2d ----, 2014 WL 715387 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order of the Family Court which, after a hearing, granted the mother's petition for an upward modification of the child support obligation set forth in a child support order dated August 4, 2011. At the time the support order entered on consent was issued, the parties shared physical custody of the child. Visitation between the father and the child subsequently ceased, and the mother's expenses related to the child increased significantly as a result of the child living exclusively with her. This change constituted a substantial change in circumstances sufficient to warrant the modification of the father's child support obligation.

Child Custody - Jurisdiction - Continuing Jurisdiction - Inconvenient Forum - Domestic Relations Law §§ 76-a[3], 76-f -

In *Greenfield v Greenfield*,--- N.Y.S.2d ----, 2014 WL 840455 (N.Y.A.D. 2 Dept.)the Appellate Division affirmed an order of the Supreme Court which held that the State of California was the more appropriate forum to determine any custody and visitation matters affecting the parties' child, and declined to continue to exercise jurisdiction over such matters. The Appellate Division observed that a court of this State which has jurisdiction

under the Uniform Child Custody Jurisdiction and Enforcement Act may decline to exercise jurisdiction if it finds that New York is an inconvenient forum and that a court of another state is a more appropriate forum (Domestic Relations Law § 76-f[1]). The child had lived in California since August 2011 with the permission of the defendant, who maintained a residence in Utah. Evidence regarding the child's care, well being, and personal relationships was more readily available in California. There was no evidence that the child retained substantial connections with New York or that significant evidence existed in this State. The

Superior Court of Napa County, California (hereinafter the California court) was familiar with the family and the pending issues, and the court was willing to exercise jurisdiction. Additionally, an attorney for the child based in the same state as the child can far more effectively communicate with the child than an attorney across the country. Although the parties had previously agreed, in August 2011, that New York would retain jurisdiction of custody and visitation matters, the agreement was outweighed by the other relevant factors.

Appellate Division, Third Department

Counsel Fees - Domestic Relations Law §237 - Award - Presumption Rebutted - Not Improvident Exercise its Discretion in Denying Interim Counsel Fees Where Wife Had Substantial Assets

Pendente Lite Maintenance - Domestic Relations Law § 236(B)(5-a) - Presumptive Amount Not Awarded Where Prior Family Court Order

In *Jordan v Jordan*, --- N.Y.S.2d ----, 2014 WL 740600 (N.Y.A.D. 3 Dept.) the parties were married in 1979, they separated in 1996 and the action was commenced in 2012. There were four children of the marriage, all but one of whom are emancipated. Plaintiff (wife) was not employed and defendant (husband) was a cardiologist with a history of earning \$480,000 annually. Since the entry of an order of Family Court in 2000, the husband paid the wife \$1,057 biweekly for spousal maintenance and \$3,573.04 biweekly for child support, totaling just over \$10,000 monthly. After commencing this action, the wife moved for temporary maintenance and child support, seeking a total of approximately \$14,000 monthly. She also sought \$15,000 in interim counsel fees and the full amount of her business valuation expert's retainer fee. Supreme Court acknowledged the presumptive amount of temporary maintenance that the wife was entitled to pursuant to Domestic Relations Law § 236(B)(5-a)(c), but concluded that the parties' circumstances warranted an interim award to be paid in the same manner and amount as set forth in the 2000 order. The court noted that the husband had continued to pay the child support amount included in the 2000 order despite the emancipation of three of the children. The court also considered the husband's other contributions to the support of the family, the respective financial conditions of both parties and the wife's reasonable needs. Given the wife's substantial assets, the court also declined to award her interim counsel fees "at this juncture," and ordered that the husband pay one half of the retainer fee for the wife's

expert. The Appellate Division affirmed. It observed that a cursory examination of the parties' respective financial circumstances revealed that the wife was able to meet her reasonable expenses with the amount she has been receiving pursuant to the 2000 order.

March 3, 2014

Appellate Division, Second Department

Agreements - Construction - Child Support - Emancipation - Child Emancipated Where He Lived with Father , a "Permanent Residence Away from the Residence of the Wife"

In *Lacy v Lacy*, --- N.Y.S.2d ----, 2014 WL 552323 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order of the Supreme Court which denied defendant wife's motion for child support arrears and granted plaintiff husband's cross motion to terminate his child support obligations due to the child's emancipation. The evidence established that pursuant to the parties' divorce settlement agreement, which required plaintiff to pay defendant child support until the children became emancipated and defined emancipation as including having a "[p]ermanent residence away from the residence of the Wife," plaintiff was properly relieved of his child support obligations. The motion court correctly determined that the parties' youngest son, the only unemancipated child, continuously resided with plaintiff, who had been paying the majority of the child's expenses, including educational and medical costs, since May 2011. Contrary to defendant's argument, the child's residence with defendant in New York was not a temporary residence akin to a college dormitory. Although he attended college in New York, he resided with plaintiff during at least one summer vacation, received mail at his father's residence, and obtained a New York City driver's license listing his father's address. In contrast, he visited defendant's home in Connecticut sporadically, during portions of his college vacations. In addition, both parties acknowledged that the child preferred to live in New York.

Supreme Court

Agreements - Stipulations - Set Aside - Agreement Sustained Where Husband a Savvy Businessman and Financial Expert, Appeared to Have Negotiated the Very Deal He Obtained.

In *A.B. v Y.B.* 2014 WL 553191 (N.Y.Sup.) plaintiff A.B. moved for an order directing that the child support provisions of the parties' Settlement Agreement, dated April 6, 2012, be rescinded and declared null and void, or in the alternative, the entire Settlement Agreement be rescinded and declared null and void. Defendant Y.B. cross moved for an order declaring the parties' Settlement Agreement to be valid and enforceable. The parties were married in 1997 and there were three unemancipated children of the marriage. The parties separated in January, 2009, and then again in May, 2010. Plaintiff was a 50% equity partner in a brokerage firm. Defendant was owner and operator of a business. On April 6, 2012, after ongoing mediation sessions lasting several years, the parties entered into a Settlement Agreement. The gravamen of plaintiff's challenge to the child support provisions of the Agreement were they are "overreaching, egregiously inequitable, manifestly unfair and unconscionable" and he was not adequately advised by the mediator, or competently represented by legal counsel regarding the Agreement. He claimed he was never advised that courts may "cap" income for child support purposes when it exceeds \$136,000, and that it is "standard" for courts to cap income for child support purposes at an amount less than 100% of the combined parental income when it exceeds \$136,000. He argued that a court "would almost invariably" have capped his income for child support purposes at an amount far less than 100% of his income, likely between a range of \$250,000 to \$400,000. The parties did not exchange Statements of Net Worth and agreed to use their 2010 income information to make support calculations as no 2011 federal tax return had been prepared at the time of the negotiation and signing of the Agreement. The parties also agreed that irrespective of plaintiff's earned income for 2011, his imputed income would be \$1.2 million in computing child support under the Child Support Standard Act. This figure was based upon a draw from plaintiff's business, an amount that plaintiff contended did not reflect his actual earned and investment income.

Supreme Court held that plaintiff failed to establish a sufficient basis to find the child support provisions of the Agreement were overreaching, inequitable, unfair, or unconscionable, or that plaintiff was entitled to relief from the Agreement on the basis that he was not adequately represented by legal counsel. Plaintiff, a savvy businessman and financial expert, appeared to have negotiated the very deal he obtained. His own e-mail communications supported this fact. Moreover, there is no requirement that a court or parties "cap" combined parental income at any specific amount over the initial \$136,000. The court concluded that the evidence demonstrated the plaintiff, who was possessed of sophistication, expertise, and intellect in financial matters, was personally involved in all aspects of the extensive negotiations, that he personally proposed the deal that was ultimately accepted, repeatedly refined his own proposal, and signed the Agreement, and initialed each page, including the final page that stated he clearly understood and assented to the Agreement. Throughout the negotiations and preparation of the Agreement, he was represented by legal counsel. Plaintiff's claims regarding the inadequacy of his legal representation, misadvice by the mediator, and his ignorance as to the provisions of the Child Support Standards Act and the "standard" application of the cap within the context of the CSSA were completely belied by the language in the Agreement, much of it. The court found that the Agreement was negotiated over a lengthy period of time, was prepared by independent counsel, and reviewed by plaintiff's own counsel. At all times, plaintiff was assisted by his own counsel who actively participated in the negotiations,

preparation, and execution of the Agreement. The court noted plaintiff produced no affirmation from prior attorney or anyone else corroborating any of his allegations regarding her failure to properly advise him, or that she operated under a conflict of interest because the mediator recommended her. The court declared the Agreement to be valid and enforceable.

February 17, 2014

Appellate Division, Second Department

Children - Immigration - 8 USC § 1101(a)(27)(J) -Special Immigrant Juvenile Status- No Restriction as to Who May Qualify as a Guardian.

In *Matter of Marisol N.H.*, --- N.Y.S.2d ----, 2014 WL 444170 (N.Y.A.D. 2 Dept.), the children, Samuel D.H., Marisol N.H., and Silvia J.H., ages 19, 18, and 16, respectively, were born in El Salvador to Miriam A.G. (mother) and Leonidas H. (father). According to the allegations made in support of the petitions, the father drank often, and he verbally and physically abused the mother. When Samuel was just four years old, the mother left the father, taking the children with her to her mother's home. The father never again had meaningful contact with the children; he did not provide them with any financial support, give them any birthday or Christmas presents, or show any interest in them. It was further alleged that in El Salvador, in the small neighborhood where the mother and the children settled, now abandoned by their father, they lived under the constant threat of violence from gangs. Members of a certain gang threatened to kill Samuel, as they did with many other children, if he refused to join their ranks, and they tried to extort money from his grandmother in exchange for sparing his life. Samuel knew nine children, one a close friend, who had refused to join that gang and were later killed. One gang member told the mother he would kill her, if she did not have sexual relations with him. The perilous situation led the mother to leave El Salvador for the United States so that she could establish a safe home for the children. She found work and lived with family and friends, saving money so that she could bring the children to her. Meanwhile, though, Samuel had stopped attending school because gang members had continued to threaten to kill him if he did not join them. Fearing for Samuel's life, the mother arranged for him to travel to the United States. Marisol and Silvia stayed behind with their grandmother. Subsequently, while the children's grandmother was walking home from work, she was killed by members of that gang. Three gang members were arrested for the murder, but the threats did not abate; other gang members threatened the lives of all the members of the mother's family. Marisol and Silvia stopped attending school, and would only leave their house if an unrelated adult male accompanied them. The mother then brought Marisol and Silvia to the United States. Now, the children lived with their mother in Nassau County, along with their teenaged uncle, Javier, who was left orphaned by the death of the children's grandmother.

The mother, who was Javier's legal guardian, worked 60 hours per week in order to support him and the children.

The children petitioned the Family Court for the appointment of the mother as their guardian so that they could pursue special immigrant juvenile status (SIJS) as a means to obtaining lawful residency status in the United States, and be freed from the fear of being returned to El Salvador, where they would have no parent to support and protect them. At a conference Family Court concluded that a best interests hearing was not warranted, *inter alia*, because the children had the "mother to protect them." There was "no reason," even if it was just "strictly for immigration purposes," to award the mother guardianship "of her own children." The Family Court dismissed the petitions without prejudice for failure to state a cause of action.

The Appellate Division, in an opinion by Justice Chambers, reversed. She observed that to obtain SIJS status the child, or someone acting on his or her behalf, must first petition a state juvenile court to issue an order making special findings of fact that the child is dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court. A state juvenile court must find that reunification with one or both parents is not viable due to parental abuse, neglect, abandonment, or a similar basis, and that it is not in the child's best interests to be returned to his or her home country (see 8 USC § 1101[a][27][J][iii]; 8 CFR 204.11[c]; *Matter of Marcelina M.-G. v Israel S.*, 112 AD3d at 107). In order to satisfy the requirement that the subject children be legally committed to an individual appointed by a state or juvenile court, they requested that their natural mother be appointed as their guardian. An infant includes a person less than 21 years of age who consents to the appointment of a guardian (see Family Ct Act § 661[a]).

The Second Department found that the Family Court has the statutory authority to appoint a natural parent to be the guardian of his or her children. Family Court Act § 661 provides that "the provisions of the surrogate's court procedure act shall apply to the extent they are applicable to guardianship of the person of a minor or infant and do not conflict with the specific provisions of this act" (Family Ct Act § 661[a]). Under the Surrogate's Court Procedure Act, "any person" (SCPA 1703) may petition to be named as guardian of an infant, and a guardian is "[a]ny person to whom letters of guardianship have been issued by a court of this state, pursuant to this act, the family court act or article 81 of the mental hygiene law" (SCPA 103[24]). Since these statutes are without limitation, they include even the appointment of a natural parent as guardian. The Court concluded that the Family Court has the statutory authority to grant a natural parent's petition for guardianship of his or her child, regardless of whether the petition is opposed.

The Court also held that Family Court erred in refusing to conduct a hearing to determine whether granting the guardianship petition would be in the best interests of the children. "When considering guardianship appointments, the infant's best interests are paramount". The fact that a child has one fit parent available to care for him or her "does not, by itself, preclude the issuance of special findings under the SIJS statute." Rather, a child may be eligible for SIJS findings "where reunification with just one parent is not viable as a result of abuse, neglect, abandonment, or a similar state law basis". Moreover,

in determining whether it is in the best interests of a child to grant a guardianship petition, it is entirely consistent with the legislative aim of the SIJS statute to consider the plight the child would face if returned to his or her native country and placed in the care of a parent who had previously abused, neglected, or abandoned him or her. In this case there were sufficient allegations in the guardianship petitions and supporting papers to suggest that naming the mother as guardian of the subject children would be in their best interests. The father abandoned the children (see *Matter of Marcelina M.-G. v Israel S.*, 112 AD3d at 110, 114). If the children were returned to their native country, they may be separated from their only other parent, who first left El Salvador because she was threatened with sexual assault and wanted to earn enough money to bring the children to the United States. The children will not have the protection of their grandmother who became their temporary, de facto guardian in El Salvador once the mother immigrated to the United States, as members of a gang murdered her. Alone, without either parent or their maternal grandmother, the children would face the prospect of having to protect themselves from violent gang members, which, cruelly, may be possible only by joining them. Naming the mother as guardian of the children may potentially enable the children to pursue legal status in the United States. If legal status is granted, the children may avoid being separated from their mother and instead keep their family intact and safe, away from the perils present in El Salvador.

Children - Immigration - 8 USC § 1101(a)(27)(J) -Special Immigrant Juvenile Status- No Restriction as to Who May Qualify as a Guardian - Fact That the Petitioner Was the Child's Mother Was Not an Automatic Bar to the Granting of Her Petition

In *Matter of Maura A.R.-R.*,--- N.Y.S.2d ----, 2014 WL 444196 (N.Y.A.D. 2 Dept.), Santos F.R. (mother) filed a petition to be appointed guardian of her daughter, Maura A.R.-R., for the purpose of obtaining an order declaring that the child was dependent on the Family Court and making specific findings that she was unmarried and under 21 years of age, that reunification with her father was not viable due to abandonment, and that it would not be in her best interests to be returned to El Salvador, her previous country of nationality and last habitual residence, so as to enable her to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (SIJS) pursuant to 8 USC 1101(a)(27)(J). The mother moved an order making the requisite declaration and special findings to enable the child to petition for SIJS. Family Court, in effect, denied the motion and dismissed the proceeding on the grounds that there was "no proof or need shown for an order of guardianship," and there was no showing that the child "cannot return to El Salvador." The Appellate Division reversed. It held that there is no restriction as to who may qualify as a guardian under the Family Court Act, which permits the appointment of a guardian for "a person who is less than twenty-one years old who consents to the appointment or continuation of a guardian after the age of eighteen" (Family Ct Act § 661[a]). Thus, the fact that the petitioner was the child's mother was not an automatic bar to the granting of her petition (citing *Matter of Marisol N.H.*, — AD3d ----; [decided herewith] *Matter of Maria E.S.G. v. Jose C.G.L.*, --- AD3d ---- [decided herewith]; *Matter of Juana A.C.S. v. Dagoberto D.*, --- AD3d ---- [decided herewith]; *Matter of Maria*

G.G.U. v. Pedro H.P., --- AD3d ---- [decided herewith].] When considering guardianship appointments, the infant's best interests are paramount". Based upon its independent factual review, it found that the child's best interests would be served by the appointment of the mother as her guardian and that the child was dependent on the Family Court. It also found that because the child's father abandoned her, reunification with her father was and that it would not be in the child's best interests to be returned to El Salvador.

Supreme Court

Counsel Fees - Domestic Relations Law §237 - Award - Factors - Imputed Income - Unemployed Husbands Obstructionist Tactics Warrants Award of Counsel Fees to Wife

In GT v AT,--- N.Y.S.2d ----, 2014 WL 517468 (N.Y.Sup.) the parties were married on December 19, 1987. They had two children, one of whom was 21. The defendant was an engineer. Prior to trial, the parties reached a settlement regarding custody and during the trial they reached a settlement regarding child support and equitable distribution of all of their real estate holdings. The court issued a trial decision on the remaining issues of marital debt, personal property and counsel fees. Supreme Court observed that "[p]ursuant to Domestic Relations Law §237(a) states that "[t]here shall be rebuttable presumption that counsel fees shall be awarded to the less monied spouse." When awarding counsel fees, the court must not only consider the parties' financial positions but any delay incurred as a result of a party's obstructionist tactics (Johnson v. Chapin, 12 NY3d at 467). It was clear to the court from an admission by the defendant, who was unemployed, that he voluntarily left his employment where he was earning \$90,000, and that the defendant was capable of working full time and earning at least \$90,000. This figure was imputed to the defendant based upon the defendant's prior employment experience, as well as his future earning capacity in light of his educational background. The plaintiff was employed full time and earned less than \$50,000 which was about half of what the court found that the defendant was capable of earning. Thus, the plaintiff was not the monied spouse for purposes of DRL § 237(a). In considering whether the defendant should be responsible for all or a portion of the plaintiff's counsel fees, the court weighed the financial circumstances of the parties and any actions taken by either party to prolong, obfuscate or delay the orderly process of this trial. It found that the defendant engaged in a pattern of obstructionist conduct which unnecessarily delayed and increased the legal fees incurred in the litigation. For example, the defendant's motion to recuse, filed on the eve of trial, could only be viewed as a delay tactic. In spite of the court's repeated explanation to the defendant that the plaintiff's action was based on irretrievable breakdown which cannot be overcome by the defendant's testimony at trial once the plaintiff swore to the fact that the marriage has irretrievably broken down for a period of at least six months prior to the commencement of the action, the defendant persisted in litigating and contesting grounds. As a result of the defendant's conduct, the plaintiff had to endure twelve days of trial rather than the three or four days that it should have taken. The court held that defendant was responsible for all of the plaintiff's counsel fees for trial.

February 1, 2014

Appellate Division, Second Department

Agreements - Enforcement - Waiver - Party Claiming a Waiver must Come Forward with Evidence of a Voluntary and Intentional Relinquishment of a Known and Otherwise Enforceable Right

In Matter of Hinck v Hinck, --- N.Y.S.2d ----, 2014 WL 128376 (N.Y.A.D. 2 Dept.), the parties stipulation of settlement, which was incorporated but not merged into their judgment of divorce obligated the father to pay the mother child support of \$2,500 per month and maintenance in the sum of \$400 per month. The mother commenced a separate plenary action in the Supreme Court seeking to set aside the stipulation. During the months of April 2008 through September 2009, the mother did not cash the checks that the father sent to her in accordance with his support obligations, because her counsel in the plenary action advised that to do so would ratify the terms of the stipulation she was trying to set aside. After the mother's plenary action was dismissed she requested that the father issue a new check to cover the child support and maintenance payments that she had previously declined to cash, and he refused. The mother filed a petition in Family Court alleging that the father had violated the terms of the stipulation of settlement and seeking its enforcement. The Family Court granted the mother's petition and issued orders directing the entry of money judgments in favor of her and against the father in the sums of \$45,000 for child support arrears and \$7,500 for maintenance arrears. The Family Court subsequently denied the father's objections with respect to his obligation to pay \$45,000 for child support arrears and granted his objection with respect to his obligation to pay maintenance arrears only to the extent of reducing his payment to \$7,200 for such arrears.

The Appellate Division rejected the fathers argument that the mother waived her right to receive child support and maintenance upon her voluntary and intentional decision not to cash the checks that he sent to her during the period from April 2008 through September 2009. A valid waiver " 'requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver would have been enforceable. It may arise by either an express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage. A waiver is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence (Peck v. Peck, 232 A.D.2d 540, 540, 649 N.Y.S.2d 22). Rather, there must be proof that there was a voluntary and intentional relinquishment of a known and otherwise enforceable right. 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 found that the father failed to prove that the mother's decision not to cash the child support and

maintenance checks constituted a voluntary and intentional relinquishment of her right to those payments. The mother's decision not to cash the checks was based upon the advice of her counsel in the plenary action so as to preserve and support her claim that she was entitled to an increase in child support and maintenance payments. The father did not come forward with any evidence showing that the mother intended to abandon her rights to child support and maintenance payments. In fact, she was seeking an increase in such payments. Upon the dismissal of the mother's plenary action, the terms of the parties' stipulation of settlement remained unchanged, intact, and enforceable. Since the father failed to prove an express or implied waiver by the mother of her right to the child support and maintenance payments from April 2008 through September 2009, he remained bound by the contractual obligations in the stipulation of settlement.

Appellate Division, Third Department

Divorce - Equitable Distribution - Property Distribution - Judgment of Divorce Generally must Include Equitable Distribution of the Parties' Property

In Herchenroder v. Herchenroder — N.Y.S.2d ----, 2014 WL 148538 (N.Y.A.D. 3 Dept.) Plaintiff (husband) and defendant (wife) were married in 1989 and the husband commenced a divorce action in 2009. The wife's answer and counterclaim included a demand for equitable distribution. On the first day of trial, the husband put in proof supporting the grounds that he had asserted for a divorce and he then rested. Before the second day of trial, the husband ostensibly contacted the wife indicating that he planned to seek permission to withdraw his complaint with leave to refile under the recently enacted no-fault cause of action (Domestic Relations Law § 170[7]). He made the application when the parties appeared in court the next morning, but Supreme Court denied the motion and directed the wife to proceed. However, she had excused her witnesses apparently upon the assumption that the husband's motion was going to be granted and she was thus not prepared to proceed. Based on the evidence from the first day of trial, Supreme Court then granted the husband a divorce on the ground of cruel and inhuman treatment. Further, the court noted the many delays that had already occurred and, because no proof had been presented relevant to equitable distribution, held that the parties had waived judicial intervention on the issue and made no award. The Appellate Division modified. It held that in the absence of a duly executed agreement by the parties regarding distribution of their property, a judgment of divorce generally must include equitable distribution of the parties' property Here, there was no such an agreement. Moreover, the wife was making a claim for equitable distribution in the divorce action and had planned to present proof in such regard. Under the circumstances, she should have been accorded a brief adjournment so as to be able to attempt to present her proof regarding equitable distribution. The judgment was modified, on the law, by reversing so much thereof as failed to order equitable distribution of the parties' marital

property and the matter was remitted to the Supreme Court for further proceedings not inconsistent with the Court's decision.

Supreme Court

Maintenance Pendente Lite - Award - Reduction in Presumptive Amount of Temporary Maintenance Appropriate Based upon Considerations of Pre-divorce Separate Households Maintained by the Parties, and Overall Assessment of the Combined Presumptive Support Awards in Relation to Resources Available to the Parties.

In *Lawlor Davis v Davis*, 2012 WL 10207966 (N.Y.Sup.), 2012 N.Y. Slip Op. 52504(U) (Sup Ct 2012) the plaintiff ("wife") filed a motion requesting pendente lite relief. The defendant ("husband") opposed the motion. The parties resolved some of the issues and only the issues of child support, temporary maintenance, construction loan payments and counsel fees remained.

The parties were married on August 3, 2002. They had two children, and agreed to share joint custody, with primary physical custody to the wife. The wife resided in the former marital residence, with the two children. This residence was a rented property, as the parties were in the process of constructing a new home when the parties separated. The husband left the marital residence on October 5, 2011.

The wife was employed in her father's business and earned \$38,232.00 per year. The husband was an engineer, and earned \$118,137.00 per year. The husband's attorney alleged that the husband provided health insurance coverage for the family through his employer, and contributed \$99.51 to the cost of that coverage on a biweekly basis. The parties purchased a parcel of vacant land in 2009, with the intention of building a home on the property where the family would reside. They previously owned a house, which they sold in October 2011. In order to build the new house, the parties secured a construction loan in the amount of \$417,000.00. While construction of the home had begun, it had not been completed, and all work has stopped. The parties currently paid \$1,665.00 per month on the loan. The husband did not provide an affidavit in opposition to the motion, and the representations by the attorney were considered hearsay, as the attorney did not demonstrate any first-hand knowledge of the claims made in the affirmation.

The Court found that the presumptive amount of temporary maintenance was \$22,516.00 per year, or \$433.00 per week. The calculation of presumptive child support amount payable by the husband was \$21,825.58 per year, or \$419.72 per week. Taking the two presumptive amounts together, the husband would be required to pay \$852.72 per week, or \$44,341.44 per year, in combined support. When this amount was added to the

disposable income attributable to each party under such an award, the wife nets \$80,016.44 per year, and the husband nets \$65,460.56 per year.

Supreme Court observed that while the statutes that govern child support and temporary maintenance provide the Court with factors to consider when the Court has determined that the amount of basic child support is unjust or inappropriate, these factors do not specifically provide direct tools for a court to evaluate a significant shift in resources created by the two presumptive support calculations. It noted that courts have dealt with this in slightly different ways depending upon the specifics of each case. In *Margaret A. v. Shawn B.* (31 Misc.3d 769 [Sup Court, Westchester County 2011]), the court awarded the presumptive amount for both child support and temporary maintenance. However, the payee was required to pay all of the expenses for the marital residence, as well as all expenses for herself and the children, with the exception of medical, dental, and life insurance coverage. In *Scott M. v. Ilona M.* (31 Misc.3d 353, 363 [Sup Ct, Kings County 2011]), the Court noted that "[g]ranted a deviation just because there is a resource shift would be inconsistent with the statutory intent. The economic intent of the statute clearly is to shift resources."The Court relied on the factors relating to the existence and expense of the pre-divorce household, as well as the substantial child care expense obligations that existed in that case, to reach a conclusion that a deviation regarding the temporary maintenance amount was appropriate. The Court reduced the presumptive amount of temporary maintenance by one-third and awarded the full presumptive amount of child support.

The Court declined to utilize any income above the income cap of \$130,000.00 for purposes of calculating child support, and specifically noted that basing child support on the first \$130,000.00 of income was appropriate "... given the amount of maintenance, the

pre-standard (sic) of living and amount of resources each party is left with ...". In *Martin v. Buckley* (33 Misc.3d 1234[A], 2011 N.Y. Slip Op 52235 [U] [Sup Ct, Monroe County 2011]), the Court agreed in principle with the issues relating to legislative intent that were noted by the Court in *Scott M.* However, the *Martin* court stated that the court believed that consideration of the size of the award in relation to the total resources available to the parties' (sic) is a permissible qualitative factor under § 236(B)(5-a)(e)(1). Application of each of the statutory deviation factors is geared to either reduce or increase the presumptive formulaic award. Therefore, consideration of the sheer size of the presumptive award in relation to the parties' total available resources is within the scope of, or as ejusdem generis with, the enumerated sixteen deviation factors and thus does not run afoul of the new statute or its intent. The *Martin* court determined that a reduction in the temporary maintenance award was appropriate, and the full presumptive child support award was appropriate.

In this case, the parties outlined monthly expenses equaling \$9,393.00 for the wife, and \$9,225.00 for the husband. Both the husband and wife included the full amount of the monthly payment on the construction loan, as well as all of the family's automotive monthly costs, on their respective statements of net worth, which resulted in higher monthly expenses overall than are actually paid. A unique factor in this case related to the monthly expense for the construction loan for the home that was not completed, and was uninhabitable. The parties had an added debt relating to their previous future housing plans that was above and beyond their individual actual housing expenses. It was clear that this family has stretched their finances thin, and that there was no extra disposable income available to the parties.

Based upon the pre-divorce separate households maintained by the parties, and the overall assessment of the combined presumptive support awards in relation to the resources available to the parties, the Court determined that a reduction in the presumptive amount of temporary maintenance was appropriate. The Court determined that a reduction of 33%, or \$7,430.28, was warranted, thus reducing the temporary maintenance award to \$15,085.72 per year, or \$290.11 per week.

The wife requested that the Court direct the husband to pay the monthly construction loan payment. In light of the shifting of resources based upon the maintenance and child support obligations imposed upon the husband, the Court determined that the parties should each be responsible for one-half of the monthly payment on the construction loan.

Based upon the courts analysis of the parties' financial resources, and the child support and temporary maintenance awards, the Court determined that the wife was no longer the "less monied" spouse, and, declined to award the wife counsel fees.

Divorce - Forum non Conveniens - Dismissal of Prior New York Action for a Divorce Warranted Where Parties No Longer Reside in New York and Have No Real Property in New York

In *D.C. v J.C.*, 2014 WL 292444 (N.Y.Sup.), 2014 N.Y. Slip Op. 50067(U) the parties were married on October 5, 1991 in Nassau County, New York. At the time of the filing of the summons and complaint, plaintiff was residing in Pleasant Valley, New York. Shortly after filing the complaint, plaintiff moved to Haddonfield, New Jersey; this residence was purchased by the parties on June 11, 2013 and it was intended to be the marital residence. Defendant indicated that he had been living in company provided housing in Philadelphia, Pennsylvania. The parties did not own any real property in New York. The parties' children were all over eighteen years of age, and maintained a legal residence with the plaintiff in New Jersey. Plaintiff was aware of no witnesses necessary to deciding this matter who would be unduly inconvenienced by the necessity of appearing in New Jersey. The plaintiff commenced an action for divorce in New Jersey, by filing a complaint on October 24, 2013.

Supreme Court observed that the doctrine of forum non conveniens permits a court, on the motion of any party, to stay or dismiss an action when, although it may have jurisdiction over a claim, the court determines that in the interest of substantial justice the action should be heard in another forum (CPLR 327[a]). On such a motion, the Supreme Court is to weigh the parties' residencies, the location of the witnesses and any hardship caused by the choice of forum, the availability of an alternative forum, the situs of the action, and the burden on the New York court system (*Tiger Sourcing [HK] Ltd. v. GMAC Commercial Fin. Corporation-Can.*, 66 AD3d 1002 [2nd Dept 2009]). No one factor is dispositive. New York courts are not compelled to retain jurisdiction over any case which does not have a substantial nexus to New York (see *Turay v. Beam Bros. Trucking, Inc.*, 61 AD3d 964 [2nd Dept 2009]). Here, although the parties were married in New York and resided in New York for a time, the parties currently had little or no connection to New York. They were not residents of New York, their appearance in the Dutchess County Supreme Court, would cause both parties hardship in the form of substantial travel and associated costs. There would be no witnesses prejudiced by the action being decided in New Jersey. The parties were in the process of moving to New Jersey prior to the turmoil in their marriage. Plaintiff's maintenance of a New York action, based upon advice of counsel, was to simply "put the automatic orders into effect which would protect [her] share of our assets." Accordingly, the court found that the courts of New Jersey were a particularly viable alternative forum, the plaintiff having shown that New York was genuinely inconvenient and the selected forum of New Jersey was significantly preferable (*Boyle v. Starwood Hotels & Resorts Worldwide, Inc.*, 110 AD3d 938 [2nd Dept 2013]). Plaintiff's motion for dismissal of the action was granted.

January 16, 2014

Appellate Division, Second Department

Child Support - Award - Test Generally Applied to Determine Whether to Award Support in Excess of the Statutory Cap Is Whether the Child Is Receiving Enough to Meet His or Her "Actual Needs and the Amount Required to Live an Appropriate Lifestyle.

In *Matter of Keith v Lawrence*, --- N.Y.S.2d ----, 2014 WL 54299 (N.Y.A.D. 2 Dept.) the father appealed from an order of the Family Court which denied his objections to an order which, after a hearing, directed him to pay child support of \$1,250 per month. The parties were the parents of one child. The mother had sole custody. After a hearing on child support, the Support Magistrate found that combined parental income was \$215,818.43, of which 47% was attributable to the father.

The Support Magistrate awarded child support based on the parties' combined parental income, rather than the combined parental income cap of \$130,000 in effect at the time. Although the father's monthly support payment based on the parties' combined parental income totaled \$1,437 monthly, the Support Magistrate modified the amount downward to \$1,250 monthly, in light of the fact that the child was receiving Social Security disability derivative benefits based on the father's active disability claim. The father filed objections arguing that the Support Magistrate erred in awarding child support based on combined parental income in excess of the \$130,000 income cap. The Appellate Division affirmed. It observed "When the combined parental income exceeds \$130,000, which was the "statutory cap" in effect when the order was entered, "the court shall determine the amount of child support for the combined parental income in excess of the cap through consideration of the factors set forth in Family Ct Act § 413(1)(f) and/or the child support percentage" (Family Ct Act § 413[1][c][3]). The Family Court must articulate an explanation of the basis for its calculation of child support based on parental income above the statutory cap. The Court held that test generally applied is whether the child is receiving enough to meet his or her "actual needs and the amount required to live an appropriate lifestyle" (*Levesque v. Levesque*, 73 AD3d 990, 990). The record indicated that the child enjoyed a middle-class lifestyle with extracurricular activities, and attended private school and summer camp. The Support Magistrate properly determined that the child's needs would be met, and her lifestyle maintained, with an award based upon applying the child support percentage to the total combined parental income.

Child Support - Award - Family Court Act § 424-a - Where Respondent Fails to Comply with Family Court Act § 424-a Court must Grant Relief Demanded in the Petition or Preclude Respondent from Offering Evidence as to Respondent's Financial Ability to Pay Support

In Matter of Speranza v Speranza, --- N.Y.S.2d ----, 2014 WL 54521 (N.Y.A.D. 2 Dept.), in a consent support order dated November 30, 2007 issued by the Family Court the parties agreed that the father would pay child support based on his annual income of \$61,467. The parties 2011 judgment of divorce incorporated but did not merge a stipulation of settlement dated December 22, 2010, in which, the parties agreed that the father's obligation to pay child support would be suspended for 15 months, after which his child support obligation would resume, as calculated pursuant to the Child Support Standards Act. In May 2012 the mother commenced a proceeding to enforce the child support provisions of the stipulation of settlement. The parties were directed to exchange and file financial information prior to the date set for a hearing. After the father failed to make any financial disclosure, the Support Magistrate granted the mother's petition, found that the father had an annual income of \$61,467, based on the November 30, 2007, support order, and directed him to pay child support \$186.99 weekly. The Family Court denied the father's objections. The Appellate Division observed that where a respondent in a support proceeding fails, without good cause, to comply with the compulsory financial disclosure mandated by Family Court Act § 424-a, "the court on its own motion or on application shall grant the relief demanded in the petition or shall order that, for purposes of the support proceeding, the respondent shall be precluded from offering evidence as to respondent's financial ability to pay support" (Family Ct Act § 424-a[b]). Since the father failed, without good cause, to comply with the compulsory financial disclosure mandated by Family Court Act s 424-a, the Family Court was required to either grant the relief demanded in the petition or preclude the father from offering evidence as to his financial ability to pay support. Family Court providently exercised its discretion by, in effect, granting the relief requested in the mother's petition and directing that the father pay child support based upon his annual income of \$61,467.

Appellate Division, Third Department

Child Support - Hearing - Motion for Judgment as a Matter of Law Following Close of Opposing Party's Proof Does Not Waive Moving Party's Right to Present Further Evidence.

In Porter v D'Adamo, --- N.Y.S.2d ----, 2014 WL 67229 (N.Y.A.D. 3 Dept.) following a hearing, the Support Magistrate granted the mother's petition and ordered the father to pay increased child support. Family Court partially granted the father's objections and vacated the Support Magistrate's order. The Appellate Division held that the father was improperly deprived of an opportunity to present his direct case. After the mother rested her case, the Support Magistrate asked the father whether he wished to present witnesses or to renew his prior motion. The father's counsel responded that he renewed the prior motion and further moved to dismiss the modification petition in its entirety. Apparently understanding this response to mean that the father did not wish to present witnesses, the Support Magistrate reserved decision on the motions and, without asking the father whether he rested his case, closed the hearing. The father immediately objected that he had not yet

presented his case and that he wished to present evidence, but the Support Magistrate responded that the ruling had been made. This was error. A motion for judgment as a matter of law following the close of the opposing party's proof "does not waive the [moving party's] right ... to present further evidence" (CPLR 4401; see *Gavigan v. John Di Guilio, Inc.*, 84 A.D.2d 857, 858 [1981]; Uniform Rules for Family Court [22 NYCRR] 205.35[a]). The father fully preserved this issue during the hearing and in his subsequent objections. Family Court should have granted his objection on this ground and remitted the matter to the Support Magistrate to reopen the hearing and permit the father to present his case.

Supreme Court

Maintenance Pendente Lite - Award - Income - Veterans Disability Benefits May Be Considered for the Purposes of Determining Income When Considering an Application to Receive Temporary Maintenance.

In *Dachille v Dachille*, --- N.Y.S.2d ----, 2014 WL 27960 (N.Y.Sup.) plaintiff moved for temporary maintenance and other relief. Defendant cross moved for pendente lite relief.

The parties were married on July 4, 1981, and had been living apart since June of 2010. There were no unemancipated children of the marriage. Defendant resided at the marital residence, and plaintiff resided with his cousin. Plaintiff contended that he paid the mortgage at the marital residence until June 2013. He asserted he stopped paying because defendant's boyfriend "barred" him from the marital residence, and because he could no longer afford pay the mortgage payments, \$1,534, and the Chapter 13 plan payments of \$2,020 per month. The parties entered Chapter 13 bankruptcy in 2008, and the Chapter 13 plan was confirmed on November 2, 2009. The plan called for the parties to pay \$121,000 in 60 payments of \$2,020. On August 29, 2012, plaintiff borrowed \$53,262.72 from his cousin to payoff the balance of their bankruptcy plan. The bankruptcy estate closed August 2, 2013.

Plaintiff sought maintenance from defendant. Plaintiff received \$2,004 per month (\$24,048 annually) in social security disability benefits, \$2,973 per month in veteran's disability benefits (\$35,676 annually), and a Postal Workers pension of \$436.18 monthly (\$5,234 annually). That is \$5,413.18 per month or \$64,958.16 per year. Defendant wife earned \$64,110 in 2012 from her job as supervisor with the United States Postal Service, together with a modest amount of deferred income.

The Court rejected plaintiff's argument that the court could not consider his Veteran's disability benefits as income to him. DRL 236(B)(5-a)(c) provides that disability benefits, veterans benefits and pension benefits must be included in gross income. DRL s 240[1-b](b)(5)(iii). Accordingly, plaintiff's income would be \$64,958.16 per year. Defendant's income, minus FICA of \$4,904 would be \$59,206.

The court rejected the argument that 10 U.S.C. § 1408 and the authority cited in *Alvarado v. Alvarado*, 38 Misc.3d 1211(A), 2013 WL 196521, 2013 N.Y. Slip Op. 50077

(Sup.Ct. Richmond Co. January 15, 2013), prevented consideration of veterans disability benefits for the purposes of determining plaintiff's income when considering his application to receive temporary maintenance from defendant. It observed that the Federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, displaces the total preemption ruling concerning federal military retirement benefits in *McCarty v. McCarty*, 453 U.S. 210 (1981). Under USFSPA, Congress authorized state courts to distribute, with certain limitations not relevant here, disposable retired pay in a divorce proceeding. 10 U.S.C. § 1408(a)(2)(C); § 1408(a)(4). Thereafter, in *Mansell v. Mansell*, 490 U.S. 581 (1989), the Supreme Court further limited the authority of a state court by prohibiting distribution of disposable retired pay which constitutes that portion of retired pay that has been waived under 38 U.S.C. §5305 to receive veterans disability benefits. Neither *Mansell* nor 10 U.S.C. § 1408 have anything to say about the proper calculation of income for purposes of temporary or permanent maintenance, especially as it concerns the putative payee or recipient of maintenance. The federal scheme purports only to concern the division of future benefits upon equitable distribution, or an order directing that alimony or maintenance be paid out of veteran's disability payments. The statute addresses whether any final divorce decree orders payment of a portion of either disposable military retirement pay, which is permissible, or veterans disability payments that result from a waiver, which under *Mansell* is not permissible.

The state cases upon which plaintiff relied did not require a different result. However in *Carl v. Carl*, 58 AD3d 1036 (3d Dept.2009), cited in the *Alvarado* case, which relied on *Carl* for the maintenance observation, the court held that income from a private disability insurance policy, conceded to be separate property, must be considered in the maintenance calculus. In a footnote the court stated that veterans disability payments "would otherwise be precluded from consideration with respect to maintenance" (citing 10 U.S.C. s 1408 and *Hoskins v. Skojec*, supra). Supreme Court found that inasmuch as the court was not dealing with a veteran, or a veteran's retirement or disability payments, the observation was entirely unnecessary to the decision and therefore dictum. In the *Alvarado* case, the husband moved for an order declaring that, inter alia, his veterans disability payments were exempt from consideration for purposes of maintenance. Relying on *Carl*, the court agreed. Thus considered, *Alvarado* stands on no better authority than *Carl* itself for the proposition advanced. Therefore, the court viewed the *Alvarado* "precedent" as of limited probative value.

The Court held that even if it did not consider such income to plaintiff for purposes of the temporary guideline calculation, it would find any resulting guideline award to plaintiff unjust and inappropriate. Section 236(B)(5-a)(e)(1) provides that "[t]he court shall order the presumptive award of temporary maintenance in accordance with paragraphs c and d of this subdivision, unless the court finds that the presumptive award is unjust or inappropriate and adjusts the presumptive award based upon consideration of the" factors at DRL §236(B)(5-a)(e)(1). Plaintiff maintained a pre-divorce separate household for more than three years prior to the commencement of this action. DRL §236(B)(5-a)(e)(1)(ix). Plaintiff did not present any argument that he was in need of support or that he was now living below the marital standard of living. DRL

236(B)(5-a)(e)(1)(iii). Plaintiff's application failed to address how he could afford to pay the mortgage and make the Chapter 13 payments, but now required temporary spousal support. Plaintiff's application for temporary maintenance was denied. The court denied plaintiff's application that defendant contribute \$500 per month toward a note to the cousin. It held that the debt of the parties shall be distributed at the time of judgment. The court had no power to distribute this debt prior to final judgment without agreement of the parties. The court ordered plaintiff to bring current and pay the mortgage on the marital residence as both parties intended to sell the residence. The court stated it would apportion any proceeds or debt considering all the facts and circumstances as presented here and developed at trial.

Supreme Court observed that exclusive occupancy of a marital residence by one party, pendente lite, is warranted only: (1) when needed to protect the safety of persons or property; or (2) when the nonmovant spouse has voluntarily established an alternative residence and that spouse's return to the marital residence would cause domestic strife. *Kenner v. Kenner*, 13 AD3d 52, 53 (1st Dept.2004). Although it appeared plaintiff vacated the marital residence voluntarily, there were insufficient allegations that his return would engender strife. It appeared that plaintiff has no intention of returning to the marital residence. An award of exclusive occupancy must be based upon incidents that exceed petty harassments such as the hostility and contempt admittedly demonstrated herein that are routinely part and parcel of an action for divorce." *Estis v. Estis*, 2002 N.Y. Misc. LEXIS 2028 (Sup. Ct., Nassau Co., 2002). There were no allegations here that plaintiff was a danger to defendant. Exclusive use and occupancy was denied.

The court denied the request for counsel fees. There was a substantial parity here between the parties' incomes and the court did not perceive that either party had an advantage over the other "on the basis of sheer financial strength."

Surrogates Court

Adoption - Standing - Drl §110 - Intimate Partners - Close Personal Friends Can Be Intimate Partners for Purposes of Adoption

In *Matter of Adoption of G*, --- N.Y.S.2d ---, 2013 WL 6977880 (N.Y.Sur.), an uncontested second-parent adoption proceeding, the court held that two close personal friends, who together decided to adopt and have jointly participated in all aspects of the adoption process, and had been raising a child together, be her joint, legal adoptive parents, were "intimate partners for purposes of a second parent adoption.

KAL and LEL met in 2000 and quickly became friends. They worked together for a number of years and their friendship deepened with time. Because LEL was a very close friend, KAL confided in him, telling him of her plans to become a mother using artificial insemination. LEL offered to be the father, rather than having KAL use an anonymous

sperm donor and then be a single parent. KAL agreed. After two years of trying to conceive a child, including a round of unsuccessful in-vitro fertilization, KAL and LEL decided to instead adopt a child together. KAL and LEL researched adoption options and together selected Ethiopia as the country of origin for their child. They spent years planning and hoping, when they finally received the call in 2011 that a child was waiting to be adopted. KAL and LEL traveled together to Ethiopia to meet G. for the first time. They then made a second trip to bring G. home to New York. Because KAL and LEL were not married to each other, they could not adopt G. together in Ethiopia, so KAL alone adopted her. Upon returning to the United States, KAL registered the foreign adoption in Family Court in Kings County, New York. LEL then petitioned this court to adopt G. and become her second legal parent. KAL executed a consent to the relief sought in the petition, so long as the adoption does not extinguish any of her parental rights and only if such adoption results in joint custody.

The Court found that from the moment they met G., KAL and LEL functioned as her parents. KAL and LEL considered themselves G.'s co-parents and G. knew them as her parents. G. called KAL "Mommy" and LEL "Daddy." G.'s legal surname was the last names of both KAL and LEL, hyphenated.

The Court found that LEL had standing to adopt and, together with KAL, was eligible to be one of G.'s legal parents. It pointed out that Domestic Relations Law § 110 sets forth the classes of people authorized to adopt another person in New York, including: "[a]n adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together...." The phrase "intimate partners" is not defined in the statute or elsewhere in the Domestic Relations Law, and thus interpretation of its meaning is necessary. The court found that the legislative history of the 2010 amendment to DRL § 110 confirmed its purpose was to further expand the categories of persons who may adopt in New York. The statute does not require that individuals live in the same household or have a sexual relationship in order for their relationship to be considered "intimate." The legislative history supported the interpretation of the phrase "intimate partners" to include a relationship such as the one here: very close, loving friends, who had an intimate connection, which included planning for and raising a child together. In the alternative, LEL would have standing to adopt G. as an "adult unmarried person." (DRL § 110.) The Court of Appeals said as much in *Matter of Jacob*, and explained that the word "together" in the statute only applies to "married persons" and "does not preclude an unmarried person in a relationship with another unmarried person from adopting." (*Matter of Jacob*, 86 N.Y.2d at 660.) Conferring standing on LEL under these circumstances would not terminate KAL's parental rights. DRL § 117 does not invariably require termination in the situation where the [custodial, legal] parent, having consented to the adoption, has agreed to retain parental rights and to raise the child together with the second parent. (*Matter of Jacob*, 86 N.Y.2d at 666-67.) The Court concluded that DRL § 117 would not terminate KAL's parental rights and did not prevent LEL's adoption of G. as requested in this petition. The court also found that it was in the best interests of G. to have both KAL and LEL as legal parents, even though they did not have a spousal or romantic relationship, and did not live together.

January 2, 2014

2013 Legislation

Laws of 2013, Ch 526, effective December 18, 2013.

The Domestic Relations Law, the Family Court Act and the Criminal Procedure Law, were amended to protect victims of domestic abuse by recognizing, as family offenses, some forms of economic abuse perpetrated against victims by their abusers. Economic abuse frequently accompanies other forms of domestic abuse perpetrated by abusers, in the family violence context, to exercise power and control over their victims and their finances. Among the long list of types of abuse cited included taking the victim's credit card and other documents; incurring debt in the survivor's name through false statements or coercion; perpetrating identity theft or otherwise incurring debt without the survivor's knowledge; preventing the victim from working; stealing the victim's paychecks or forcing the victim to turn them over to the abuser; forging the victim's signature; withholding household finances from the victim; controlling the victim's access to health insurance; exercising control over the victim's immigration status and documents; monitoring the victim's computer access and harassing the victim at work. Laws of 2013, Ch 526, effective December 18, 2013. See NY Legis Memo 526 (2013)

Family Court Act, §812 (1), Family Court Act § 821 (1) (a), Criminal Procedure Law § 530.11, were amended to add as family offenses, identity theft in the first degree, identity theft in the second degree and identity theft in the third degree (Penal Law §190.80, §190.79 and §190.38), grand larceny in the third degree and grand larceny in the fourth degree (Penal Law §155.35 and §155 30), and coercion in the second degree (Penal Law § 135.60, subdivisions one, two and three.)

Domestic Relations Law § 240 (3) (a), Domestic Relations Law § 252, Family Court Act § 446, Family Court Act § 551, Family Court Act § 656, Family Court Act § 842, Family Court Act § 1056, and Criminal Procedure Law § 530.12 were amended to provide that an order of protection may require the petitioner or respondent to promptly return specified identification documents to the protected party, in whose favor the order of protection or temporary order of protection is issued. "Identification document" means any of the following exclusively in the name of the protected party: birth certificate, passport, social security card, health insurance or other benefits card, a card or document used to access bank, credit or other financial accounts or records, tax returns, any driver's license, and immigration documents including but not limited to a United States permanent resident card and employment authorization document. Upon motion and after notice and an opportunity to be heard, "Identification document"

means any of the following, including those that may reflect joint use or ownership, that the court determines are necessary and are appropriately transferred to the protected party: any card or document used to access bank, credit or other financial accounts or records, tax returns, and any other identifying cards and documents. The order may include any appropriate provision designed to ensure that any such document is available for use as evidence in the proceeding, and available if necessary for legitimate use by the party against whom the order is issued; and specify the manner in which such return shall be accomplished. Laws of 2013, Ch 480, effective November 13, 2013. See NY Legis Memo 480 (2013)

Laws of 2013, Ch 480, effective November 13, 2013

The Domestic Relations Law, the Family Court Act and the Criminal Procedure Law were amended in 2013 to protect victims of domestic violence from being charged with and prosecuted for violating their own order of protection. Domestic Relations Law § 240 (3) (b) was amended; Domestic Relations Law § 240 (3) (i) was added ; Domestic Relations Law §252 (2) was amended; Domestic Relations Law §252 subdivision 9-a was added; Family Court Act § 155 was amended; Family Court Act § 168 (3) was added; Family Court Act § 446 was amended; Family Court Act § 551 was amended; Family Court Act § 656 was amended; Family Court Act § 759 was amended; Family Court Act § 842 was amended; Family Court Act § 846 was amended by adding subdivision (a-1); Family Court Act § 1056 was amended by adding subdivision 7; Criminal Procedure Law § 140.10 (4) was amended and Criminal Procedure Law § 530.12, Subdivisions 6 and 8 was amended. The order of protection will now provide that the order will remain in effect even if the protected party has, or consents to have, contact or communication with the party against whom the order is issued, and that the protected party cannot be held to violate the order nor be arrested for violating the order. There must be a notice in the order of protection that "This order of protection will remain in effect even if the protected party has, or consents to have, contact or communication with the party against whom the order is issued. This order of protection can only be modified or terminated by the court. The protected party cannot be held to violate this order nor be arrested for violating this order."

The amendments were effective November 13, 2013 and applied to all orders of protection regardless of when such orders are issued, except for the amendments to Domestic Relations Law §240 (3) (b) and Domestic Relations Law §252 (2), which took effect on January 12, 2013 and applied to orders of protection issued on or after such effective date. Laws of 2013, Ch 480, effective November 13, 2013. See NY Legis Memo 480 (2013)

First Department

Family Offenses - Family Ct Act §812 - Order of Protection - A vehicle is a dangerous instrument. There is no requirement that the person using the instrument intend to cause serious physical injury.

In Matter of Nakia C., v. Johnny F.R., --- N.Y.S.2d ----, 2013 WL 6767527 (N.Y.A.D. 1 Dept.) the Appellate Division modified an order of the Family Court which denied petitioner's request that the order of protection it granted remain in effect for five years and that respondent be required to participate in individual counseling and a batterer's program, and remanded the matter for reconsideration of the duration of the order of protection. It found that the court's finding that respondent committed the family offense of reckless endangerment in the second degree was undisputed and supported by the record. After threatening violence against petitioner over the telephone, respondent showed up near her home and, when she drove away with her boyfriend and one of the parties' children, engaged in a high-speed car chase in which he recklessly cut off her car, thereby "creat[ing] a substantial risk of serious physical injury to another person" (Penal Law 120.20).

It held that Family Court erred in concluding that there were no aggravating circumstances that would permit it to impose longer than a two-year duration in the order of protection, based on its finding that respondent did not use his car as a dangerous instrument because he did not intend to make or threaten dangerous contact using the car (Family Court Act §§ 842; 827[a][vii]). A dangerous instrument is "any instrument, article or substance, including a 'vehicle' as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury" (Penal Law § 10.00[13]). There is no requirement that the person using the instrument intend to cause serious physical injury.

Second Department

Contempt - Civil - Judiciary Law § 475 - Second Department Clarifies Parties' Relative Burdens of Proof Where Alleged Contemnor Invokes Constitutional Privilege Against Self-incrimination, and Attempts To Harmonize Inconsistencies in the Case Law with Respect to the Elements of Civil Contempt.

In El Dehdan v El Dehdan, --- N.Y.S.2d ----, 2013 WL 6641279 (N.Y.A.D. 2 Dept.) Supreme Court held the defendant in contempt of court for disobeying a court order dated January 29, 2010, which required him to deposit with the plaintiff's attorney the proceeds of a certain real estate transaction and imposed a civil sanction which allowed him to purge the contempt to avoid incarceration. In affirming the order, Justice Angiolillo, in an opinion for the Second Department Court, clarified the parties' relative burdens of proof where the alleged contemnor has invoked the constitutional privilege against self-incrimination, and attempted to harmonize inconsistencies in the case law with respect to the elements of civil contempt.

Throughout their lengthy marriage, the parties acquired substantial marital property and had a dry cleaning business. Two parcels of real property were relevant to the issues

in this appeal: a parcel on Ainslie Street in Brooklyn (Brooklyn property), and a parcel on 60th Road in Maspeth, Queens (Queens property). In 2008, the plaintiff commenced the action. On February 24, 2009, the defendant entered into a contract to sell the Brooklyn property for \$950,000 to Zackmaxie, LLC, and the transfer was completed by deed dated March 31, 2009. On April 6, 2009, he transferred the Queens property by deed to Mustafa Othman, apparently without consideration. When the defendant failed to appear for further proceedings, the court denied his motion to dismiss and referred the matter to the referee for an inquest on the grounds for divorce and equitable distribution. On December 4, 2009, the referee issued findings of fact and a determination which awarded the plaintiff a divorce on the ground of cruel and inhuman treatment and provided for equitable distribution, awarding her, among other things, the Brooklyn and Queens properties. Shortly thereafter, the plaintiff learned of the March 2009 transfer and the April 2009 transfer. On January 29, 2010, on the plaintiff's motion, the Supreme Court issued an order, which directed the defendant to "deposit immediately" with the plaintiff's attorney the net proceeds of the March 2009 transfer, that is, "the sum of nine hundred fifty thousand (\$950,000.00) dollars ..., minus the money paid for real estate broker, transfer taxes and payment of the underlying mortgage." The defendant failed to deposit the proceeds of the March 2009 transfer with the plaintiff's attorney.

In August 2010, the plaintiff moved to hold the defendant in civil and criminal contempt for violating the January 2010 Order. Supreme Court appointed a referee to hear and report on the issue. At the hearing defendant conceded that he had received a copy of the January 2010 Order and that he had not deposited any money with the plaintiff's attorney pursuant to that order. He stipulated to the admission into evidence of all relevant documents and evidence concerning the Brooklyn property and the March 2009 transfer, including the closing statement. The defendant invoked his constitutional privilege against self-incrimination in response to all questions relating to the proceeds of the March 2009 transfer, and whether he owned an account at Washington Mutual. The referee made findings that the defendant had dissipated marital assets and may have transferred assets without fair consideration after the plaintiff commenced this action, but recommended denial of the motion on the ground that the plaintiff had failed to meet her burden of establishing either civil or criminal contempt. In an order dated September 12, 2011, the Supreme Court granted the plaintiff's motion to set aside the referee's report and recommendation, determining that the referee's findings were not supported by the record and that the defendant was in contempt of court by failing to abide by the terms of the January 2010 Order. The court found that the requirements to hold the defendant in civil contempt had been satisfied because the defendant was aware of the lawful and unequivocal requirements of the January 2010 Order, and disobeyed that order with full knowledge of its terms. The court also noted that while the defendant was entitled to rely upon his constitutional privilege against self-incrimination in response to questions relating to the proceeds of the March 2009 transfer, the privilege did not protect him from the consequences of his failure to submit competent proof that he had no access to the proceeds. The court directed that the defendant could purge his contempt and avoid imprisonment by complying with certain conditions, including the payment of the proceeds from the March 2009 transfer. The court did not impose the criminal sanction of a

definite jail term without the opportunity to purge the contempt, thus granting, in effect, only that

branch of the plaintiff's motion which was to find the defendant in civil contempt (see *Matter of Rubackin v. Rubackin*, 62 AD3d 11, 15-16).

The defendant contended on appeal that the plaintiff failed to satisfy her burden of establishing civil contempt because the March 2009 transfer did not violate any court order and the plaintiff failed to adduce evidence that the defendant still possessed the proceeds of the March 2009 transfer when he received the January 2010 Order, such that he had the ability to comply. The plaintiff responded that she made a prima facie showing satisfying all elements of civil contempt, at which point the burden shifted to the defendant to show his inability to comply with the January 2010 Order, and that he failed to meet that burden.

The Appellate Division observed that a motion to punish a party for civil contempt is addressed to the sound discretion of the court, and the movant bears the burden of proving the contempt by clear and convincing evidence. In *Matter of McCormick v. Axelrod* (59 N.Y.2d 574), the Court of Appeals held that the civil contempt must be proved "with reasonable certainty". The "reasonable certainty" standard requires "a quantum of proof ... greater than a preponderance of evidence but less than proof beyond a reasonable doubt ... akin to the clear and convincing evidence standard". In addressing the elements of civil contempt which must be proved by clear and convincing evidence, the court is guided by Judiciary Law § 750, et seq. The section applicable to civil contempt permits a court "to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced," in various circumstances including, as relevant here, "any other disobedience to a lawful mandate of the court" (Judiciary Law § 753[A][3]). By contrast, a court may impose punishment for criminal contempt where a person is guilty of "[w]ilful disobedience to [the court's] lawful mandate" or "[r]esistance wilfully offered to [the court's] lawful mandate" (Judiciary Law § 750[A][3], [4]). Notably, for civil but not criminal contempt, there must be a finding that a "right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced" (Judiciary Law § 753[A]). An order of civil contempt must include an express finding that this element has been satisfied, but an omission of the finding may be supplied on appeal where the record supports it. The element of prejudice to a party's rights is essential to civil contempt, which aims to vindicate the rights of a private party to litigation, but not criminal contempt, which aims to vindicate the authority of the court. Another notable distinction between the two kinds of contempt is that subdivision (3) of the civil contempt statute, at issue here, does not include the words "wilful" and "wilfully," which are included in the criminal contempt statute. The absence of the term "wilful" from paragraph (3) of the civil contempt statute, authorizing sanctions "for any other disobedience to a lawful mandate of the court" (Judiciary Law § 753[A][3]), indicated that the legislature, by inference, intentionally omitted or excluded the requirement of willfulness.

The Court concluded that for the plaintiff to prevail on her motion to hold the defendant in civil contempt, she was required to prove by clear and convincing evidence "(1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct". The use of the words "willful" and "willfully" in some of the Courts cases involving civil contempt, should not be construed to import the element of willfulness into a civil contempt motion made pursuant to Judiciary Law § 753(A)(3). It is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes, or prejudices the rights or remedies of a party."

The absence of willfulness from this formulation does not result in strict liability, since the proponent of a civil contempt motion must establish the contemnor's failure to comply with a court order with knowledge of its terms. Nor can civil contempt be founded upon an inadvertent or mistaken failure to comply with a court order since it is the movant's burden to establish that the court's mandate was clear and unequivocal. Moreover, the movant's preliminary evidentiary showing of the elements of civil contempt does not end the inquiry. Once the movant establishes a knowing failure to comply with a clear and unequivocal mandate, the burden shifts to the alleged contemnor to refute the movant's showing, or to offer evidence of a defense, such as an inability to comply with the order. A hearing is required only if the papers in opposition raise a factual dispute as to the elements of civil contempt, or the existence of a defense.

Here, the plaintiff met her burden of establishing, by clear and convincing evidence, that the defendant was fully aware of the January 2010 Order, which was a lawful and unequivocal mandate of the court, and that he disobeyed that mandate, while having full knowledge of its terms, resulting in prejudice to the plaintiff, who was denied the equitable distribution of marital property. Notably, at the contempt hearing, the defendant conceded that he received the January 2010 Order and failed to deposit any money with the plaintiff's attorney pursuant to the order; these concessions established his knowing disobedience of the order. Contrary to the defendant's contention, the fact that he did not disobey an express order of the court in March 2009 when he transferred the Brooklyn property was irrelevant to the issue of whether he disobeyed the clear mandate of the January 2010 Order to deposit the proceeds of that sale with the plaintiff's attorney. Nor did the plaintiff have the additional burden of establishing that the defendant still possessed or had control over the proceeds from the March 2009 transfer such that he had the ability to comply with the January 2010 order. Rather, once his failure to comply was established, the burden shifted to the defendant to offer competent, credible evidence of his inability to pay the sum of money as ordered.

The defendant failed to meet his burden of establishing his defense of an inability to pay. In opposition to the contempt motion, the defendant submitted an affidavit in which he averred that he no longer possessed those proceeds, but he provided no evidence in

support of that self-serving assertion. Generally, "conclusory, baseless, and self-serving allegations [are] insufficient to raise an issue of fact necessitating a hearing" on a contempt motion (*Jaffe v. Jaffe*, 44 AD3d at 826), much less establish a defense to the motion. Nonetheless, here, the defendant was afforded a hearing and the opportunity to present evidence in support of this defense. He refused to answer certain questions regarding the location of the proceeds of the March 2009 transfer by invoking his constitutional privilege against self-incrimination, and otherwise failed to present any evidence in support of his contention that he was unable to deposit the necessary sum of money as required by the order. Thus, the record established all elements of civil contempt, and the defendant failed to meet his burden of rebutting that evidence.

The defendant contended on appeal that he properly invoked his constitutional Fifth Amendment privilege in response to certain questions, and that the Supreme Court improperly drew an adverse inference against him. He contended that, since he was potentially facing both civil and criminal contempt sanctions, he was placed in the untenable position of having to make a choice between defending the civil branch of the motion or asserting his Fifth Amendment privilege with respect to the criminal branch of the motion. Therefore, he asserted his invocation of the privilege against self-incrimination could not be used against him, as it was his right to invoke the privilege in defense of the criminal branch of the proceeding without adverse consequence. The Court found defendant's contentions to be without merit based on well-established principles in analogous cases. The Court observed that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. "In New York, unlike the rule in a criminal case, a party's invocation of the privilege against self-incrimination in a civil case may be considered by the finder of the facts in assessing the strength of the evidence offered by the opposing party on the issue which the witness was in a position to controvert". Although a defendant in an ongoing criminal prosecution faces a dilemma whether to defend a civil proceeding involving the same subject matter or to assert the Fifth Amendment privilege, "a court need not permit a defendant to avoid this difficulty by staying a civil action until a pending criminal prosecution has been terminated," and the fact "that the witness may invoke the privilege against self-incrimination is not a basis for precluding civil discovery". A party to a civil action or proceeding is not relieved of his or her burden of proof simply by invoking the privilege against self-incrimination. While a party may not be compelled to answer questions that might adversely affect his [or her] criminal interest, the privilege does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding; nor does it afford any protection against the consequences of failing to submit competent evidence.

Here, the defendant had the burden of establishing his defense of an inability to pay the sum required by the January 2010 Order); his invocation of his privilege against self-incrimination did not relieve him of the obligation of coming forward with evidence in support of that defense. Moreover, the Supreme Court was entitled to draw an adverse inference against him (see *Marine Midland Bank v. Russo Produce Co .*, 50 N.Y.2d at 42).

The defendant correctly contended that a party may not be held in criminal contempt solely for a justified assertion of the Fifth Amendment privilege. Thus, in a criminal contempt proceeding, in which willful disobedience is an element, the court may not base a finding of willfulness solely upon the defendant's justified invocation of the privilege, absent any other evidence of willfulness. Here, however, the Supreme Court did not hold the defendant in criminal contempt, and thus, did not impose a criminal sanction. Rather, the court held the defendant in civil contempt.

Contrary to the defendant's contention, the Supreme Court did not hold him in contempt solely for having asserted his Fifth Amendment privilege. Rather, the Supreme Court held him in civil contempt for failing to comply with the January 2010 Order. There is a difference. The civil penalty imposed was not a punishment for refusing to answer questions at the hearing. Rather, the civil sanction was properly imposed, based on evidence establishing the defendant's disobedience of the January 2010 Order, and his failure to adduce evidence refuting the elements of civil contempt or establishing his defense of an inability to pay. Where evidence in the record supports the civil contempt finding, which is not based solely upon the invocation of the privilege against self-incrimination, and the defendant has failed to meet his or her burden of proof, the order will be upheld.

The Appellate Division rejected the defendants argument that plaintiff failed to satisfy the mandatory precondition of Domestic Relations Law § 245 that she first exhaust other, less drastic enforcement mechanisms, such as settling a judgment from the equitable distribution order and seeking enforcement of the judgment. The Court observed at a civil contempt motion in a divorce action should be denied where the movant fails to make a showing pursuant to Section 245 that "resort to other, less drastic enforcement mechanisms had been exhausted or would be ineffectual" (*Capurso v. Capurso*, 61 AD3d 913, 914). Although the exhaustion precondition is discussed most often in case law involving the nonpayment of maintenance or child support, it has also been applied in cases involving the nonpayment of other sums because the plain language of Domestic Relations Law s 245 unambiguously includes the nonpayment of "any sum of money." Nothing in this language restricts the meaning to maintenance and child support. Thus, the exhaustion precondition of Section 245 does apply here, where the defendant failed to pay a sum of money in lieu of real property awarded to the plaintiff in an order of equitable distribution.

However, the record established plaintiff's satisfaction of the exhaustion precondition with evidence demonstrating that less drastic enforcement measures would have been ineffectual. The plaintiff submitted extensive evidence in support of her motion to hold the defendant in contempt, demonstrating his pattern of divesting himself of his assets during the course of the earlier divorce litigation in 2000 through 2002, and during the present litigation; as a result, the defendant no longer held assets in his name against which execution could be obtained. Moreover, the defendant's suggestion that the plaintiff should have first settled a judgment upon the order of equitable distribution, and thereafter executed on the judgment, was without merit. It was undisputed that the defendant had transferred the Brooklyn and Queens properties that had been awarded to the plaintiff in the equitable distribution order, and that the purpose of the January 2010 Order was to

preserve the funds obtained from the sale of the real property. Therefore, the plaintiff satisfied the exhaustion precondition of Domestic Relations Law § 245.

Child Custody - Visitation - Visitation Schedule For Noncustodial Parent That Deprives Custodial Parent of "Any Significant Quality Time" with the Child Is Excessive

In *Matter of Rivera v Fowler*, --- N.Y.S.2d ----, 2013 WL 6644622 (N.Y.A.D. 2 Dept.), the Appellate Division found that the parties demonstrated that a change of circumstances had occurred and that modification of the existing visitation arrangement was in the children's best interests where the existing visitation arrangement did not specify the exact time and date that weekly and summer vacation visitations were to begin, which led to disagreement between the parties. However, the Family Court improvidently exercised its discretion in providing that the father have visitation every weekend, beginning Saturday at noon and ending Sunday at 8:00 p.m. 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. Here, the schedule established by the Family Court effectively deprived the mother of any significant quality time with the children during each weekend. Moreover, the Family Court improvidently exercised its discretion in failing to specify the period of the mother's visitation with the children during their summer vacation. In the circumstances presented, it held that a more appropriate schedule, consistent with the parental rights and responsibilities of both parties, and the best interests of the children, should provide that the noncustodial father have visitation every other weekend, beginning Saturday at noon and ending Sunday at 8:00 p.m., and one overnight visit per week, and that the parties should have equal visitation time during the children's summer vacation. It remitted to Family Court for further proceedings.

Maintenance - Award - Supreme Court's Decision Concluding That Defendant Was Obligated to Pay Pendente Lite Maintenance, Was Enforceable Against Him, Notwithstanding That it Was Never Reduced to a Written Order (22 NYCRR 202.8[g]). Expert Fees - Absent a Showing of Necessity or Inability to Pay, an Award of Experts Fees Is Generally Unjustified.

In *Kim v Schiller*, --- N.Y.S.2d ----, 2013 WL 6484143 (N.Y.A.D. 2 Dept.) Supreme Court granted plaintiff's cross motion which was for an award of an attorney's fee of \$5,000, and granted a judgment which, awarded the plaintiff \$247,000 as the plaintiff's portion of the defendant's enhanced earning capacity; awarded the plaintiff possession and ownership of the former marital residence and awarded the defendant a credit \$60,000 as his share of the equity in the residence; awarded the plaintiff \$662 as the plaintiff's share of the

defendant's Charles Schwab account; awarded the plaintiff child support for the parties' two children of \$3,774 per month; awarded the plaintiff, pendente lite, carrying costs on the former marital residence without modifying the child support awarded to the plaintiff; awarded the plaintiff pendente lite maintenance arrears of \$30,594; directed the defendant to pay 50% of certain additional expenses incurred on behalf of the children; awarded the plaintiff \$5,000 for an expert's fee; and directed the defendant to pay 50% of, inter alia, all health care expenses of the parties' children not covered by insurance.

The Appellate Division held that Supreme Court properly determined that the plaintiff was entitled to a share of the defendant's enhanced earning capacity. Although the plaintiff did not make direct financial contributions to the defendant's attainment of his medical degree and license, she made substantial indirect contributions, as the plaintiff was supportive of the defendant's attainment of his degree and the advancement of his career. The plaintiff worked full-time throughout the marriage, except for those periods of time when she was on maternity leave or collecting disability benefits due to her chronic lupus disease. The plaintiff contributed her earnings to the family, bore two children for whom she had primary caretaking responsibility, cooked the family's meals, and participated in the housekeeping (*Holterman v. Holterman*, 3 NY3d 1, 8-9; *McSparron v. McSparron*, 87 N.Y.2d 275). However, under the circumstances of this case, where the defendant made accommodations for the sake of the plaintiff's career and her desire to remain near her family, as well as in light of the defendant's financial contributions during his tenure at medical school, it reduced the award to the plaintiff of the marital portion of the defendant's enhanced earning capacity from 50% to 30%, thereby reducing the plaintiff's award from \$247,000 to \$148,200.

The Appellate Division agreed with the defendant that he was entitled to a credit of \$20,000 with respect to funds from his separate property that he used during the marriage to repay the plaintiff's student loan debt.

The Appellate Division held that Supreme Court erred in awarding the plaintiff \$662 as her share of a money market account held by the defendant with Charles Schwab, since no evidence regarding the provenance of this account was adduced at the trial. The only evidence that was before the Supreme Court with respect to this account was its inclusion in the defendant's net worth statement.

The plaintiff was entitled to an award of pendente lite relief retroactive to May 5, 2011, the date that she moved for pendente lite relief the date that the Supreme Court issued an order awarding pendente lite relief to her. The defendant, however, was entitled to a credit for the voluntary child support payments he made from May 5, 2011, through June 24, 2011, that were in addition to the court-ordered pendente lite child support payments, but only to the extent of the pendente lite award actually made to the plaintiff. Since the pendente lite award actually made to the plaintiff was less than the \$5,200 that the defendant made in voluntary child support payments from May 5, 2011, to June 24, 2011, the defendant was not entitled to a credit for the entire sum of \$5,200, but, he was entitled to a credit of \$3,400 for those payments.

The Appellate Division held that Supreme Court should have directed that the defendant's child support obligation be decreased by "the amount of any college room and board expenses he incurs while the parties' child[ren] attend [] college" It also agreed with the defendant that, as a wage earner contributing to the support of his children, he was entitled to claim one of the children as a dependent on his income tax returns (Lueker v. Lueker, 72 AD3d 655, 658). Thus, the parties were to equally share the dependent tax exemptions, allowances, and deductions derived from claiming their children as dependents on their respective income tax returns.

Supreme Court erred in directing defendant to contribute or to additionally contribute to certain discretionary expenses that the plaintiff incurred on behalf of the children, including a sweet sixteen party for the parties' daughter, trips to South Korea, and new furniture. Additionally, it modified the judgment to correct the Supreme Court's omission of the word "reasonable" to describe the unreimbursed health care expenses to be paid by the defendant (Domestic Relations Law s 240[1-b][c][5]).

The Appellate Division held that contrary to the defendant's assertions, the Supreme Court's decision concluding that he was obligated to pay, inter alia, pendente lite maintenance, was enforceable against him, notwithstanding that it was never reduced to a written order (22 NYCRR 202.8[g]). The defendant challenged the court's award of pendente lite maintenance arrears to the plaintiff, as set forth in the judgment, as well as its failure to award him a credit for the pendente lite maintenance payments he made during the pendency of the action. The defendant asserted that the pendente lite maintenance award improperly resulted in a double counting of the income derived from his medical license. It noted that courts recognize that pendente lite awards are temporary, and some degree of inequity with respect to such awards is accepted in the interests of judicial economy. The defendant's remedy for any perceived inequity was to seek a speedy trial. Nonetheless, exercising its discretion pursuant to CPLR 5019(a), it noted that the Supreme Court mistakenly awarded the plaintiff \$30,594 as pendente lite "maintenance arrears" and it recalculated the defendant's total pendente lite arrears as the sum of \$19,800.

The Appellate Division agreed with the defendant that the Supreme Court improvidently exercised its discretion in awarding the plaintiff expert fees (Domestic Relations Law 237[a]). Absent a showing of necessity or inability to pay, an award of such fees is generally unjustified. Here, the Supreme Court awarded the plaintiff a pendente lite attorney's fee of \$5,000. At that time, it found that the wife was financially capable of retaining her own expert. Subsequently, the court determined that the plaintiff was thereafter capable of paying her own attorney's fee. Therefore, it was inappropriate for the court to award the plaintiff expert fees under these circumstances.

Third Department

Marital Residence- Sale - Third Department Holds That a Court, by or after Judgment, in its Discretion, May Appoint a Receiver of Property Which Is the Subject of an Action (Marital Residence), to Carry the Judgment into Effect or to Dispose of the Property According to its Directions. Such Relief May Be Awarded Sua Sponte.

In *Bennett v Bennett*, --- N.Y.S.2d ----, 2013 WL 6500272 (N.Y.A.D. 3 Dept.) the parties, who appeared before the Court on three prior occasions (99 AD3d 1129 [2012]; 82 AD3d 1294 [2011]; 49 AD3d 949 [2008]), were married in 1980, and plaintiff (wife) commenced the action for divorce in 2006. Pursuant to the terms of the parties' March 2009 amended judgment of divorce, defendant (husband) was permitted to retain title to and possession of the marital property, which was located in St. Lawrence County, provided that he paid the wife one half of the equity contained therein by a specified date. In the event that the husband opted not to do so, the amended judgment directed that the property be listed for sale with a licensed real estate broker and that the resulting proceeds be divided equally between the parties. Supreme Court subsequently granted the wife's motion to compel the husband to sign a listing agreement with realtor Jennifer Stevenson. The property thereafter was listed with Stevenson for \$192,000 from July 2009 through January 2010, at which time the listing expired. When the property failed to sell, the wife moved to modify the terms of the amended judgment to permit Stevenson to reduce the listing price. Supreme Court denied the wife's motion, without prejudice, based upon her failure to establish that the original listing price no longer reflected the market value of the property. In August 2011, the wife again sought to modify the terms of the amended judgment in order to, permit the property to be relisted with Stevenson at a price of \$175,000. The husband opposed the motion contending that he was in no way impeding Stevenson's efforts to market and sell the property. By order entered January 30, 2012, Supreme Court denied the requested relief but, sua sponte, directed that a receiver be appointed to carry out the sale of the marital property in accordance with the terms of the amended judgment. The husband's motion to vacate that order was denied in April 2012 and he appealed.

The Appellate Division affirmed. It observed that a court, by or after judgment, may appoint a receiver of property which is the subject of an action, to carry the judgment into effect or to dispose of the property according to its directions" (CPLR 5106; *Wagenmann v. Wagenmann*, 96 A.D.2d 534, 536 [1983]). Whether a receiver should be appointed in a particular matter is a determination committed to the trial court's sound discretion. In light of the husband's obstructionist tactics and the demonstrated deterioration of the marital property, it could not say that Supreme Court abused its discretion in appointing a receiver to effectuate the sale of the marital residence consistent with the terms of the amended judgment of divorce (*Lutz v. Goldstone*, 42 AD3d at 563; *Trezza v. Trezza*, 32 AD3d 1016, 1017 [2006]; *Stern v. Stern*, 282 A.D.2d 667, 668 [2001]; cf. *Westfall v. Westfall*, 194 A.D.2d 960, 961-962 [1993]). Such relief may be awarded sua sponte (see *Tirado v. Miller*, 75 AD3d 153, 159 [2010]) and, under the particular facts of this case, it rejected the husband's assertion that a hearing was warranted. In appointing a receiver, Supreme Court made no mention of whether an undertaking would be required (CPLR 5106, 6403), nor did it specify the manner in which the cost of the

receiver would be allocated between the parties. It remitted the matter to Supreme Court for these purposes.

Child Support - Modification - Where Only Change in Circumstances, Which Was Unanticipated, Was Son's Receipt of Social Security Survivors Benefits as a Result of His Biological Father's Death, the Benefits Did Not in Any Way Affect the Father's Financial Situation and Did Not Warrant a Downward Modification. A Child's Resources May Be Considered Only in Determining If the Amount of the Basic Child Support Obligation Is Unjust or Inappropriate.

In Matter of McDonald v McDonald,--- N.Y.S.2d ----, 2013 WL 6500342 (N.Y.A.D. 3 Dept.) Petitioner (father) and respondent (mother) were married in 2000, but the father had previously signed acknowledgments of paternity for their son (born in 1995) and daughter (born in 1998). As a consequence thereof petitioner was his legal father. The parties' 2003 separation agreement continued that child support arrangement of \$150 a week from a prior order, and the separation agreement was incorporated into their 2005 divorce decree. In 2006, Family Court continued the previously-ordered child support. The father commenced a proceeding seeking to reduce his child support obligation on the grounds that he earned substantially less than he did previously, and that the son began receiving Social Security survivors benefits of \$859 per month as a result of his biological father's death.

Following a hearing, the Support Magistrate determined that the father did not demonstrate a significant change in his earning ability, but the Support Magistrate reduced his child support payments to \$105 per week based on the son's unanticipated receipt of Social Security benefits. Family Court denied the mother's objections.

The Appellate Division reversed on the law. It found that Family Court erred in denying the objections on the procedural ground that the mother failed to properly serve them on the father. The statute requires that an objecting party serve objections on the opposing party (Family Ct Act § 439[e]). The mother complied with that requirement by serving the father's counsel and filing proof of that service.

The Appellate Division held that the Support Magistrate did not err in denying the father's motion to dismiss the petition prior to holding a hearing. While a hearing is not required unless the application for a modification is supported by an affidavit and evidentiary material sufficient to establish a prima facie case (Family Ct Act § 451 [1]), the statutory language is permissive, rather than mandatory, providing the court with discretion to either proceed to a hearing or dismiss the petition. The Support Magistrate did not abuse that discretion by permitting the matter to proceed to a hearing.

The Appellate Division held that Family Court erred in confirming the Support Magistrate's decision to reduce the father's child support obligation. If a separation agreement was fair and equitable when entered into, its child support provisions should

not be modified "[u]nless there has been an unforeseen change in circumstances and a concomitant showing of need" (*Matter of Boden v. Boden*, 42 N.Y.2d 210, 213 [1977]). The father did not argue that the separation agreement was unfair or inequitable in 2003. Despite the father's assertions that his earnings had been below the poverty line for more than three years, he had no debt, more than \$14,000 in the bank and had remained current on his support payments, the father was now self-employed and reported that he makes less than he did previously, but income could be imputed to him under the circumstances. It agreed with the Support Magistrate's finding that the father failed to show any significant change in his income-producing ability. The only change in circumstances, which was unanticipated, was the son's receipt of Social Security survivors benefits as a result of his biological father's death. However the father had not demonstrated any showing of need for modification as a result of that change. Those benefits did not in any way affect the father's financial situation (see *Matter of Graby v. Graby*, 87 N.Y.2d 605, 611 [1996]). A child's resources may be considered only in determining if the amount of the basic child support obligation is unjust or inappropriate (Family Ct Act § 413[1][f][1]; *Matter of Weymouth v. Mullin*, 42 AD3d 681, 682 [2007]). The father only addressed the financial resources of the parents and one child, not any of the other factors applicable to that determination (Family Ct Act §§ 413[1][f]), and that factor alone was insufficient to find the basic support amount unjust or inappropriate. The son's receipt of Social Security benefits did not provide a basis for a downward modification of the father's child support payments, as such benefits are intended to "supplement existing resources," not to displace or reduce a parent's obligation to support his or her children (*Matter of Graby v. Graby*, 87 N.Y.2d at 611. Thus, Family Court should have dismissed the petition. The Court pointed out in a footnote that although previous cases dealt with Social Security disability benefits received by children as dependents of a disabled parent (see e.g. *Matter of Graby v. Graby*, 87 N.Y.2d at 611; *Matter of Weymouth v. Mullin*, 42 AD3d at 682; *Matter of Cohen v. Hartmann*, 285 A.D.2d at 675-676), the same result is appropriate in relation to Social Security survivors benefits received after a parent's death. If a parent cannot have his or her support obligation reduced based on the child's receipt of benefits that are received as a result of that parent's disability, it saw see no reason why a parent should receive a reduction based on the child's receipt of benefits that are in no way attributable to that parent.

Supreme Court

Maintenance Pendente Lite - Award - Income - Income, as Reported in the 2012 Joint Federal Income Tax Return, Being the Last Filed Tax Return, Need Not Be Utilized for the Determination of Plaintiff's Maintenance Obligation. Nothing in the Statute Prohibits a Court's Reliance upon Partial Information from a Tax Year Not Yet Completed.

In SA v LA--- N.Y.S.2d ----, 2013 WL 6608000 (N.Y.Sup.), defendant L.A. sought, inter alia, interim support and maintenance from plaintiff S.A. in the amount of \$17,000 per month and payment of all expenses related to the maintenance of the marital residence. The parties were married in 1987 and separated in 2009. They had one child, age 26. Plaintiff was 56 years old and defendant was 64 years old. Plaintiff was residing in an apartment in New York City while defendant continued to reside in the marital residence in Westchester County, New York.

The pendente lite maintenance application required the court to determine whether it must rely on the parties' 2012 federal tax return as the last filed return, in determining plaintiff's income, notwithstanding that plaintiff's income had been sharply reduced in 2013 to less than one-third of his last year's income, after plaintiff lost his employment in October, 2012 and began new employment in April, 2013. The differential in salary was significant: plaintiff earned \$819,049 in 2012 and since beginning his new employment in April, 2013, he was making \$20,000 per month or \$240,000 per annum. In addition to plaintiff's earnings in 2012, the parties paid income taxes on a withdrawal of \$111,685 from a pre-tax account. Gross earnings for 2012 were \$930,685, before deduction for F.I.C.A. and medicare taxes. Against this amount was a reduction of \$1,127 relative to a capital loss. The 2012 joint federal tax return was dated September 25, 2013, presumably filed by the extension deadline of October 15, 2013. The F.I.C.A. withholding amount on plaintiff's reported income should have been \$4,624.20 ($\$110,100 \times 4.2\%$), while the medicare withholdings should have been \$11,876.21 ($\$819,049 \times 1.45\%$) for a total deduction of \$16,500.41. Hence, for the calculation of the presumptive amount of temporary maintenance, as set forth in DRL § 236(B)(5-a)(b)(4) and (5), plaintiff's adjusted gross income, as reported on the parties' last filed income tax return, was \$802,548.59 (\$819,049 less \$16,500.41). In determining the presumptive amount of spousal support, the court did not take into consideration the withdrawal of the \$111,685 from the pre-tax account as reported on reported in 2012. According to the Temporary Spousal Maintenance Guidelines Calculator, on the entirety of plaintiff's adjusted gross earnings, the amount due plaintiff on the first \$524,000 thereof was \$157,200 per annum, or \$13,100 per month.

As to the amount of adjusted gross earnings in excess of \$524,000, the court had to determine any additional amount to be awarded, upon application of the nineteen statutory factors set forth in DRL § 236(B)(5-a)(c)(2)(a)(i)-(xix). The court did not make that determination. It observed that Plaintiff claimed through no fault of his own, he was terminated in October, 2012 from his position upon which his 2012 salary was based. Defendant disputed the assertion that the termination was involuntary. That issue could not be decided on the papers and the court directed it be considered at trial. As against plaintiff's earning history for 2012 and 2013, plaintiff reported his expenses on a Statement of Net Worth, sworn to on February 23, 2013. He claimed total monthly expenses of \$25,559.80, part of which included defendant's expenses. Defendant alleges a portion of plaintiff's expenses were being spent on plaintiff's companion. Defendant claimed total monthly expenses of \$18,402. On the parties' present combined gross income, namely the \$20,000 on the gross monthly salary plaintiff now received, the parties could not possibly maintain their present lavish life styles. In addition to their significant monthly expenses,

the parties respective Statements of Net Worth reveal they have accumulated over \$1 million in debt.

The issue was whether the income, as reported in the 2012 joint federal income tax return, being the last filed tax return, must be utilized for the determination of plaintiff's maintenance obligation as of the date hereof. DRL § 240(1-b)(b)(5)(I), in defining income, states that it is the "gross (total) income that should have been or should be reported in the most recent federal income tax return." In this case, despite the dispute as to the circumstances of plaintiff's loss of his prior position, from which he earned the amount reported in 2012, it was not disputed that 2013 income, since April 1st, has been significantly reduced to \$20,000 per month. The court observed that in the context of a child support proceeding, nothing in the statute prohibits a court's reliance upon partial information from a tax year not yet completed. *Arak v. Arak*, 60 AD3d 937 (2d Dept 2009); *Moran v. Grill*, 44 AD3d 859 (2d Dept 2007); see also *Matter of Calhoun v. Holt*, 28 AD3d 251 (1st Dept 2006); *Matter of Taraskas v. Rizzuto*, 38 AD3d 910 (2d Dept 2007), citing *Matter of Kellogg v. Kellogg*, 300 A.D.2d 966 (4th Dept 2002) (income earned during a tax year not completed at the commencement of trial, may, under some circumstances, be weighed by the court). Given the inclusion in the language of DRL § 236(B)(5-a)(4)(a) that "income" is as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act, as cited in *Matter of Calhoun v. Holt*, supra, the court concluded that it was appropriate, in the context of a spousal support proceeding, to apply the same present income rule as applicable in child support proceedings. It found that to establish plaintiff's income as reported on the parties' last filed income tax return at \$802,548.59 (\$819,049 less \$16,500.41), after giving due consideration to the amount of income above \$524,000, may result in a presumptive award of temporary maintenance that exceeds defendant's legitimate monthly expenses [*Chusid v. Silvera*, 110 AD3d 660 (2d Dept 2013)] and would be unjust and inappropriate.

The Court calculated plaintiff's gross income, annualized for tax year 2013, and imputed to him, at \$240,000. His adjusted gross income for calculation of his spousal maintenance obligation was \$229,470.60. Defendant had no income. According to the Temporary Spousal Maintenance Guidelines Calculator, annual interim spousal support was \$68,841.18, or \$5,736.77 monthly. Plaintiff was ordered to pay the amount of \$5,737 monthly non-taxable to defendant, and non deductible by plaintiff. In addition, plaintiff was required to continue defendant's medical insurance coverages, and to pay 100% of her non-reimbursed, non-covered out of pocket medical expenses. All medical care providers, including defendant's therapy, shall, unless in an emergency, be "in-network". This award was retroactive to April 18, 2013, the date of a letter request by defendant's counsel for a pre-motion conference seeking pendente lite relief. Such procedure, in lieu of the filing of a pendente lite motion, was required by Rule E(1) of the Operational Rules of the Westchester Supreme Court Matrimonial Part.

December 16, 2013

First Department

Attorneys - Legal Fees - Attorney for Child - Parents Who Are Directed to Pay Fees of Attorney Appointed to Represent Child May Raise Defense of Legal Malpractice to Attorney's Claim For Fees.

In *Venecia C. v. August V.*, --- N.Y.S.2d ----, 2013 WL 6325172 (N.Y.A.D. 1 Dept.), the divorced parents had three children, age 17, 14 and 11. In the divorce action, although the parties stipulated to joint custody, it was left to the trial court to direct that plaintiff mother would have primary residential custody in the marital apartment in Manhattan. In 2009, the mother moved for an order allowing her to relocate with the children to Demarest, New Jersey, approximately 12 miles outside Manhattan, and the father responded by moving for a change of custody. The motion court appointed the attorney for the children in this context. On November 22, 2011, the attorney for the children moved for an order directing the father to pay the outstanding fees he owed in the amount of \$2,034.60, and for an additional sum covering the cost of making the enforcement application. The attorney for the children stated that the father never objected to any of her bills and had previously paid his 30% share of the fees billed. The motion court granted the motion by the attorney for the children, ordering the father to pay the sum of \$2,034.60 for his share of outstanding fees, as well as \$1,500 for fees she incurred in making the application. It rejected the argument that the Court's ruling in *Mars v. Mars* (19 AD3d at 196), gave a parent the right to challenge the fee of an attorney for the child on the ground of malpractice. In any event, it found no factual basis for the malpractice claim.

The Appellate Division, in an opinion by Justice Saxe, held that parents who are directed to pay the fees of the attorney appointed to represent the children may raise the defense of legal malpractice to that attorney's claim for fees. He observed that in *Mars v. Mars* (19 AD3d at 196), the Court held that a parent may assert legal malpractice as an affirmative defense to a Law Guardian's fee application "to the extent of challenging that portion of the fees attributable to advocacy, as opposed to guardianship." He noted that the ruling was limited by the then-prevailing view that attorneys appointed as law guardians for children in divorce cases often functioned in a role similar to a guardian ad litem, advocating for what they believed to be the best interests of the child, as opposed to what the child desired. Accepting the rule of *Bluntt v. O'Connor* (291 A.D.2d 106 [4th Dept 2002]), which held that absent special circumstances, a parent in a visitation dispute lacks standing to bring a legal malpractice claim against a child's court-appointed law guardian, it limited its ruling to the portion of the law guardian's fee representing the work that consisted of advocacy rather than guardianship. However, in 2007, the role of the law guardian was changed by a newly-promulgated Rule of the Chief Judge (22 NYCRR §7.2) that renamed the position "attorney for the child," and required those attorneys to

"zealously advocate the child's position." The rule states that 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" (§7.2[d][1]). It further requires that the attorney for the child should be directed by the child's wishes after fully explaining the available options and making recommendations to the child, as long as the child is capable of knowing, voluntary and considered judgment (§7.2[d] [2]). Only when the attorney is convinced that the child lacks the capacity for knowing, voluntary and considered judgment, or if following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, may the attorney advocate a position contrary to the child's wishes, and even then the attorney must inform the court of the child's articulated wishes if the child wants the attorney to do so (§ 7.2[d][3]). He concluded that after 2007, the distinction made by the ruling in Mars is no longer necessary in cases such as this; where the child is capable of decision-making, the task of the attorney for the child is generally solely advocacy, rather than guardianship, as long as the child is capable of knowing, voluntary and considered judgment. The portion of the Mars decision allowing a parent to raise malpractice as a defense to a fee application for that portion of the fee earned by advocacy has become applicable to the attorney's entire fee claim. Rule 7.2 does not in any way vitiate the Mars ruling; on the contrary, it renders it more generally applicable.

The Court reaffirmed the essence of the Mars v. Mars ruling, namely that a parent may assert legal malpractice as an affirmative defense to the fee claim of an attorney for a child. The attorney for the child, no less than the attorneys for the parties, is serving as a professional and must be equally accountable to professional standards. That the children cannot hire and pay for their own attorneys, leaving it to the court to make the necessary appointment, does not alter the applicable standards, or the means by which they may be raised.

Notwithstanding that the father may have standing to assert such a defense, Justice Saxe agreed with the motion court that the father's accusations here did not establish a prima facie showing of legal malpractice and disciplinary violations. He also found that the father never objected to any of the bills presented by the attorney for the children despite the fact that they were in his possession for a significant amount of time (Pedreira v. Pedreira, 34 AD3d 225 [1st Dept 2006]). The court therefore acted properly in ordering him to pay the fees under an account stated theory (Shaw v. Silver, 95 AD3d 416, 416 [1st Dept 2010]).

Second Department

Equitable Distribution - Property Distribution - Pre - Marital Debts - Parties' Choice of How to Spend Funds During the Course of the Marriage Should Ordinarily Be Respected

In Kessler v Kessler, --- N.Y.S.2d ----, 2013 WL 6182969 (N.Y.A.D. 2 Dept.) the Appellate Division found that under the circumstances of this case, an award of 50% of the parties' marital property to each of the parties constituted an equitable distribution of that property and that Supreme Court providently exercised its discretion in denying the defendant a credit for \$20,000 of marital funds used to pay a premarital debt of the plaintiff. "The parties' choice of how to spend funds during the course of the marriage should ordinarily be respected," and the "[c]ourts 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" (Mahoney-Buntzman v. Buntzman, 12 NY3d 415, 421).

The Appellate Division held that Supreme Court should not have awarded the plaintiff a credit of \$28,330, representing 50% of the attorney's fees paid in connection with the prosecution of an unrelated action which was settled in the defendant's favor, and the tax liability incurred on the settlement funds. Since a significant portion of the settlement funds were ultimately determined to be marital property, the fees paid in connection with the prosecution of that action, and the tax liability incurred on the settlements funds, were marital debt.

Child Support - Modification - Surviving Agreement - Boden - Brescia Rule - Substantial and Unanticipated Change in Circumstances Warrants Downward Modification -

In Dimaio v Dimaio, --- N.Y.S.2d ----, 2013 WL 6183006 (N.Y.A.D. 2 Dept.), the parties' stipulation of settlement, which was incorporated but not merged into the parties' judgment of divorce, and which set forth the father's child support obligation, was executed prior to the effective date of the 2010 amendments to Family Court Act § 451. Therefore, in order to establish his entitlement to a downward modification of his child support obligation, the father had the burden of showing a substantial and unanticipated change in circumstances since the time he agreed to the support amount (Family Ct Act § 451[2][a]; L 2010, ch 182, s 13). Loss of employment may at times constitute a substantial and unanticipated 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. The father testified that he was unable to pay child support because he lost his prior job in October 2010. He stated that he had been working at a restaurant in the dual capacity of manager and head waiter. Following his loss of that employment, he sought and obtained a position as a manager at a restaurant at a lesser salary, but could not find a position working in the dual capacity of manager and head waiter. Under these circumstances, the father demonstrated that his loss of employment and obtainment of new employment at a lesser salary constituted a substantial and unanticipated 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 monthly child support obligation of \$2,500, which had been set in the parties' judgment of divorce, was not supported by the evidence. Accordingly, the father's objections to the Support Magistrate's order denying his petition for a downward modification of his child support obligation should have been granted.

Child Custody - UCCJEA - Domestic Relations Law §76-a - New York Had Exclusive, Continuing Jurisdiction to Determine Custody Pursuant to Domestic Relations Law § 76-a.

In *Matter of Seminara v Seminara*, --- N.Y.S.2d ----, 2013 WL 6183029 (N.Y.A.D. 2 Dept.), on April 7, 2011, the parties, who are separated but not divorced, agreed to an order of joint custody whereby the mother would have primary physical custody of the subject child in Florida, but the child would spend four months a year in New York with the father. After the mother failed to comply with the terms of that order, the father petitioned to modify the order of custody so as to award him sole legal and residential custody of the child. On October 3, 2012, upon the mother's oral application, the Family Court dismissed the father's petition on the basis that the child had resided outside of New York for more than six months and that New York no longer had jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act. On January 7, 2013, the father again petitioned to modify custody, and the mother moved to dismiss the petition for lack of jurisdiction. The court found that it had continuing jurisdiction over the matter pursuant to Domestic Relations Law § 76-a(1) and denied the mother's motion.

The Appellate Division held that Family Court improperly granted the mother's oral application to dismiss the father's prior custody petition for lack of jurisdiction. The court failed, as required by Domestic Relations Law § 76-a(1), to determine whether the child, or the child and a parent, had a significant connection to the State of New York, or whether substantial evidence was available in this state or to determine whether New York was an inconvenient forum based upon the factors set forth in Domestic Relations Law § 76-f(2). The Family Court correctly determined that New York had exclusive, continuing jurisdiction to determine custody pursuant to Domestic Relations Law § 76-a. The initial child custody determination was rendered in New York, and there was ample evidence of a significant connection by the child with this state for Family Court to retain jurisdiction. The father's extensive parenting time took place in New York, the child had relationships with a half-sibling and extended family in New York, and the father had furthered the child's education and attended to her medical care in New York. Accordingly, the court correctly concluded that the child had a substantial connection to New York, that there was adequate evidence in this state regarding her present and future well-being, and that jurisdiction in the courts of this state was proper.

Equitable Distribution - Marital Residence - Improvident Exercise of Discretion in Directing Sale of the Marital Residence Without First Offering Defendant Option of Purchasing Plaintiff's Interest

In *Abely v Lally*, --- N.Y.S.2d ----, 2013 WL 6246231 (N.Y.A.D. 2 Dept.) defendant wife appealed from a judgment which, inter alia, directed the sale of the marital residence, awarded the plaintiff \$36,227.50 as a distributive award, and awarded the plaintiff one half of the appreciation in value of the defendant's separate property located on Sound Beach Avenue in Bayville. The Appellate Division found that at the time of the parties' marriage in 1997, the defendant owned real property on Sound Beach Avenue in Bayville, which she purchased in 1995. Based on the plaintiff's contributions to the Sound Beach property during the marriage, the Supreme Court properly determined that the plaintiff was entitled to share equally in the appreciation in the value of that property during the parties' marriage. However, it held that since, plaintiff used \$7,500 of marital funds to pay a retainer fee to his first attorney in connection with this litigation, the defendant was entitled to a credit in the sum of one half of this retainer fee.

The Appellate Division held that under the particular circumstances of this case, the Supreme Court improvidently exercised its discretion in directing the immediate sale of the marital residence without first offering the defendant the option of retaining exclusive occupancy of the marital residence by purchasing the plaintiff's interest therein (*Skinner v. Skinner*, 241 A.D.2d 544, 545; *Hillmann v. Hillmann*, 109 A.D.2d 777, 778; *Patti v. Patti*, 99 A.D.2d 772). The financial circumstances of the parties did not dictate the immediate sale of the marital residence. However, in light of the acrimonious relationship between the parties, it found that the marital residence should not continue to be jointly owned by the parties for an extended period of time. The Appellate Division found it was appropriate to give the defendant the option of retaining exclusive occupancy of the marital residence, provided that, in the event she exercised the option, she must, within six months after service upon her of a copy of the decision and order with notice of entry, pay off the remaining balance of the mortgage on that property and, upon receipt of a satisfaction of the mortgage, the plaintiff must convey by deed to the defendant, his interest in the property. It also directed that in the event that the defendant exercised the option and satisfied the mortgage, and the plaintiff conveys his interest in the property to the defendant, the Supreme Court must recalculate the equitable distribution award and make appropriate adjustments, taking into account the exercise of the option and satisfaction of the mortgage and conveyance of title. It held that in the event that the option was not exercised, or the option was exercised but the mortgage was not satisfied within the time period allotted, the marital residence must be sold by the appointed receiver, following an appraisal, in accordance with the terms of the judgment. It gave the defendant 60 days after service upon her of a copy of the decision and order with notice of entry, to notify the Supreme Court and plaintiff's counsel, in writing, whether she intended to exercise the option. In the event that the defendant failed to communicate her intent to the Supreme Court and plaintiff's counsel, then she would be deemed to have waived the option. In the event that the defendant exercised the option for exclusive occupancy, she would be solely responsible for, and must pay, all carrying charges on the marital residence incurred on or after the date of the decision and order, and the plaintiff would be entitled to a credit for any such carrying charges paid by him on or after the date of the decision and order.

Equitable Distribution - Property Distribution - Marital Debt - General Rule Is That Financial Obligations Incurred During Marriage Which Are Not Solely Responsibility of One Party Should Be Shared Equally by the Parties.

In *Alleva v Alleva*, --- N.Y.S.2d ----, 2013 WL 6246236 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court providently exercised its discretion in awarding plaintiff maintenance of \$750 per week. However, as the defendant correctly contended, Supreme Court should have awarded the plaintiff maintenance only until she became eligible for full Social Security retirement benefits or remarries. However, it found that it was appropriate in this case to require the defendant to maintain life insurance on her behalf to secure his maintenance obligation. The Supreme Court providently exercised its discretion in equally allocating responsibility for marital debt, including certain credit card debt incurred during the pendency of this action. In general, financial obligations incurred during the marriage which are not solely the responsibility of one party should be shared equally by the parties (see *Mahoney-Buntzman v. Buntzman*, 12 NY3d 415, 421). The plaintiff argued that the defendant should be solely responsible for certain credit card debt that the plaintiff incurred during the pendency of the action for, inter alia, the support of herself and the parties' two emancipated children. However, the plaintiff did not assert that the defendant failed to comply with a pendente lite order directing him to pay maintenance and expenses of the children. Under these circumstances, the plaintiff failed to show that the debt should be borne solely by the defendant. The Appellate Division held that under the circumstances of this case, the Supreme Court providently exercised its discretion in awarding the plaintiff the sum of \$10,000 as an attorney's fee, payable within 18 months after the date of service of the decision.

Child Support - Enforcement - Family Ct Act § 451 - Cancellation of Arrears - Where noncustodial parent's income below or equal to the poverty level, prohibition against reduction of accrued child support arrears does not apply.

In *Matter of Briggs v McKinley -Mays*--- N.Y.S.2d ----, 2013 WL 6246278 (N.Y.A.D. 2 Dept.), the father moved to reduce child support arrears for the period of June 2, 2011, through July 16, 2012, to \$500, claiming that, on June 2, 2011, he suffered a heart attack, which rendered him disabled, and that, after that date, his income fell below the poverty level. The Support Magistrate denied the motion, and the father filed an objection to that order. The Family Court denied the father's objection.

The Appellate Division reversed and remitted for a new hearing and determination. It observed that Family Court Act § 451 provides that "the court ... may modify, set aside or vacate any order issued in the course of the proceeding, provided, however, that the modification, set aside or vacatur shall not reduce or annul child support arrears accrued

prior to the making of an application pursuant to this section." However, Family Court Act § 413(1)(g) provides: "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 " Thus, it held that for any period of time that the noncustodial parent's income is below or equal to the poverty level, and he or she does not satisfy his or her child support obligation, the prohibition against reduction of accrued child support arrears contained in section 451 is not triggered because there are no accrued arrears in excess of \$500 to reduce. (Matter of Mandelowitz v. Bodden, 68 AD3d 871, 875). The Court held that to the extent its decision in Matter of Martinez v. Torres (26 AD3d 496) indicated that arrears cannot be capped at \$500 pursuant to Family Court Act § 413(1)(g), for periods preceding the filing of a party's petition, it should not be followed.

Here, the father's averments as to his level of income for the period of June 2, 2011, through July 16, 2012, which were supported by documentation of disability payments he received, warranted a hearing to determine whether the father's income for that period fell below, or was equal to, the income level provided in the poverty income guidelines. If the father proves that his income was at or below that level for "any period of time" child support arrears for that period of time must be capped at \$500 (Family Court Act §413[1][g]).

Counsel Fees - Domestic Relations Law §237 - Award - Presumption Rebutted - Not Improvident Exercise of Discretion in Denying Interim Counsel Fees Where No Significant Disparity in the Parties' Financial Circumstances - Attorneys Fees Denied Where Attorney's Failed to Substantially Comply with 22 NYCRR 1400.2 and 1400.3 and 22 NYCRR 202.16(k)(3)

In Vitale v Vitale, --- N.Y.S.2d ----, 2013 WL 6246465 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order which denied the wife's motion for an award of an attorney's fee and an expert fee. It noted that in determining whether to award fees, the court should review the financial circumstances of both parties, together with all of the other circumstances of the case, which may include the relative merit of the parties' positions. A court may consider whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation. It held that under the circumstances of this case, the Supreme Court did not improvidently exercise its discretion in denying plaintiff's motion for an award of an attorney's fee and an expert fee pursuant to Domestic Relations Law § 237(a), since there was no significant disparity in the parties' financial circumstances and the plaintiff's conduct unnecessarily prolonged this litigation (Beth M. v. Joseph M., 12 Misc.3d 1188[A] [Sup.Ct. Nassau County 2006]). In addition, the failure of the plaintiff's former attorney to substantially comply with 22 NYCRR 1400.2 and 1400.3 precluded him from seeking unpaid fees from the plaintiff and, therefore, the defendant could not be compelled to pay such fees (see Rosado v. Rosado, 100 AD3d 856). The plaintiff's current attorney failed to comply with 22 NYCRR 202.16(k)(3),

precluding an award of fees to him (see *Mimran v. Mimran*, 83 AD3d 550; *Covington v. Covington*, 249 A.D.2d 735).

Third Department

Child Support - Award - Family Ct Act 413[1][F] - Child Support Award Which Represented Roughly One Half of Respondent's Earnings"unjust and Inappropriate"

In *Matter of Broome Country Dept of Social Services v Meghan XX*--- N.Y.S.2d ----, 2013 WL 6182496 (N.Y.A.D. 3 Dept.), Respondent was the mother of Tequilla XX, who was born in 2011 and placed in foster care shortly after her birth. Thereafter, petitioner commenced a proceeding seeking child support on Tequilla's behalf. Respondent was developmentally disabled; she received Supplemental Security Income benefits (SSI) and public assistance payments in a total sum of \$961 per month, and earned some wages from part-time employment at a sheltered workshop. Her SSI payments were made directly to petitioner, as her representative payee. After a hearing, the Support Magistrate directed respondent to pay \$25 per month in support retroactive to the date that Tequilla became eligible for public assistance, and capped respondent's arrears at \$500. Respondent filed objections to the order, which Family Court denied.

The Appellate Division reversed. It found that the Support Magistrate's determination that respondent's average weekly income was "between \$15[] to \$20[] per week gross each and every week" was unsupported by the record, and apparently in error. Respondent's financial disclosure affidavit was the only evidence presented at the support hearing regarding her income, and it listed her biweekly gross income at \$25. Thus, after subtracting respondent's public assistance and SSI benefits (see Family Ct Act §413[1][b][5][vii][E], [F]; [c]), the child support award represented roughly one half of respondent's earnings. The court found this award "unjust and inappropriate" (Family Ct Act § 413[1][f]), granted respondent's objections and set her support obligation at \$0.

Termination of Parental Rights - Fact Finding Hearing - Rule Against Hearsay - Professional Reliability Exception to the Hearsay Rule - Error to Admit Psychologist's Report into Evidence Because it Contained Inadmissible Hearsay.

In *Matter of Dakota F.*, 110 A.D.3d 1151, 974 N.Y.S.2d 594 (3d Dept, 2013) in May 2010, following a permanency hearing in a neglect proceeding, Family Court directed petitioner to arrange a parenting assessment and mental health evaluation of respondent, which was thereafter performed by psychologist Richard Liotta. In the subsequent termination proceeding, where termination of parental rights was granted, his report was received in evidence.

The Appellate Division reversed and dismissed the petition. It noted that petitioner had the right to submit "psychiatric, psychological or medical evidence" (Social Service Law § 384-b [6][e]), and Liotta testified that he examined respondent for the purpose of determining whether she had a mental condition that might impair her ability to care for her children. However, it agreed with respondent that Family Court erred in admitting Liotta's report into evidence because it contained inadmissible hearsay. Liotta testified that in the course of his examination, he conducted numerous personal interviews with caseworkers, counselors, and others. Pursuant to the professional reliability exception to the hearsay rule, an expert witness may rely on information that would otherwise constitute inadmissible hearsay "if it is 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" (People v. Goldstein, 6 N.Y.3d 119, 124-125 [2005]). While some of the individuals with whom Liotta spoke testified during the hearing and were thus subject to cross-examination, several others did not. Liotta was not asked and offered no opinion as to whether the information he gleaned from the interviews with individuals who did not testify was professionally accepted as reliable in performing mental health evaluations. Respondent objected on hearsay grounds to Liotta's testimony about these interviews and to the admission of his report-which contained detailed accounts of each interview-but the court overruled these objections. Moreover, when respondent's counsel sought to ask about the effect of the collateral source interviews on his opinions, the court precluded him from doing so. As a result, no proper foundation was laid for the admission of Liotta's testimony or his report (Matter of Anthony WW. [Michael WW.], 86 A.D.3d 654, 657; Matter of Murphy v. Woods, 63 A.D.3d 1526,1526-1527(2009)).

In addition to proof of the parent's underlying condition, termination of parental rights on the basis of mental illness requires " testimony from appropriate medical witnesses particularizing how the parent's mental illness affects his or her present and future ability to care for the child' " (Matter of Karen GG. [Marline HH.], 72 A.D.3d 1156, 1158, [2010]). Here, psychologist Donald Danser was appointed to perform the statutorily required mental evaluation, and he opined that respondent did not have a mental condition which prevented her from providing her children with adequate care. In the absence of Liotta's testimony and report, the record did not include clear and convincing evidence that respondent suffered from a mental illness rendering her unable to care for her children, and Family Court's orders had to be reversed.

Family Court

Child Support - Award - FCA § 439 (e) - Father Entitled to Credit for Excess Child Support Paid Pursuant to Order of Support Magistrate Affirmed by Family Court but Vacated by Appellate Division

In Matter of F.S. v. K.O., --- N.Y.S.2d ----, 2013 WL 6389194 (N.Y.Fam.Ct.) the Support Magistrate increased the petitioner-father's child support obligation by \$1,000 per month. Family Court affirmed. The Appellate Division reversed, holding the substantial change in circumstance standard, that was legislated in 2010, but had long been the standard for modifying support orders, did not apply because this was an incorporated support order that took place before 2010. They held that a Family Court support order incorporated into a judgment of divorce before 2010 could not be modified unless the Boden standard was met. (Overbaugh v. Schettini, 103 AD3d 972.)

The issue before the family court was should the father receive a credit for the excess child support (which may amount to almost \$29,000) paid pursuant to the order of the Support Magistrate when that order was affirmed by the Family Court but vacated by the Appellate Division?

The Court held that the father should receive the credit allowed by FCA § 439(e) for excess child support paid from the date of filing of the mother's modification petition until the date of the Court's decision that affirmed the Magistrate's decision. The grounds for this ruling were that the reversal order of the Appellate Division created a "new order" of the Family Court within the meaning of the FCA §439 and payments made in excess of a new order were entitled to be credited against future child support obligations. The Court also held that the father should receive a credit for the excess child support paid from the date of the Court's order that affirmed the Magistrate until the date of the Appellate Division order that reversed Family Court's order regardless of whether it can be characterized as a new order. This credit was based on the rulings of the Court of Appeals in *Spencer v. Spencer* (10 NY3d 60 [2008]) and *Johnson v. Chapin* (12 NY3d 461 [2009]). In *Spencer v. Spencer* (10 NY3d 60 [2008]), the Court of Appeals as a result of its main holding, also held that the father could seek a credit for the support he paid pursuant to the invalid New York order and that Family Court had the authority to order that credit. In *Johnson v. Chapin* (12 NY3d 461 [2009]), where it was determined at trial that the husband's income was significantly less than that upon which the temporary orders for maintenance and child support were based, the Court of Appeals approved the crediting of the excess maintenance against the equitable distribution award, but upheld the denial of a credit against excess child support, noting the strong public policy against such crediting. The Court did imply that in the right case , a credit could be granted. It stated, "nothing in this record shows it was error to deny that relief"(Johnson, at 466). This obviously suggested that a proper record would support an order crediting for excess child support. Family Court held that this was one of those proper cases because not granting a credit to the father would be manifestly unfair.

This credit would be applied from the date of the filing of the petition on April 28, 2011, until the date of the Family Court's order on April 17, 2012. The Court held that with regard to \$17,000 of that amount in excess that was paid while the appeal was pending *Paris v. Paris* (226 A.D.2d 381 [2nd Dept., 1996]) was controlling. "In construing the statute according to its plain language, it is clear that the term 'new order' refers to an order made by the Judge, or the [Support Magistrate] upon remand, based upon a review of properly

filed objections and rebuttal, if any, to a previously issued final order.' Consequently, the crediting process enumerated therein applies in those situations where a final order is objected to, reviewed and subsequently superseded by a new order " (Paris, at 383-4).

Family Court held that a credit should be allowed when it would be manifestly unfair to deny it. This was such a case and it closely paralleled the circumstances that supported the granting of a credit in Spencer. Reversing and reinstating the original order without granting the father a credit would mean that justice was neither done nor seen to be done. The Court directed a hearing to determine the actual amount in controversy, the amounts to be credited and the schedule to apply those credits.

December 2, 2013

First Department

Child Custody - Jurisdiction - Home State - Domestic Relations Law §76 - E - Courts Lack Subject Matter Jurisdiction over Custody Proceedings Filed Prior to the Birth of a Child. Domestic Relations Law §76 -G - Removal of Fetus of While in Utero Is a Constitutional Right and Not Unjustifiable Conduct.

In Matter of Sara Ashton McK. v. Samuel Bode M. --- N.Y.S.2d ----, 2013 WL 6016210 (N.Y.A.D. 1 Dept.) the Appellate Division reversed an order of the Family Court which granted respondent father's motion to dismiss the mother's custody petition, reinstated the petition and remanded for further proceedings. It held that the Family Court properly found that New York was the child's home state, based "on the literal construction of the statute," since the mother gave birth on February 23, 2013, in New York and the child lived in New York continuously until the time of the mother's filing of her custody petition, two days later. However, the court erred in declining to exercise jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to determine the mother's petition for initial custody of the child. It found that the California court did not have "jurisdiction substantially in conformity" with the UCCJEA (see Domestic Relations Law § 76-e), since the father's paternity petition, filed in California on November 15, 2012, did not initiate a proper custody proceeding, because the child had not yet been born. Under the UCCJEA, courts cannot exercise subject matter jurisdiction over custody proceedings filed prior to the birth of a child (see e.g. *Waltenburg v. Waltenburg*, 270 S.W.3d 308, 316-317 [Tex App, 5th Dist 2008]).

The Appellate Division found that the mother had not engaged in "unjustifiable conduct" to gain the Family Court's jurisdiction (Domestic Relations Law § 76-g). While "unjustifiable conduct" is not defined by statute, courts generally apply this provision where a child has been removed contrary to an existing custody order (see *Adoption*

House v. P.M., 2003 WL 23354141, *7, 2003 Del Fam Ct LEXIS 227, *22 [Del Fam Ct 2003]). It disagreed with the Referee's finding that the mother's "appropriation of the child while in utero was irresponsible" and "reprehensible" and warranted a declination of jurisdiction in favor of the California court. The mother's conduct amounted to nothing more than her decision to relocate to New York during her pregnancy. It rejected the Referee's apparent suggestion that, prior to her relocation, the mother needed to somehow arrange her relocation with the father with whom she had only a brief romantic relationship. Putative fathers have neither the right nor the ability to restrict a pregnant woman from her constitutionally-protected liberty (see Matter of Wilner v. Prowda, 158 Misc.2d 579, 601 N.Y.S.2d 518 [Sup Ct, N.Y. County 1993] [refusing the putative father's request to determine custody of the parties' unborn child and restrain his then-pregnant wife from leaving New York]).

The Appellate Division held that Family Court erred in declining jurisdiction on the basis of an inconvenient forum (Domestic Relations Law § 76-f[1]). Although a determination as to whether a court is an inconvenient forum is left to the sound discretion of the trial court after consideration of eight enumerated factors(Domestic Relations Law § 76-f[2]), the Referee did not consider all of the relevant factors in reaching its determination that New York was an inconvenient forum. The father appears to be in a superior financial position to the mother, there was an approximate 3,000 mile distance between New York and California, the mother had now established herself as a New York resident, the child was born in New York and had never resided in California, and New York was the child's "home state." The UCCJEA "elevates the 'home state' to paramount importance in both initial custody determinations and modifications of custody orders. Although the Referee found the mother's conduct to be a relevant factor, her relocation to New York with her fetus did not constitute conduct capable of supporting the Referee's decision to decline jurisdiction based on inconvenient forum.

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Granted - Single Incident Is Legally Sufficient to Support a Finding of Harassment in the Second Degree

In Matter of Tamara A v Anthony Wayne S, 110 A.D.3d 560, 974 N.Y.S.2d 48, (1st Dept 2013) Petitioner testified that while she and respondent were sitting in the Family Court waiting room, respondent stood up, faced her, and said, "[S]omeone is going to get a bullet in their head." Petitioner, the child's maternal grandmother, testified that she believed respondent was talking about her, because she was preparing to adopt the child. She testified that she was afraid of respondent because they never got along, he had treated her with disrespect, and he had assaulted her daughter. Petitioner also testified that immediately after respondent made the statement, agency caseworkers who were in the waiting room entered the courtroom and informed the court. Petitioner's testimony was undisputed. Although the court adjourned the hearing to allow

respondent to testify, he later declined to do so.

The Appellate Division found that a fair preponderance of the evidence supported the court's finding that respondent committed acts that would constitute harassment in the second degree and disorderly conduct (Family Court Act §§ 812[1]; 821[1]; 832). A person is guilty of harassment in the second degree when, "with intent to harass, annoy or alarm another person ... [h]e ... subjects such other person to physical contact, or attempts or threatens to do the same" (Penal Law § 240.26[1]; see e.g. McGuffog v. Ginsberg, 266 A.D.2d 136, 699 N.Y.S.2d 26 [1st Dept.1999]). A person is guilty of disorderly conduct when, "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof," he engages in "violent, tumultuous or threatening" behavior (Penal Law § 240.20[1]). The Appellate Division found that contrary to respondent's contention, a single incident is legally sufficient to support a finding of harassment in the second degree, and the court properly drew a negative inference from respondent's failure to testify.

Child Custody - Jurisdiction - Domestic Relations Law §76-a[1][A] - New York Retained Exclusive Continuing Jurisdiction Where No Determination Was Made That the Child, the Child and One Parent, or the Child and a Person Acting as a Parent Lacked a Significant Connection to this State, That Substantial Evidence Was No Longer Available in this State, or That the Child and the Parent Lived in Another State.

In Matter of Rankin v Rankin, --- N.Y.S.2d ----, 2013 WL 6063843 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which denied respondent mother's motion to dismiss the petition of paternal grandmother for visitation with the subject child. The child and the mother lived in New York since the child's birth, and New York was the child's home state at the time of the initial custody order. New York remained the child's home state at the time the petition was filed. Thus, the court had jurisdiction to modify its initial custody order, which limited visitation to the father (see DRL §§ 76[1][a] and 76-a[2]). New York retained exclusive continuing jurisdiction because no determination was made that the child, the child and one parent, or the child and a person acting as a parent lacked a significant connection to this state, that substantial evidence was no longer available in this state concerning the child's care, protection, training and personal relationships, or that the child and the parent lived in another state, since the mother and the child did not move to Florida until after the petition was filed (see DRL §76-a[1][a]). The court properly exercised its discretion to retain jurisdiction over the parties after they moved to other states because the mother failed to sustain her burden of demonstrating that public or private interests militated against the litigation going forward in this state (see Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 479 [1984], cert denied 469 U.S. 1108 [1985]), where an alternative forum was unavailable to the petitioner grandmother.

Child Custody - Jurisdiction - Domestic Relations Law §76-[1][B] - Florida Could Not Have Jurisdiction in Substantial Conformity with the UCCJEA Where Neither the Child Nor the Parties Were Residing There - Domestic Relations Law § 76[1][a] .

In Matter of Liza P. v. Kevin P., --- N.Y.S.2d ----, 2013 WL 6064763 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order of the Family Court which granted petitioner mother custody of the child. It held that the Family Court properly determined that it had jurisdiction over the matter pursuant to Domestic Relations Law § 76(1)(b). Florida could not have jurisdiction because, although it was the child's home state at the time the proceeding commenced, neither the child nor either party resided there. Furthermore, the mother and child resided in New York and had a family network here, and substantial evidence was available in this state regarding the child's care. Although respondent father commenced a proceeding in Florida prior to the commencement of the New York proceeding, Family Court correctly found that Florida could not have jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction and Enforcement Act because neither the child nor the parties were residing there (Domestic Relations Law § 76[1][a]). In any event, having learned of the Florida proceeding, the court fulfilled its obligation pursuant to Domestic Relations Law § 76-e by attempting to communicate with the Florida court (see Vanneck v. Vanneck, 49 N.Y.2d 602, 610-611 [1980]; cf. Cynthia Marie S. v. Allen Wayne L., 228 A.D.2d 249 [1st Dept 1996]).

Second Department

Same-sex Relationships - Oral Contract - Appellate Division Upholds Cause of Action for Breach of an Alleged Oral "Joint Venture/partnership" Agreement Whereby Plaintiff Would Share in Assets, Including the Defendant's Retirement Contributions and Earnings, in Exchange for Leaving Her Full-time Job to Care for the Parties' Children.

In Dee v Rakower, --- N.Y.S.2d ----, 2013 WL 5989685 (N.Y.A.D. 2 Dept.) the parties lived together in a committed, same-sex relationship for nearly 18 years, and were the parents of two children. After the relationship ended, the plaintiff commenced this action seeking, inter alia, damages for breach of an alleged oral "joint venture/partnership" agreement whereby she would share in assets, including the defendant's retirement contributions and earnings, in exchange for leaving her full-time job to care for the parties' children. The plaintiff also asserted several equitable causes of action predicated upon the alleged oral agreement to share in the defendant's retirement contributions and earnings. The Appellate Division held that the complaint was sufficiently pleaded to state a cause of action sounding in breach of contract. However, it concluded that Supreme Court properly

granted those branches of the motion which were to dismiss the equitable causes of action predicated upon the alleged oral agreement to share the defendant's retirement contributions and earnings.

In her complaint, the plaintiff alleged, and the defendant did not dispute, that she was involved in a committed relationship with the defendant, living as a family unit, from 1990 until 2007. Two children were born of this relationship. Each party was the biological parent of one child, and each child was legally adopted by the other party. According to the allegations set forth in the complaint, before they had children, each party was employed full-time, earning a salary and retirement benefits. The parties pooled their respective salaries to meet their shared expenses pursuant to what the plaintiff described as a specific agreement to form "a partnership and/or joint venture." In 1996, in furtherance of their agreement, the parties purchased a house as "joint tenants with rights of survivorship." After the parties' first child was born, the parties agreed, given the cost of child care, that the plaintiff would eschew her full-time employment and work part-time so that she could "be home with the child (later, children) and perform other non-financial services for the benefit of the family and for the parties' partnership and/or joint venture" while the defendant would continue to work full-time. The plaintiff claimed that her decision to leave her full-time employment was based upon the defendant's promise that her non-economic contributions to their family unit would, along with their pooled salaries and assets, be in furtherance of the "partnership/joint venture." Indeed, the parties "realized and specifically discussed that [the] defendant would be earning more income for, and [the plaintiff] would be contributing more non-financial services to, the parties' partnership/joint venture." The plaintiff asserted that, as a result, the parties specifically agreed to share equally in all financial contributions made by each of them and that all such contributions were for their mutual benefit. In addition, the parties allegedly specifically discussed that the defendant would continue to accrue retirement savings while the plaintiff would no longer be able to, and agreed that the plaintiff would be entitled to one half of the defendant's retirement contributions and earnings for the period that the plaintiff did not work at a job that provided her with a retirement plan.

Upon the termination of their nearly-18-year relationship, the plaintiff commenced this action. In her complaint, the plaintiff alleged ten causes of action. At issue on the appeal were the plaintiff's eighth cause of action, which was to recover damages for breach of the parties' alleged partnership/joint venture agreement, as well as her sixth cause of action, which was for dissolution of the alleged partnership/joint venture and an accounting of its assets, seventh cause of action, which was for the imposition of a constructive trust on one-half of the defendant's assets, and ninth cause of action, which was based on unjust enrichment.

The Appellate Division found that within its four corners, the complaint sufficiently alleged the elements of a breach of contract cause of action necessary to survive a motion to dismiss pursuant to CPLR 3211(a)(7). The essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach. In her complaint, the

plaintiff sufficiently pleaded all of the elements of a breach of contract cause of action. In pertinent part, she alleged:

"15. After the parties' first child was born in 1996, the parties agreed that, given the costs of child care, Plaintiff would leave her full time job and assume part-time work so she could be home with the child (later, children) and perform other non-financial services for the benefit of the family and for the parties' partnership and/or joint venture, while Defendant would continue to work full-time to support the family/joint venture/partnership financially.

"16. At that time, the parties realized and specifically discussed that Defendant would be earning more income for, and Plaintiff would be contributing more non-financial services to, the parties' partnership/joint venture.

"17. The parties therefore specifically agreed that they would share equally in all financial and non-financial contributions made by each of them and that all such contributions-including without limitation earnings, assets, money, funds, accounts, and labor-was for their mutual benefit ...

"18. At that time, the parties also realized and specifically discussed that Defendant would continue to accrue retirement savings from her work while Plaintiff would not, since Plaintiff would no longer work at a job which provided retirement plans.

"19. The parties therefore specifically agreed that Plaintiff would be entitled to one-half of Defendant's retirement contributions and earnings that accrued to Defendant during the period that Plaintiff did not work at a job that provided her with full retirement plans."

The Appellate Division held that these factual allegations adequately set forth the existence of a contract pursuant to which the plaintiff would quit working full-time, thereby ceasing to earn money toward her own retirement plan, and pursue part-time work enabling her to stay home to care for the parties' children, in exchange for a one-half share in the defendant's retirement accounts accrued during those years that the plaintiff refrained from working at a job which provided retirement benefits.

The court found that alleged contractual agreement between the parties was supported by consideration. "Consideration consists of either a benefit to the promisor or a detriment to the promisee. It is enough that something is promised, done, forbore, or suffered by the party to whom the promise is made as consideration for the promise made to him [or her]" (*Anand v. Wilson*, 32 A.D.3d 808, 809, 821 N.Y.S.2d 130). The consideration here for the alleged contract was the forbearance of the plaintiff's career, the inability to continue to save toward her retirement during that forbearance, and her maintenance of the household in return for a share in the defendant's retirement benefits and other assets earned during the period of forbearance .

Since the plaintiff also alleged that the defendant breached the alleged agreement and that she sustained damages as a result of that breach, at this pleading stage, the eighth cause of action survived dismissal. The fact that the alleged agreement was made by an unmarried couple living together did not render it unenforceable. "New York courts have long accepted the concept that an express agreement between unmarried persons living together is as enforceable as though they were not living together, provided only that illicit sexual relations were not 'part of the consideration of the contract' " (*Morone v. Morone*, 50 N.Y.2d 481, 486, 429 N.Y.S.2d 592, 413 N.E.2d 1154, quoting *Rhodes v. Stone*, 17 N.Y.S. 561, 63 Hun 624, 624).

"[W]hile cohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation, neither does cohabitation disable the parties from making an agreement within the normal rules of contract law" (*Morone v. Morone*, 50 N.Y.2d at 486, 429 N.Y.S.2d 592, 413 N.E.2d 1154;see *Matter of Gorden*, 8 N.Y.2d 71, 75, 202 N.Y.S.2d 1, 168 N.E.2d 239). The Court found the case similar to *Morone v. Morone* (50 N.Y.2d 481, 429 N.Y.S.2d 592, 413 N.E.2d 1154. In *Morone*, the parties cohabited as husband and wife although they were not married. The plaintiff claimed that the parties had entered into an oral partnership agreement whereby, among other things, they agreed that the net profits of their partnership would be used and applied for their equal benefit. The plaintiff devoted herself exclusively to their relationship and this endeavor. The Court of Appeals concluded that the plaintiff sufficiently stated a breach of contract cause of action.

The Appellate Division found that the cause of action for a constructive trust had to be dismissed because the allegations were insufficient to state a cause of action to impose a constructive trust. Unlike divorcing married couples who can rely upon the equitable distribution law to fashion a formula for the court to calculate a coverture value of a spouse's pension, it found that find that the allegation of an equitable right to share the defendant's pension on an equal basis was insufficient to support a cause of action to impose a constructive trust. In any event, it held that the Employee Retirement Income Security Act (29 USC § 1001 et seq.) precludes the imposition of a constructive trust on a pension plan. The Court also dismissed the equitable causes of action to recover damages for unjust enrichment, and for an accounting for failure to state a cause of action.

Child Support - Enforcement - Deliberate Interference by a Parent with Court-ordered Visitation Does Not Constitute a Ground to Cancel Child Support Arrears

In *Matter of Vasquez v. Powell*, --- N.Y.S.2d ----, 2013 WL 5992228 (N.Y.A.D. 2 Dept.), the mother sought to suspend child support payments and to cancel her child support arrears based upon the father's alleged violation of a visitation order, and to hold the father in civil contempt for the alleged violation. The Appellate Division held that initially,

deliberate interference by a parent with court-ordered visitation does not constitute a ground to cancel child support arrears (Ledgin v. Ledgin, 36 A.D.3d 669, 828 N.Y.S.2d 202). Interference with visitation rights can be a basis for prospectively suspending child support payments, but 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 mother failed to demonstrate that the father actively interfered with or deliberately frustrated her visitation rights. Rather, the evidence showed that, while the father did not force the parties' son to visit with the mother, he did encourage visitation.

Third Department

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Granted - Respondent Committed Family Offense of Harassment in the First Degree. He "Intentionally and Repeatedly" Harassed Petitioner "By Engaging in a Course of Conduct or by Repeatedly Committing Acts Which Place[d][Her] in Reasonable Fear of Physical Injury". The Requisite Intent May Be Inferred from the Surrounding Circumstances

In Matter of Shana SS. v. Jeremy TT., --- N.Y.S.2d ----, 2013 WL 6096754 (N.Y.A.D. 3 Dept.) in April 2002, respondent, who then resided in New York, was arrested after he transmitted child pornography via the Internet to an undercover police officer who was posing as a 13-year-old girl. In February 2003, respondent "jumped bail" on that charge and fled to Florida where, by his own admission, he began "living as a fugitive." While there, respondent became involved in an electronic crime enterprise and primarily supported himself by engaging in credit card fraud.

Respondent and petitioner met in Florida in April 2004 and moved in together shortly thereafter. In October 2004, respondent was arrested and extradited to New Jersey to face a federal indictment related to the credit card fraud. In 2005, the parties' child, who was the subject of these proceedings, was born. Following resolution of the federal charges, respondent was extradited to New York to answer to the child pornography and bail jumping offenses and, in 2006, pleaded guilty to one count of promoting a sexual performance by a child, one count of attempted dissemination of indecent material to a minor in the first degree and one count of bail jumping in the second degree and was sentenced to an aggregate prison term of 2 to 6 years. During the course of respondent's incarceration, petitioner initially attempted to facilitate a relationship between respondent and the child. As time went on, however, petitioner became increasingly alarmed by what she regarded as the threatening nature of certain statements made by respondent in various letters to and telephone conversations with her. Following respondent's release from prison in 2011, petitioner commenced proceedings alleging a family offense and seeking an order of

protection. Shortly thereafter, respondent petitioned for custody and visitation, and petitioner cross-petitioned for sole legal and physical custody of the child. A combined hearing ensued, at the conclusion of which Family Court granted petitioner sole legal and physical custody of the child with therapeutic visitation to respondent. Family Court also found that respondent committed the family offense of harassment in the first degree and awarded petitioner a two-year order of protection.

The Appellate Division affirmed. Petitioner met her burden of establishing that Respondent committed the family offense of harassment in the first degree-specifically, that he "intentionally and repeatedly" harassed her "by engaging in a course of conduct or by repeatedly committing acts which place[d][her] in reasonable fear of physical injury" (Penal Law s 240.25). The requisite intent may be inferred from the surrounding circumstances. Petitioner testified that, while incarcerated, respondent repeatedly threatened both her well-being and to take the child away from her. For example, when petitioner advised respondent that she had met another man (now her husband), respondent replied, "[You] must have a f* * *ing death wish.... [I]t's until death do us part ..., you don't just get to leave." Similarly, when petitioner approached respondent about changing the child's last name, respondent stated, "[I]f you try to take that f* * *ing kid from me I will make sure he ... never knows your name, ... I [will] make him disappear like that (fingers snapping); all it takes is one phone call." Finally, when petitioner suggested that they allow Family Court to resolve their differences, respondent replied, "[E]ven if you do win in court I'm gonna make sure you lose." These specific statements, in its view, "carried ominous implications" for petitioner and the child's safety and, given the context in which they were made provided ample support for Family Court's conclusion that respondent had committed [the underlying] family offense.

In light of respondent's limited contact with the child while incarcerated and his resulting lack of parental experience, as well as his failure to successfully complete a sex offender treatment program, there was no basis upon which to set aside Family Court's award of therapeutic visitation -particularly given the nightmares and behavioral difficulties that the child experienced following visits with respondent.

Child Support - Modification - Substantial Change in Circumstances - Family Ct Act § 451 Was Amended to Provide That "[I]ncarceration Shall Not Be a Bar to Finding a Substantial Change in Circumstances Provided Such Incarceration Is Not the Result of Nonpayment of a Child Support Order, or an Offense Against the Custodial Parent or Child Who Is the Subject of the Order or Judgment" .

In Matter of Baltes v Smith, --- N.Y.S.2d ----, 2013 WL 6096780 (N.Y.A.D. 3 Dept.) Pursuant to a May 2010 order, petitioner (father) was required to pay \$72 per week to respondent (mother) for support of their child (born in 2006). In July 2011, after being arrested a month earlier and held on federal charges, the father petitioned for a downward

modification of his child support obligation. Following a hearing, the Support Magistrate noted a recent amendment to Family Ct Act § 451, which provided that incarceration does not necessarily bar a finding of a substantial change in circumstances (see L 2010, ch 182, § 6, codified as Family Ct Act § 451[2][a]), and granted the petition, modifying the father's support obligation to \$25 per month for the period from July 2011 to January 2012.

The mother filed objections and Family Court vacated the Support Magistrate's order and dismissed the petition. The court found that the amendment to Family Ct Act § 451 did not apply to the father's petition regarding the May 2010 order since the amendment applied prospectively to child support orders entered after October 13, 2010, the effective date of the pertinent amendments to the statute. Family Court determined that the father otherwise failed to meet his burden of establishing a substantial change in circumstances. The father's second petition, filed before Family Court's February 2012 order and seeking to extend the reduced child support beyond January 2012 because of his continued incarceration, was dismissed by the Support Magistrate in light of Family Court's order.

The Appellate Division affirmed. It noted that request for a downward modification of a child support order must be supported by a showing of a substantial change in circumstances. Before the 2010 amendment to Family Ct Act § 451, a parent's loss of income resulting from incarceration generally was not considered a sufficient change in circumstances to warrant a reduction or suspension of child support (see *Matter of Knights v. Knights*, 71 N.Y.2d 865, 866-867 [1988]). As part of legislation making many changes regarding child support , Family Ct Act § 451 was amended in several respects including, as relevant here, to provide that "[i]ncarceration shall not be a bar to finding a substantial change in circumstances provided such incarceration is not the result of nonpayment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment" (Family Ct Act § 451[2][a]; see L 2010, ch 182, § 6). However, the legislation further provided that, as to the section that included this amendment, it "shall apply to any action or proceeding to modify any order of child support entered on or after the effective date of this act " (L 2010, ch 182, § 13). The language used by the Legislature controls. And, under such circumstances, Family Court correctly found that, since the order the father sought to modify had been entered before the effective date of the statute, the amended language did not apply. Moreover, under applicable pre -amendment precedent, Family Court's determination that the father failed to demonstrate a substantial change in circumstances to warrant a downward modification was supported by the record.

November 16, 2013

Recent Legislation

New York Law Restricts Parental Rights of Sexual Perpetrators When a Child Is Born as a Result of Sexual Offenses. Laws of 2013, Ch 371. Effective September 27, 2013.

Domestic Relations Law § 240 (1-c) (a) was amended to provide that no court shall make an order providing for visitation or custody to a person who has been convicted of murder in the first or second degree in this state, or convicted of an offense in another jurisdiction which, if committed in this state, would constitute either murder in the first or second degree, of a parent, legal custodian, legal guardian, sibling, half-sibling or step-sibling of any child who is the subject of the proceeding. Pending determination of a petition for visitation or custody, the child may not visit and no person may visit with the child present, such person who has been convicted of murder in the first or second degree in this state, or convicted of an offense in another jurisdiction which, if committed in this state, would constitute either murder in the first or second degree, of a parent, legal custodian, legal guardian, sibling, half-sibling or step-sibling of a child who is the subject of the proceeding without the consent of such child's custodian or legal guardian. Laws of 2013, Ch 371, §1.

Domestic Relations Law §240 (1-c) (b) was amended to provide that there shall be a rebuttable presumption that it is not in the best interests of the child to be placed in the custody of or to visit with a person who has been convicted (in this state or in another jurisdiction) of one or more of the following sexual offenses, when the child who is subject of the proceeding was conceived as a result: rape in the first or second degree; course of sexual conduct against a child in the first degree; predatory sexual assault; or predatory sexual assault against a child. Laws of 2013, Ch 371, §1.

Notwithstanding the foregoing a court may order visitation or custody where:
(i) (A) such child is of suitable age to signify assent and such child assents to such visitation or custody; and the court finds that such visitation or custody is in the best interests of the child. Laws of 2013, Ch 371, §1.

Notwithstanding the foregoing a court may order visitation or custody where:
(i) (B) if such child is not of suitable age to signify assent, the child's custodian or legal guardian assents to such order(ii) and the court finds that such visitation or custody is in the best interests of the child. Laws of 2013, Ch 371, §1.

Notwithstanding the foregoing a court may order visitation or custody where:
(i) (C) the person who has been convicted of murder in the first or second degree, or an offense in another jurisdiction which if committed in this state, would constitute either murder in the first or second degree, can prove by a preponderance of the evidence that:
(1) he or she, or a family or household member of either party, was a victim of domestic violence by the victim of such murder; and (2) the domestic violence was causally related to the commission of such murder; (ii) and the court finds that such visitation or custody is in the best interests of the child.¹² For the purpose of making a

determination pursuant to this provision the court shall not be bound by the findings of fact, conclusions of law or ultimate conclusion as determined by the proceedings leading to the conviction of murder in the first or second degree in this state or of an offense in another jurisdiction which, if committed in this state, would constitute murder in either the first or second degree, of a parent, legal guardian, legal custodian, sibling, half-sibling or step-sibling of a child who is the subject of the proceeding. In all proceedings under this section, an attorney must be appointed for the child. Laws of 2013, Ch 371, §1.

Domestic Relations Law § 111-a, subdivision 1 was amended to provide that a person who has been convicted in this state or in another jurisdiction of the sexual offenses of rape in first or second degree; course of sexual conduct against a child in the first degree; predatory sexual assault; or predatory sexual assault against a child shall not be entitled to receive notice of adoption proceedings, when the child subject to these proceedings was conceived as the result of the sexual offenses committed. Laws of 2013, Ch 371, §2

Social Services Law §384-c was amended to provide that a person who has been convicted in this state or in another jurisdiction of the sexual offenses of rape in first or second degree; course of sexual conduct against a child in the first degree; predatory sexual assault; or predatory sexual assault against a child, shall not be entitled to receive notice of specified social services proceedings regarding dependent children in foster care, guardianship and custody of children not in foster care, and guardianship and custody of destitute or dependent children. Laws of 2013, Ch 371, §3

Appellate Division, First Department

Stipulations - Appellate Division Sustains Stipulation Pursuant to CPLR 2104 Although Not Made in Open Court Where Executed in the Context of a Pending Divorce Proceeding, and Was Subject to Judicial Oversight

In *Rio v Rio*, --- N.Y.S.2d ----, 2013 WL 5814350 (N.Y.A.D. 2 Dept.) the parties were married in 2001. They entered into a separation agreement dated March 11, 2005, which was duly acknowledged. The 2005 separation agreement provided, in part, that the appellant would pay the respondent \$500 weekly as maintenance for a period of two years, commencing on March 11, 2005. In 2007, the parties attempted a reconciliation. However, in 2008, the respondent commenced an action for a divorce in Supreme Court, Suffolk County, under Index No. 35634/2008. Thereafter, the parties, through separate counsel, negotiated a "Post-Nuptial Agreement," settling the respondent's action. Pursuant to the postnuptial agreement, the appellant was to pay the respondent \$300,000. The postnuptial agreement also provided that the parties "hereby revoke any and all

agreements ... previously made by the parties."Both parties executed the postnuptial agreement on September 22, 2009, in the presence of two witnesses. Prior to the execution of the postnuptial agreement, the appellant discharged his attorney. The appellant had signed a stipulation discontinuing the respondent's action and his counterclaims the day before the execution of the postnuptial agreement. On the same day that the postnuptial agreement was executed, counsel for the respondent and the appellant signed a stipulation discontinuing with prejudice the respondent's action.

In 2010, the appellant commenced this action for a divorce. On December 16, 2010, the parties and their counsel signed a preliminary conference stipulation and order which indicated that, with respect to present maintenance being paid, the respondent was being paid "\$1,000 per week to be credited toward \$300,000 under postnup. agreement." The respondent subsequently moved for pendente lite relief. In his affidavit opposing the respondent's motion, the appellant acknowledged that he had agreed to pay the respondent \$1,000 per week for maintenance. In an order dated January 21, 2011, determining the respondent's motion, the Supreme Court directed the appellant to pay the respondent \$1,000 per week as temporary maintenance "as agreed upon in the Stipulation and Order dated December 16, 2010." The appellant thereafter moved, inter alia, for determinations that the postnuptial agreement was not valid and the 2005 separation agreement was valid. Supreme Court determined that the postnuptial agreement was valid and binding on the parties and incorporated, but did not merge, the postnuptial agreement into the judgment.

The Appellate Division affirmed. It observed that Domestic Relations Law §236(B)(3) applies only to agreements entered into outside the context of a pending judicial proceeding (*Rubinfeld v. Rubinfeld*, 279 A.D.2d 153, 158). Moreover, stipulations of settlement are favored by the courts and are not lightly cast aside. Thus, an agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered" (CPLR 2104). The record established that the parties relied on the duly executed stipulation of settlement, which was denominated as the postnuptial agreement, as a means of resolving the respondent's prior divorce action. The postnuptial agreement was executed while the respondent's action was pending before the Supreme Court. The Supreme Court referred to the appellant's obligations pursuant to the postnuptial agreement in two prior orders. Accordingly, the postnuptial agreement was valid, as it "was executed in the context of a pending divorce proceeding, and was subject to judicial oversight, even though it was not signed in open court" (*Acito v. Acito*, 23 Misc.3d 832, 836, [Sup Ct, Bronx County], affd 72 A.D.3d 493, 898 N.Y.S.2d 133;see CPLR 2104). Moreover, the appellant relied upon the postnuptial agreement in the preliminary conference order relating to his maintenance obligation in this action. Having done so, he ratified the postnuptial agreement. Supreme Court properly denied that branch of the appellant's motion which was for a determination that the postnuptial agreement was not valid. Inasmuch as the postnuptial agreement provided for the revocation of all prior agreements, the Supreme Court also properly denied that branch of the appellant's motion which was for a determination that the 2005

separation agreement, was valid, since the postnuptial agreement superseded the prior agreement.

Pendente Lite Maintenance - Domestic Relations Law § 236(b)(5-a) - First Department Holds Formula Adopted by New Maintenance Provision Covers All the Spouse's Basic Living Expenses, Including Housing Costs

In *Francis v Francis*, --- N.Y.S.2d ----, 2013 WL 5976098 (N.Y.A.D. 1 Dept.) the Appellate Division reversed on the law an order which awarded plaintiff \$868.66 bi-weekly in temporary maintenance, and denied plaintiff's request for counsel and appraisal fees, and remanded the matter for a reconsideration of the award in light of the directives of Domestic Relations Law § 236(B)(5-a), and for a reconsideration of the request for counsel and appraisal fees. It noted 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. While the motion court properly followed the calculations provided in that section to arrive at a presumptive award of temporary maintenance, it did not address the fact that defendant was paying the carrying costs on the marital residence, where both parties still reside, and that plaintiff specifically requested an order directing that defendant continue to pay those costs, as well as her unreimbursed medical expenses. It pointed out that it has viewed the "formula adopted by the new maintenance provision as covering all the spouse's basic living expenses, including housing costs" (*Khaira*, 93 AD3d at 200). Accordingly, it vacated the award and remanded the matter for a reconsideration. It noted that in reconsidering the award of temporary maintenance, the motion court should consider the payment of the carrying costs on the marital residence, half of which should be credited to defendant in calculating the award. The court should also articulate any other factors it may consider in deviating from the presumptive award, including plaintiff's medical condition and her inability to work. Any award of maintenance should be made effective as of the date of application. Given the rebuttable presumption that counsel fees shall be awarded to the less monied spouse (DRL § 237), it also remanded for a reconsideration of plaintiff's request for counsel and appraisal fees. The motion court's denial of those requests was based on the now vacated award and a mathematical error in the calculation of the parties' respective incomes following the award of temporary maintenance.

Appellate Division, Second Department

Supreme Court Erred in Determining Plaintiff Lacked Standing to Seek Custody or Visitation with Regard to the Child born of Artificial Insemination. Because the Same Sex Parties Were Married it Should Have Recognized the Plaintiff as the Child's Parent under New York Law.

In *Counihan v Bishop*, --- N.Y.S.2d ----, 2013 WL 5927078 (N.Y.A.D. 2 Dept.) in May 2009, the plaintiff and the defendant traveled to Connecticut to be married, and then returned to live in their home in New York. Subsequently, they decided to have a child, the defendant was artificially inseminated, and, in September 2010, the defendant gave birth to a child. The plaintiff was listed as the second mother on the child's birth certificate, and the child's last name was the hyphenated last names of the plaintiff and the defendant. In 2012, the parties separated, and the defendant and the child lived apart from the plaintiff for several months. However, the plaintiff continued to see the child a few times per week, which included overnight visits. The parties briefly lived with each other again at the end of 2012, but their attempt to reconcile failed, and the defendant again moved with the child to another residence. In January 2013, the plaintiff commenced an action for a divorce and sought, by order to show cause, custody of the child, or in the alternative, visitation. The defendant cross-moved, for sole custody of the child. Supreme Court, determined that the plaintiff lacked standing to seek custody or visitation because she was not the child's biological or adoptive parent, and without a hearing, denied the plaintiff's motion and granted the defendant's cross motion for sole custody.

The Appellate Division reversed. It held that although, at the time of the child's birth, New York had not yet enacted the Marriage Equality Act (see L. 2011, ch. 95), affording comity to the parties' Connecticut marriage, the Supreme Court should have recognized the plaintiff as the child's parent under New York law (citing *Debra H. v. Janice R.*, 14 N.Y.3d 576, 599-601, 904 N.Y.S.2d 263, 930 N.E.2d 184; *Matter of Ranftle*, 81 A.D.3d 566, 567, 917 N.Y.S.2d 195; *Laura WW. v. Peter WW.*, 51 A.D.3d 211, 217, 856 N.Y.S.2d 258; see also Domestic Relations Law § 73[1]). Thus, the Supreme Court erred in determining that the plaintiff lacked standing to seek custody or visitation with regard to the child. It remitted the matter to the Supreme Court for a hearing and, thereafter, a new determination.

Appellate Division, Fourth Department

Agreements - Stipulations - Set Aside - Unconscionability - Regardless Whether Wife Committed Fraud, Wife's Failure to Disclose Her Earnings in an Agreement That Was Manifestly Unfair to the Husband. The Decision Whether to Consider Capital Gains as Income Is a Discretionary Determination.

In *Marlinski v Marlinski*, --- N.Y.S.2d ----, 2013 WL 5952044 (N.Y.A.D. 4 Dept.), the Defendant wife appealed from a judgment of divorce that, inter alia, equitably distributed marital assets, allocated marital debt and calculated the child support for the parties' minor children. The Appellate Division held that contrary to the wife's contention, Supreme Court

did not abuse or improvidently exercise its discretion in determining that plaintiff husband was entitled to an equitable share of the marital funds used to discharge the mortgage on the wife's separate residence, which had been used as the marital residence for the entire duration of the marriage. As the court noted in its decision, the parties engaged in "complex financial dealings," which often consisted of acquiring new lines of credit to pay off existing lines of credit. The testimony at trial established that, although the wife purchased the marital residence prior to the marriage, the parties used marital funds to pay for improvements and to discharge the mortgage on that residence. The husband was thus "entitled to recoup [his] equitable share of the marital funds used to reduce the indebtedness and pay for improvements to the marital abode.

The Appellate Division agreed with the wife that the court abused its discretion in awarding the husband \$3,000, which represented one-half of the parties' 2008 tax refund. The entire tax refund had been used to pay down debt on a Discover Card line of credit. After the divorce action was commenced, the wife took a cash advance from the Discover Card line of credit and deposited the money into her separate checking account. The evidence at trial established that the wife used that money to make payments toward marital debt. As the Discover Card debt was marital debt, the husband was not entitled to credit for his share of the marital funds that were used to reduce that debt. It also held that the court abused its discretion in awarding the husband \$569, the amount withdrawn by the wife from the parties' joint checking account in September 2008 and January 2009. The evidence at trial established that the wife used the money for household bills and also to reduce the Discover Card debt.

The Appellate Division held that contrary to the wife's contention, the court did not err in vacating the child support and maintenance provisions of the parties' October 2009 stipulation. In that stipulation, the parties had agreed to impute income to the wife in the amount of \$15,000, and the husband had agreed to maintenance and child support awards to the wife based on that imputed income. The Appellate Division agreed with the Supreme Court that a reasonable inference existed that the wife did not fully disclose her financial assets ..., and, as a result, the terms of the agreement were so inequitable as to be manifestly unfair to the husband]. The wife had not been employed outside the home since the birth of the parties' children, but it is likewise undisputed that she had inherited large sums of money during the course of the marriage. Moreover, the wife failed to disclose her significant stock earnings, which, by October 2009, had totaled over \$48,000 for that year. By the end of 2009, the wife had an adjusted gross income of \$121,901. Thus, the wife had over \$100,000 more in income than was imputed to her in the stipulation, and her income was more than two times what the husband had earned in any of the years before the stipulation. The Court held that regardless whether the wife could be said to have committed fraud, the wife's failure to disclose her earnings in the stock market resulted in an agreement that was manifestly unfair to the husband.

The Appellate Division rejected the wife's argument that after partially vacating the stipulation, the court erred in imputing an annual income of \$50,000 to her. The court did not abuse its discretion in considering the wife's gross income as "reported in the most recent federal income tax return" (Domestic Relations Law § 240[1-b][b][5), including investment income, as well as "such other resources as may be available to the wife" , including non-income producing assets such as real property she inherited and money, goods or services provided by relatives and friends, such as the large monetary gifts provided to her by family members. While the wife contended that her capital gains in 2009 were an anomaly that was not likely to recur, it concluded that the court properly took into consideration the volatility of the stock market when it imputed less than half of the wife's actual earnings to her as annual income. The decision whether to consider capital gains as income is a discretionary determination and, under the circumstances of this case, it saw no basis upon which to disturb the court's exercise of its discretion.

Child Support - Award - Drl § 240(1-b)(C)(7) - Extraordinary Expenses - Extraordinary Visitation Expenses Are Only One Factor for the Court to Consider. Payment for Private School Tuition Continued Despite Order Quadrupling Basic Support.

In *Barton v Barton*,--- N.Y.S.2d ----, 2013 WL 5952434 (N.Y.A.D. 4 Dept.), the Appellate Division affirmed an order granting petitioner mother an upward modification of child support. Pursuant to an agreement of the parties that was incorporated but not merged in their judgment of divorce, the parties agreed with respect to child support that, "in the event that either party's income increases or decreases by 25% through no fault of their own, either may petition the Court for a de novo review of their respective child[] support obligations and school cost contributions." In her petition, the mother alleged that her income had decreased by 25%. After a hearing, the Support Magistrate determined that the father had more than a 25% increase in income, and thereafter calculated the father's child support obligation in accordance with the Child Support Standards Act.

The Appellate Division rejected the argument that the Support Magistrate should have dismissed the petition after finding that the mother failed to demonstrate that she had a 25% decrease in income. While Family Court Act § 441 requires a court to dismiss a petition for modification of child support if the allegations of the petition are not established by competent proof, the pleadings are to be liberally construed and courts may sua sponte conform the pleadings to the evidence. It concluded that the support Magistrate properly conformed the petition to the proof, and rejected the father's contention that he was prejudiced thereby.

The Court rejected the father's further contention that the amount of child support awarded was unjust and inappropriate (Family Ct Act § 413[1] [f]). Although the father's visitation expenses were extraordinary inasmuch as he lived and worked in New York City he also maintained a home in Syracuse to visit the children on weekends, and that was simply one factor for the court to consider (see § 413[1][f][9]). The father also noted that his child support obligation as set forth in the agreement was less than what would be the

amount under the CSSA because, inter alia, he agreed to pay for the children's private school tuition without contribution from the mother. He contended that, "[g]iven this linkage, it made no sense [for the Support Magistrate] to keep the father's tuition obligation intact (with a negligible contribution from the mother), while quadrupling his basic support." The Appellate Division rejected that contention. The Support Magistrate ordered the mother to pay her pro rata share of the private school tuition and, while the father dismissed the mother's contribution as negligible, that was a function of the vast disparity in income between the parties.

Supreme Court

Action for a Divorce - Depositions - 22 NYCRR 221.2 - Propriety of Direction to Witness Not to Answer Questions - Rule Requiring a Deponent to Answer All Questions Does Not Extend to Questions of Law , Legal Strategy or Witness' Opinion about Legal Strategy

In *White v White*, --- N.Y.S.2d ----, 2013 WL 5929120 (N.Y.Sup.) Supreme Court was asked to rule on the propriety of a question asked at a deposition which required the client to disclose his legal position: "Okay. Is that right? You're not withdrawing your request for changing custody unless she withdraws her request for child support?" Opposing counsel directed the witness not to answer, claiming "it is an inappropriate question." The witness then stated he had to consult with counsel. The court held that the witness was not required to answer the question posed during the deposition by virtue of existing case law and 22 NYCRR 221.2.

Supreme Court pointed out that the scope of permissible questioning at depositions is generally governed by court rule. 22 NYCRR 221.2 provides that a deponent shall answer all questions at a deposition, except; (1) to preserve a privilege or right of confidentiality, (2) to enforce a limitation set forth in an order of a court, or (3) when the question is plainly improper and would, if answered, cause significant prejudice to a person. Unless a question is clearly violative of a witness's "constitutional rights, or of some privilege recognized in law, or is palpably irrelevant, questions (at an examination before trial) should be freely permitted and answered, since all objections other than those as to form are preserved for the trial and may be raised at that time." *Roggow v. Walker*, 303 A.D.2d 1003,1004 (4th Dept.2003). The scope of permitted discovery only applies to facts, or to matters that relate to a witness' bias or motive. *Williams v. Roosevelt Hosp.*, 66 N.Y.2d 391, 397 (1985); *Monica W. v. Milevoi*, 252 A.D.2d 260 (1st Dept.1999) (a witness may not refuse to answer questions regarding matters of fact); *Burke v. County of Erie*, 2013 N.Y. Slip Op 6466 (4th Dept.2013) (questions regarding motive or bias are relevant and proper). The general rule requiring a deponent to answer all questions does not extend to questions of law or legal strategy or the witness' opinion about legal strategy. In *Barber v. BPS Venture, Inc.*, 31 AD3d 897 (3rd Dept.2006), the questions which counsel refused to permit the witness to answer largely related to his understanding of the parties' ultimate legal contentions. The court described such inquiry as "palpably improper ." See

also *O'Neill v. Ho*, 28 AD3d 626 (2nd Dept.2006) (acknowledging that no answers required to questions of "palpable irrelevance"); *Lakeville Merrick Corp. v. Town Bd., of Islip*, 23 A.D.2d 584 (2nd Dept.1965) (conclusion of fact or law and an argumentative matter as to which examination before trial is not permitted). In *Mayer v. Hoang*, 83 AD3d 1516 (4th Dept.2011) the court held that it was "well settled" that a plaintiff at a deposition may not "be compelled to answer questions seeking legal and factual conclusions or questions asking him [or her] to draw inferences from the facts." See also *Roggow v. Walker*, 303 A.D.2d 1003 (4th Dept.2003) (acknowledged that questions should not be permitted into matters that are "palpably irrelevant.").

Supreme Court observed that before the enactment of the court rule the Fourth Department directed trial courts that: A witness at an examination before trial may not be compelled to answer questions of law, particularly those which relate to his understanding of his contentions in the lawsuit. Nor may he be compelled to answer questions seeking legal and factual conclusions or questions asking him to draw inferences from the facts. *Lobdell v. S. Buffalo Ry.*, 159 A.D.2d 958 (4th Dept.1990). The decision in *Lobdell* declares a broader common law ban on questions involving legal strategy and legal/factual conclusions than the restrictions of 22 NYCRR 221.2. The court rule does not supersede the crux of the Fourth Department's broad prohibition against requiring a witness to answer questions that involve legal conclusions or facts related to legal matters. Applying the holding in *Lobdell* requires that if the question improperly intrudes on legal matters, the court need not find any "significant prejudice" to the deponent which would otherwise be required under 22 NYCRR 221.2.

In the alternative, this court concluded that "significant prejudice" would result to the deponent if he answered the question, and therefore, the witness would be justified in not answering it under the rule as well. The Court noted that other courts suggest that if the question is "plainly improper" then "substantial prejudice" flows from it. See, e.g., *Koch v. Sheresky, Aronson & Mayefsky LLP*, 33 Misc.3d 1228(A) (Sup.Ct. New York Cty, 2011) (directing a party to answer a question about current legal theory or strategy would be the cause of significant prejudice to that party, and is improper). However, the text of the rule does not equate the two concepts: it requires a judicial finding on both aspects-the question must be both "plainly improper" and "cause significant prejudice."

In this case, the witness, after the exchange between counsel over the validity of the question, added that he would have to "consult with my attorney to decide anything about that." In this respect, the witness was declining to further answer the question without consultation with his attorney. Under these facts, this court concluded that the witness was seeking legal counsel on a legal question before answering the inquiry. Hence, he was seeking, after the interruption of the deposition and albeit somewhat awkwardly, to assert his right to counsel before answering the question. To deny the witness the right to seek counsel on a question that asked him to describe his legal strategy would, in the court's view, cause him "significant prejudice" under the court rules.

November 1, 2013

Appellate Division, First Department

Child Custody - Award - Epileptic Seizures Do Not Render Mother Unfit to Be the Custodial Parent

In *Desiree L v Louis N*, --- N.Y.S.2d ----, 2013 WL 5644444 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which awarded permanent custody of the child to petitioner mother. It held that the court properly determined that petitioner's epileptic seizures, standing alone, did not render her unfit to be the custodial parent. Petitioner consistently received medical care for her condition and was reasonably compliant with her medication, and her physicians did not suggest that she could not adequately care for the child. The court also correctly found that petitioner has made adequate arrangements for the child in the event that she experienced a seizure.

Contempt - DRL § 245 - Hearing Required on Contempt Motion When Party Opposing Motion Asserts a Prima Facie Defense of Financial Inability to Comply (Domestic Relations Law § 246 [3]).

In *Edelstein v Edelstein*, --- N.Y.S.2d ----, 2013 WL 5745996 (N.Y.A.D. 1 Dept.), the Appellate Division reversed an order which granted plaintiff's motion to hold defendant in contempt of court for failing to comply with court orders relating to pendente lite financial obligations, and directed incarceration of defendant for the lesser of 60 days or until he paid \$436,527.24. It observed that as a matter of due process, a hearing is required on a contempt motion that will result in incarceration when the party opposing the motion asserts a defense of financial inability to comply (Domestic Relations Law § 246 [3]). In opposition to original contempt motion, defendant requested a hearing on his ability to pay, and submitted evidence to show that all of his income was going toward paying his monthly pendente lite obligations for spousal and child support, as well as the mortgage and virtually all expenses of maintaining the marital residence, tuition for the parties' five children, and other expenses of the household. He asserted that he could not continue to meet those obligations and also comply with the portions of the prior orders requiring him to pay additional lump sum amounts, including over \$262,000 to a contractor to make repairs to the marital residence and \$150,000 to the wife's attorney for interim legal fees. He submitted a statement of net worth showing assets worth about \$1.5 million, which he contended had no ready market value, and asserted that, even if those assets could be sold, he then would have no income with which to satisfy his continuing support obligations. Defendant also submitted an affidavit of the family's long-time accountant

concerning defendant's income and opining that defendant could not comply with the additional orders requiring the lump sum payments without liquidating all of his assets.

Plaintiff responded that defendant was being deceitful and hiding assets and income that would enable him to comply, pointing to inconsistencies in his submissions and to his comfortable lifestyle. Upon renewal, plaintiff requested a hearing in connection with her contempt motion, and argued that no means other than contempt were available to obtain satisfaction because defendant's disclosed income was insufficient and he had no remaining assets that could be sequestered or used to satisfy a money judgment. Since the issue of defendant's financial ability to comply with all of the obligations imposed by the court's orders turned on issues of credibility, which could not be resolved on the face of the submitted documents, a hearing was required before a determination can be made.

Appellate Division, Second Department

Family Court - Support - Enforcement - Family Ct Act § 454 - Wilful Violation of Order - Receipt of Public Assistance Did Not Conclusively Establish Inability to Pay

In *Matter of Smith v Jeffers*, --- N.Y.S.2d ----, 2013 WL 5629785 (N.Y.A.D. 2 Dept.) the Appellate Division held that Family Court did not err in finding that the father had willfully violated an order of child support. The fact that the father was receiving public assistance did not conclusively establish his inability to pay child support and was not sufficient to relieve him of his obligation to provide such support. The petitioner established, by clear and convincing evidence, that the father willfully and deliberately situated himself in a position to have limited income, and the father did not demonstrate that he had made reasonable efforts to obtain gainful employment to meet his child support obligation. Although the father claimed that stress and mental problems prevented him from finding and holding a job, he failed to offer any competent medical evidence to establish that he was unable to obtain employment due to mental illness.

Divorce - Disclosure - Medical Records - Except in Certain Circumstances, Medical Records Are Protected from Discovery by Cplr 4504(a).
Maintenance - Pendente Lite - Proper to Deny Award Where Parties' Income Tax Returns Demonstrated Movant Was Spouse with the Higher Income (see Domestic Relations Law § 236[B][5-a][b][4]).

In *Mujahid v. Mujahid*, --- N.Y.S.2d ----, 2013 WL 5629834 (N.Y.A.D. 2 Dept.) the parties were married in 1974 and had four adult children. In this action for a divorce, in November 2011, the Supreme Court denied the defendant's motion to compel the plaintiff to comply with certain discovery demands, for an award of temporary maintenance, and to direct the plaintiff to pay one half of the monthly mortgage obligation on certain investment property. The Appellate Division pointed out that although CPLR 3101(a) provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action," discovery concerning marital fault with regard to equitable distribution is permitted "in only a limited set of circumstances involving egregious conduct" (*Howard S. v. Lillian S.*, 14 NY3d 431, 437). Moreover, except in certain circumstances, medical records are protected from discovery by CPLR 4504(a). Here, the Supreme Court properly determined that the defendant's allegation that the plaintiff infected her with genital herpes more than 20 years prior to her motion was insufficient to warrant discovery of, inter alia, the plaintiff's confidential medical records (see *Howard S. v. Lillian S.*, 14 NY3d at 435-436).

Supreme Court properly denied that branch of the defendant's motion which was for an award of temporary maintenance, as the parties' 2010 income tax returns demonstrated that she was the spouse with the higher income (see Domestic Relations Law § 236[B][5-a][b][4]). Supreme Court also properly denied that branch of the defendant's motion which was to direct the plaintiff to pay one half of the monthly mortgage obligation on certain investment property (Domestic Relations Law § 236 [B] [5-a]). It found no merit to the defendant's contention that the plaintiff's failure to pay a portion of the monthly mortgage obligation on that property constituted a wasteful dissipation of marital assets (cf. *Maggiore v. Maggiore*, 91 AD3d 1096, 1097).

Special Immigrant Juvenile Status - Juvenile May Satisfy this Statutory Reunification Requirement When the Juvenile Court Determines That Reunification Is Not Viable with Just 1, as Opposed to Both, of the Juvenile's Parents.

In *Matter of Marcelina M.-G. v. Israel S.*, --- N.Y.S.2d ----, 2013 WL 5733616 (N.Y.A.D. 2 Dept.) the Appellate Division pointed out that in 1990, Congress enacted the special immigrant juvenile provisions of the Immigration and Nationality Act (see 8 USC 1101[a][27][J]; Pub L 101-649, §153, 104 U.S. Stat 4978 [101st Cong, 2d Sess, Nov 29, 1990]), which provide a gateway for undocumented children who have been abused, neglected, or abandoned to obtain lawful permanent residency in the United States. Prior to petitioning the relevant federal agency for special immigrant juvenile status, an immigrant juvenile must obtain an order from a state juvenile court making findings that the juvenile satisfies certain criteria. Among those findings is a determination that reunification with "1 or both" of the juvenile's parents "is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" (8 USC § 1101[a][27][J][i]). In an opinion by Justice Roman the Appellate Court held that a juvenile may satisfy this statutory reunification

requirement when the juvenile court determines that reunification is not viable with just 1, as opposed to both, of the juvenile's parents. It concluded that the "1 or both" language requires only a finding that reunification is not viable with 1 parent.

On or about December 17, 2009, Suzy's Uncle Francisco, who resided in Westchester County, filed a petition seeking his appointment as his niece, Susy's guardian. On or about December 23, 2009, Susy moved for the issuance of an order making the requisite declaration and specific findings that would allow her to apply to the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101(a)(27)(J). In support of the motion, Susy alleged that she was under 21 years of age, unmarried, and dependent upon the Family Court in that the court had accepted jurisdiction over the matter of her guardianship, and her parents had effectively relinquished control over her. Additionally, Susy maintained that reunification with one or both of her parents was not viable due to neglect and abandonment. Susy alleged that her father had abandoned her and had not provided any financial support or parental guidance. Susy asserted that her mother had neglected her by failing to provide her with adequate food, clothing, shelter, and education in Honduras, and by allowing her to travel unaccompanied to the United States. She alleged that her mother had abandoned her by failing to provide her with any substantial financial assistance or provisions since she arrived in the United States. She submitted an affidavit from her mother. In her affidavit, the mother averred that Susy's father, Israel, "never was responsible-he drank, used drugs, and was violent towards [the mother], even breaking [her] nose once. The mother, who now lived in Westchester, stated that when she lived in Honduras, she had relied on her sister Estella to take care of her children while she worked. She was aware that Estella had hit Susy, and that Estella would deprive the child of meals as a punishment. The mother indicated that she "continued to have Estella take care of [Susy] because [she] had no other choice." The mother acknowledged having left her children in the care of Estella when she left Honduras and immigrated to the United States in 2004. The mother stated that after she left Honduras, "Susy related on several occasions that Estella beat her frequently and permitted her daughters to hit her as well. The mother noted that her brother-in-law, Francisco, agreed to pick up the children in Texas and bring them back to live with him and his family. The mother asserted that she currently lived with her youngest daughter in a small apartment in the same town as Francisco, and that she did not have the resources to support Susy or Jason, her brother. She indicated that the children were "very happy" living with Francisco and his family, and that she wanted them "to stay with their Aunt and Uncle," noting that "it [was] much better for them than to be with [her]."

Although the mother had initially supported Francisco's application for guardianship of Susy, in May 2011, the mother filed a petition for custody of Susy. The mother indicated that she resided in Westchester County, and that it would be in Susy's best interests to have custody awarded to her because the father was not involved in the child's life, and the child "want[ed] to live with [the] mother."

Family Court, granted the mother's petition for sole custody of Susy and, as a result, dismissed Francisco's petition for guardianship of the child. In addition, the court denied Susy's motion for a special findings order, which had been supported by the mother . Counsel for the mother argued that because Susy had been neglected by her father, she was eligible for special findings under "the new law" even though the mother obtained custody. The court rejected that argument. Family Court issued an order granting the mother's petition for custody, denying Susy's motion for a special findings order, and reciting that Francisco withdrew his guardianship petition.

The Appellate Division held that Family Court erred in denying Susy's motion for an order of special findings on the basis that custody was awarded to the mother. It pointed out that under the SIJS provisions of the Immigration and Nationality Act were enacted by Congress in 1990 (8 USC s 1101[a][27][J]; Pub L 101-649, 153, 104 U.S. Stat 4978), immigrant juveniles, or any person acting on their behalf, may petition the United States Citizenship and Immigration Services for SIJS. To be eligible for SIJS, an immigrant juvenile must obtain an order from a state juvenile court making findings that the juvenile satisfies certain criteria. Once the state court makes an SIJS predicate order, a juvenile may apply to the USCIS for SIJS using an I-360 petition, and if the juvenile is granted SIJS, he or she may be considered for adjustment to lawful permanent resident status. Justice Roman observed that since the enactment of the statute in 1990, Congress amended the law in 1997 out of concern that juveniles entering the United States as visiting students were abusing the SIJS process, and in 2008, the requirements for SIJS were again amended. The 2008 amendments expanded eligibility to include those immigrant children who had been placed in the custody of an individual or entity appointed by a State or juvenile court. Congress also removed the requirement that the immigrant child had to be deemed eligible for long-term foster care due to abuse, neglect, or abandonment, and replaced it with a requirement that the juvenile court find that "reunification with [1] or both of the immigrant's parents is not viable due to abuse, neglect, abandonment[,] or a similar basis found under State law" (Pub L 110-457, 122 U.S. Stat 5044, 5079). The amendments also modified the consent requirement by deleting the language requiring the Attorney General to "expressly consent[] to the dependency order," and replacing it with, "the Secretary of Homeland Security consents to the grant of special immigrant juvenile status" (Pub L 110-457, 122 U.S. Stat 5044, 5079). Thus, under the current law, a "special immigrant" is a resident alien who is under 21 years of age, unmarried, and dependent on a juvenile court located in the United States or "legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States" (8 USC § 1101[a][27] [J][i]; see 8 CFR 204.11). Additionally, the court must find that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law," and "that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence" (8 USC § 1101[a][27][J] [i], [ii]). By making these preliminary factual findings, the juvenile court is not rendering an immigration

determination. Rather, "the final decision regarding [SIJS] rests with the federal government, and, as shown, the child must apply to that authority".

The Court found that Family Court erred in denying Susy's motion for the issuance of an order making a declaration and specific findings that would allow her to apply to the USCIS for SIJS. The record established that Susy was under 21 years of age and unmarried. Additionally, since the Family Court placed Susy in the custody of her mother, she had been "legally committed to, or placed under the custody of ... an individual ... appointed by a State or juvenile court located in the United States". With respect to the nonviability of reunification with one or both parents, the record revealed that Susy was abandoned by her father. Susy established that reunification with her father was not viable due to abandonment. The Family Court denied Susy's application for a special findings order on the ground that the viability of reunification with Susy's mother rendered Susy ineligible for SIJS.

The Court disagreed with the Family Court's interpretation of the reunification component of the statute. Under the plain language of the statute, to be eligible for SIJS, a court must find that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" . It interpreted the "1 or both" language to provide SIJS eligibility where reunification with just one parent is not viable as a result of abuse, neglect, abandonment, or a similar State law basis. Even when reunification with one parent is viable, courts must determine the viability of reunification with the other parent. Contrary to the Family Court's determination, the fact that the mother was available as a custodial resource for Susy did not, by itself, preclude the issuance of special findings under the SIJS statute. The legislative history of the SIJS statute supported this interpretation of the reunification requirement.

Turning to the best interests component the record showed that the father, who apparently continued to live in Honduras, abandoned Susy. Susy's aunt, Estella, with whom she previously lived in Honduras, was neglectful and abusive toward her. The mother stated that she had left Susy. By contrast, the record demonstrated that in the United States, Susy was attending school, had made friends, and had family members to care for her, including her mother, as well as her uncle and aunt. Under these circumstances, the record demonstrated that it would not be in the best interests of the child to return to Honduras. Based on the foregoing, the Court found that the Family Court erred in denying Susy's motion for the issuance of an order making a declaration and specific findings that would allow her to apply to the USCIS for SIJS. The order was reversed and the motion was granted.

Appellate Division, Fourth Department

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Although His Attorney Appeared Family Court's Finding of Default and Dismissal Was Proper in Light of Father's Willful Refusal to Appear and the Absence of a Reasonable Excuse for His Nonappearance

In *Matter of Scott KK v Patricia LL*, --- N.Y.S.2d ----, 2013 WL 5745869 (N.Y.A.D. 3 Dept.) the parties, unmarried parents of a child (Febe, born in 2003), had multiple proceedings pending before Family Court. Petitioner (father), who was serving a prison term for a felony conviction, informed Family Court directly and through his attorney that he would not appear in court except for a trial. Based upon his refusal to be transported for a duly scheduled appearance in court regarding the pending petitions, Family Court dismissed the father's petitions. The court granted the pending application of respondent (mother), which alleged a family offense by the father, and, after the mother's testimony as to repeated violations by the father of temporary orders of protection, Family Court issued a five-year order of protection for the mother and her child from another relationship as well as a two-year order of protection for Febe. As to Febe, Family Court indicated that it was amenable to attempting to establish visitation for the father in the event that he petitioned for modification and acknowledged a willingness to adhere to court orders.

The father appealed. The Appellate Division rejected the father's contention that Family Court erred in finding him in default. While "[a] party who fails to appear generally will not be considered in default when the party's attorney is able to offer an explanation for the absence" (*Matter of Scott v. Jenkins*, 62 AD3d 1053, 1054 [2009]; see *Matter of Freedman v. Horike*, 107 AD3d 1332, 1333 [2013]; *Matter of Hill v. Hillenbrand*, 12 AD3d 980, 981 [2004], lv denied 4 NY3d 705 [2005]), the only explanation offered by the father's attorney, who did appear, was to report the father's refusal to appear at any proceeding before Family Court other than a trial on his petitions. The record reflects that the father attempted to dictate to Family Court how the proceedings should progress and when he would attend. Family Court's finding of default and dismissal was proper in light of the father's willful refusal to appear and the absence of a reasonable excuse for his nonappearance (see generally *Matter of Ariane I. v. David I.*, 82 AD3d 1547, 1548 [2011], lv denied 17 NY3d 703 [2011]; compare *Matter of Freedman v. Horike*, supra).

The Appellate Division also found that the family court had subject matter jurisdiction. While the bulk of the allegations in the petition concerned the father's acts with the mother's child from a different relationship and there were no allegations indicating that such child and the father were "members of the same family or household" as that phrase is statutorily defined (Family Ct Act s 812[1][a]-[e]), the petition also included the additional-albeit somewhat conclusory-contention that the father had "threatened other people with a gun in front of [the mother's] children ", which would necessarily include Febe. While further development of the record may have clarified and perhaps even eroded this contention, it nonetheless provided Family Court a sufficient

basis to exercise its jurisdiction to issue a temporary protective order, and the father's willful failure to appear in court has left the contention unchallenged.

Family Court - Support - Family Ct Act § 439(e) - Objections to Order - Timeliness - Liberal Approach in Third Department

In *Matter of Ryan v Ryan*, --- N.Y.S.2d ----, 2013 WL 5640803 (N.Y.A.D. 3 Dept.) both parties filed objections to the Support Magistrate's modification order. Family Court dismissed the mother's objections as untimely, and stated that her objections were also without merit. The Appellate Division held that Family Court erred in dismissing the mother's objections as untimely. Either party may file specific objections to an order of a support magistrate within 30 days of personal service of the order or, if the party did not receive the order in court or by personal service, within 35 days after the order was mailed (see Family Ct Act § 439[e]). Strict adherence to this deadline is not required; Family Court has discretion to overlook a minor failure to comply with the statutory requirements regarding filing objections and address the merits. The Support Magistrate's order was apparently mailed on August 5, 2011, making Friday, September 9, 2011 the last day to timely file objections. The mother's objections were dated September 8, 2011. In reply papers, the mother explained that she intended to file the objections on September 8 or 9, 2011, but Family Court was closed on those days due to flooding conditions and a state of emergency. She was able to locate an open post office and mailed her objections on September 9. While receipt by the court, rather than the act of mailing, constitutes filing of objections, as September 9 was a Friday, the first day that the court was open following the filing deadline was Monday, September 12, 2011. Family Court's order inconsistent as to whether the objections were filed with the court on September 12 or 13, 2011. If the objections were received on September 12, they were timely filed because the official closing of the court extended the statutory filing deadline (Judiciary Law § 282-a). If the objections were received on September 13, it found that Family Court abused its discretion by dismissing the mother's objections as untimely, considering that the court was closed on the statutory deadline and the objections were filed only one day following the extended deadline, just after the court reopened from its closure due to the extraordinary weather conditions. Based on the mother's assertion that she could not obtain a sample affidavit of service or the services of a notary due to the flooding and court closure, the mother's failure to provide an affidavit of service was also excused and her objections should have been accepted and addressed on the merits.

The Appellate Division also held that on the merits, the Support Magistrate correctly determined the presumptive amount of child support by using the method provided in its previous decision (84 AD3d at 1516). However, he erred when he stated

that he was relying on factor 10, the catch-all provision for "[a]ny other factors the court determines are relevant in each case" (Family Ct Act § 413[1][f][10]). His stated reason for deviating from the presumptive amount was that the father has physical custody of the older child all of the time and of the younger child every other week, so the Support Magistrate adjusted the amount such that the father would not pay support when both children were with him. The Appellate Division held that this was merely another way of applying the proportional offset method, which would reduce a parent's child support obligation based upon the amount of time that he or she actually spends with the child (see *Bast v. Rossoff*, 91 N.Y.2d at 730). It noted that the Court of Appeals has rejected this method as impractical, unworkable and contrary to the statute and legislative history (see *id.* at 730-732). It pointed out that it explained in its prior decision in this case that this method was inappropriate (84 AD3d at 1517). The costs of providing suitable housing, clothing and food for the children during custodial periods do not qualify as extraordinary expenses so as to justify a deviation from the presumptive amount (Family Ct Act §413[1][f][9]). While there may be circumstances in which a deviation is warranted in situations involving shared parenting time, the Support Magistrate's articulated reason did not provide an adequate basis for such deviation here, and its independent review of the record in the exercise of its factual review power revealed a lack of sufficient evidence to support any of the factors for deviation. Accordingly, the mother was entitled to an award of child support equal to the presumptive amount, namely \$862 per month, less her \$21 monthly share of health insurance, for a total of \$841 per month.

October 16, 2013

Appellate Division, First Department

Child Custody - Modification - Relocation - Denial of Petition for Relocation To Mississippi Reversed By Appellate Division

In *Kevin McK. v. Elizabeth A.E.*--- N.Y.S.2d ----, 2013 WL 5431590 (N.Y.A.D. 1 Dept.) the parties never married, but were intimately involved for 10 years, during which time their son, Lucas, was born, on January 6, 2003. The father, Kevin McK., moved into the mother's apartment a few months prior to the child's birth, and moved out in November 2007, when the child was about 4 ½ years old. The mother filed a custody petition in December 2007, and was awarded temporary custody on January 8, 2008; the father filed a custody petition shortly thereafter. Later that year, the mother filed a second petition, seeking to modify the temporary custody order to permit her to relocate with the child to Oxford, Mississippi. The Family Court denied the petition. The Appellate Division reversed and granted the petition.

The testimony revealed that the mother lost her job in March 2007 and that from April 2007 until November 2007, and again in 2009 and 2010, the mother collected \$300 per week in unemployment benefits, but she was not eligible for those benefits since June 2010. In addition, between June 2010 and June 2011, when the mother was entitled to \$732 per month in child support from the father, payments were almost always late, and several payments were missed entirely between November 2010 and February or March 2011. Support arrears in excess of \$6,000 had accrued by June 2011, which the father paid off after a one year delay, only after the mother filed a violation petition. He had not made any further support payments since then. Due to the missed child support payments and increases in her rent since 2007, the mother testified that she was barely able to make ends meet, so that to cover her expenses, she had borrowed \$10,000 from a friend, as well as \$1,800 from the Author's League Fund, and some smaller amounts from her parents, as well as drawing down on her savings, which decreased from approximately \$25,000 to \$10,000. Essentially, she supported herself and the parties' child on a combination of her meager earnings, irregular child support payments, unemployment benefits, food stamps, loans from friends and family, and by depleting her savings. The mother's tax returns were admitted into evidence. According to the returns, in 2007, she earned approximately \$31,486; in 2008, approximately \$8,074; in 2009, approximately \$16,000; and in 2010, approximately \$13,000.

At trial the mother established that two stables in Oxford, Mississippi, offered her year-round employment as a horse trainer and riding instructor. She estimated that, were she to relocate to Mississippi, her expenses would be reduced by approximately 75%, and the combined income from those jobs would exceed \$2,000 per month. Testimony from her own mother, the child's grandmother, who lived in Oxford, Mississippi, reflected that if the mother and child were permitted to relocate, the child would have the benefit of a close relationship with his grandparents and cousins as well as other children his age with whom he developed friendships during previous summers spent in Mississippi. The court-appointed forensic psychologist, testified that if the child were to move to Mississippi due to financial circumstances, he would be able to make the necessary adjustment and, provided that ample contact was permitted between the child and the father, such a move would not be damaging to the child. He did not believe that the mother was moving to Mississippi to interfere with the child's relationship with the father. To the contrary, she seemed to appreciate that the child had a positive relationship with the father. He further noted that he found no evidence that the mother was "badmouthing" the father or attempting to alienate him from the child.

The father's own testimony demonstrated that the mother would not be able to rely on him for steady and current payments of support. Although he claimed to have filed income tax returns, he could not recall whether he had filed tax returns in the years 2006, 2007 and 2008, and testified that he had "no idea" what income he had reported, and that he "would not be able even to begin" to put together a list of his "various sources of income" that "varie[d] week to week." He refused to estimate his average monthly expenses. He asserted that he paid his rent by bartering personal services. He did not

provide a lease for the apartment in which he was living in 2010, but testified that he was responsible for rent of \$3,200 per month, although on cross-examination it was revealed that he had reported to the Support Magistrate that his rent was \$1,000 per month. Despite these clear indications of the father's inability or unwillingness to regularly make the required child support payments, the attorney for the child took the position that the mother's relocation petition should be denied. He disbelieved her assertion that her financial situation made the relocation necessary; in his view, she failed to establish that she could not find remunerative employment in New York, and failed to sufficiently substantiate her claims regarding available employment for her in Mississippi. Moreover, he argued that the evidence failed to establish that the mother was in dire need and distress, as she had successfully paid for her and the child's expenses up to that point, and continued to have a balance of funds in her bank account.

The Family Court denied the mother's petition for relocation on the ground that she had failed to prove by preponderance of the evidence that her financial circumstances require that she be permitted to move to Mississippi—a move that, according to the court, and the father, would disrupt the very close and steady relationship between the father and child. The court expressed doubts about the mother's credibility, both in regard to her finances and her assertions that she would attempt to work with the father regarding additional visitation if the child moved to Mississippi. Nor was the court convinced that the mother's financial situation was as dire as she claimed, citing her continued ability to pay her rent, maintain \$10,000 in savings, keep a zero balance on her credit card, and provide for the child; it found that she had not been forthright in regards to her finances, and asserted the belief that the mother had other jobs or income that was not documented.

The Appellate Division, in an opinion by Justice Saxe, found that the Family Court's determination lacked a sound and substantial basis in the record, and that the mother established by more than a preponderance of the evidence that relocation was in the best interests of the child, in that it would enhance the child's life both economically and emotionally. The primary factors on which the court focused were the mother's reasons and need for the move, whether the child's life would be enhanced by the move, the impact of the move on the child's relationship with the father and the difficulty of maintaining the father's central role in the child's life. *Matter of Tropea v. Tropea*, 87 N.Y.2d 727, 736, 740-741 [1996]. The mother's petition for relocation was primarily based on the claim that the child's life would be improved by the move, because she had been unable to support herself and the child beyond the subsistence level since she lost her job in 2007. The Court found that she established the truth of that claim with a showing well beyond a preponderance of the evidence. While a trial court's assessment of the evidence is entitled to deference, there was no sound or substantial basis in the record here for the Family Court's assessment of the mother's truthfulness regarding her earnings and her earning ability. The supposition that the mother could find, or actually did find, other remunerative employment, was unsupported, and contradicted by her receipt of various public assistance benefits such as Medicaid and food stamps. In sharp contrast to the father's evasive testimony and evidence with regard to his finances, the mother made a forthright showing of exactly how she had supported herself and the child.

Although the mother here was not destitute the court found that the relocation application was prompted by a legitimate, pressing need for a secure economic situation. The court observed that “ proof of economic necessity does not require the parent to wait until she has used up every last dollar of her savings before taking steps to ensure that she will be able to care for the child's future economic needs.” Where the proposed move will provide economic, emotional and educational benefits for the child, relocation may be appropriate even where it will disrupt the frequency of visits between the child and the noncustodial parent (*Aziz v. Aziz*, 8 AD3d 596, 597 [2d Dept 2004]. Here, the proposed move to Mississippi would give the mother and child an extensive network of family support, and the child had strong emotional bonds with his maternal grandparents, whom he had visited in previous summers. The requested relocation would provide the benefits of living near, and having the financial and emotional support of, the child's maternal extended family, enabling the child to enjoy a comfortable life free of economic distress, among a loving and supportive extended family. That powerful consideration would be less weighty if the father were providing consistent, steady, and sufficient support to ensure the child's lifestyle at a level above subsistence; however, nothing in the record provided such assurance.

Although the Family Court expressed serious concerns that the mother might interfere with the father's ability to maintain a meaningful relationship with the child, and believed the mother's affect and demeanor to support those concerns, nothing in the record established any actual interference by the mother. There was no history of the mother preventing or overtly interfering with father-child visits, or subtly interfering with the father-child relationship. While the impact of the move on the quantity and quality of the child's future contact with the father is a central concern, it is not "the" central concern. The grant of relocation was issued with the proviso that the father shall be allowed broad access to the child in Mississippi as well as a liberal visitation schedule for visits to New York, the specifics to be addressed by the Family Court on remand.

The court took judicial notice of certain court orders rendered subsequent to the preparation of the record on the appeal, since the contents of the orders were undisputed (see *Matter of Khatibi v. Weill*, 8 AD3d 485, 485 [2d Dept 2004]). While not dispositive, those documents tended to indicate that the father would not likely be contributing financially to the care of the child, at least in the near future, which added support to the conclusion that the relocation was in the child's best interests.

Neglect - Finding of Neglect Reversed Where No Substantial Probability that Child At Risk

In Matter of Destiny --- N.Y.S.2d ----, 2013 WL 5477233 (N.Y.A.D. 1 Dept.), the Appellate Division reversed an order which, after a hearing, found that respondent mother neglected the child, and dismissed the Petition.

The child was born to a mother who was unaware that she was pregnant until the moment she gave birth to a healthy baby. The mother then went to the hospital to seek treatment for the newborn child, and made statements that lead to a police investigation. The police determined that same day that there was no evidence warranting any further police action. While the mother's judgment was impaired during the time immediately following the unexpected birth, she provided a reasonable explanation based on her medical history and weight for not realizing she was pregnant, and immediately sought appropriate medical treatment for the newborn following delivery. These facts, standing alone, were insufficient to support a finding that if the child were released to the mother, there would be a substantial probability of neglect' that places the child at risk.

Pendente Lite Maintenance - Award - Effect of Prenuptial Agreement - Imputed Income -

In Lennox v. Weberman, --- N.Y.S.2d ----, 2013 WL 4711539 (N.Y.A.D. 1 Dept.), Supreme Court granted defendant's motion for pendente lite relief to the extent of awarding her tax-free maintenance in the amount of \$38,000 per month, directing plaintiff to pay, inter alia, defendant's unreimbursed medical expenses up to \$2,000 per month, interim counsel fees of \$50,000, and expert fees of \$35,000, and held plaintiff's cross motion for summary judgment and for counsel fees in abeyance,

The Appellate Division modified, on the facts, to provide that one half of the aforesaid pendente lite relief shall be treated as an advance on the 50 percent of the parties' Joint Funds (as defined in the parties' prenuptial agreement) to which defendant was entitled pursuant to the prenuptial agreement, and otherwise affirmed. It found that the the court properly applied the formula set forth in Domestic Relations Law § 236(B)(5-a)(c)(2)(a) (see *Khaira v. Khaira*, 93 AD3d 194 [1st Dept 2012]) in calculating defendant's temporary spousal maintenance award. Specifically, the court listed all 19 of the enumerated factors, explained how 7 of them supported an upward deviation to \$38,000 per month from the \$12,500 a month in guideline support, and found that \$38,000 per month was not "unjust or inappropriate." It also found that the court properly imputed an annual income to plaintiff of \$2.29 million when it computed maintenance, since this was his income on the most recent tax return. 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. The court properly took into account plaintiff's income from his investments, voluntarily deferred compensation, and substantial distributions (Domestic Relations Law § 236[B][5-a][b][4]; 240[1-b][b][5][i], [iv]), which was \$50.5 million the previous year.

The Appellate Division rejected plaintiff's argument that defendant waived temporary maintenance in the parties' prenuptial agreement. Notwithstanding that defendant waived any claim to a final award of alimony or maintenance in the prenuptial agreement, the court was entitled, in its discretion, to award pendente lite relief in the absence of an express agreement to exclude an award of temporary maintenance (see *Tregellas v. Tregellas*, 169 A.D.2d 553 [1st Dept 1991]; see also *Vinik v. Lee*, 96 AD3d 522 [1st Dept 2012]). Under the circumstances of this case, however, the Court deemed it appropriate to charge one half of the interim awards against the one-half share of the marital property to which defendant was entitled under the prenuptial agreement. In so doing, it found it significant that the parties provided in the agreement that each waived any right to the separate property of the other, that living expenses were to be paid out of the marital property, and that the marital property would be equally divided in the event of divorce. It also found it significant that, here, the equal division of the marital property to which the parties agreed would leave each of them with substantial wealth.

The Appellate Division held that the court's award of interim counsel fees of \$50,000 and expert fees of \$35,000 was warranted under the circumstances where the parties' assets appear to be anywhere from \$77 million to \$90 million. While there were some funds in defendant's possession, plaintiff was in a far better financial position than defendant (*Prichep v. Prichep*, 52 AD3d 61, 66 [2d Dept 2008]), and defendant should not have to deplete her assets in order to have legal representation comparable to that of plaintiff (*Wolf v. Wolf*, 160 A.D.2d 555, 556 [1st Dept 1990]).

Appellate Division, Second Department

Motion Practice - Relief Not Too Unlike Relief Sought May Be Granted Pursuant to a General Prayer

In *Carter v. Johnson*, --- N.Y.S.2d ----, 2013 WL 5450409 (N.Y.A.D. 2 Dept.) the Appellate Division pointed out that a court "may grant relief, pursuant to a general prayer contained in the notice of motion or order to show cause, other than that specifically asked for, to such extent as is warranted by the facts plainly appearing [in] the papers on both sides," it may do so only "if the relief granted is not too dramatically unlike the relief sought, and if the proof offered supports it and the court is satisfied that no one has been prejudiced by the formal omission to demand it specifically" (*Nehmadi v. Davis*, 95 A.D.3d 1181, 1184, 945 N.Y.S.2d 122 [internal quotation marks omitted]; see *Carter v. Johnson*, 84 A.D.3d at 1142, 923 N.Y.S.2d 668; *HCE Assoc. v. 3000 Watermill Lane Realty Corp.*, 173 A.D.2d 774, 570 N.Y.S.2d 642).

Maintenance Pendente Lite - Award Reversed for Failure of Court to Set Forth Factors it Considered and the Reasons for its Decision. (Domestic Relations Law 236 [B][5-a][e][2][

In *Davydova v. Sasonov*, --- N.Y.S.2d ----, 2013 WL 5340376 (N.Y.A.D. 2 Dept.), the Appellate Division observed that Domestic Relations Law § 236(B)(5-a) sets forth formulas for the courts to apply to the parties' reported income in order to determine the presumptively correct amount of temporary maintenance. In any decision made pursuant to [Domestic Relations Law 236(B)(5-a)], the court shall set forth the factors it considered and the reasons for its decision. (Domestic Relations Law s 236 [B][5-a][c][2][b]; see *Khaira v. Khaira*, 93 A.D.3d 194, 201, 938 N.Y.S.2d 513). A court may deviate from the presumptive award if that presumptive award is 'unjust or inappropriate (*Goncalves v. Goncalves*, 105 A.D.3d at 902, 963 N.Y.S.2d 686). Under such circumstances the court must "set forth, in a written order, the amount of the unadjusted presumptive award of temporary maintenance, the factors it considered, and the reasons that the court adjusted the presumptive award of temporary maintenance" (Domestic Relations Law §236[B][5-a][e][2]). When a court is unable to perform the calculation established by Domestic Relations Law §236(B)(5-a)(c) as a result of being "presented with insufficient evidence to determine gross income, the court shall order the temporary maintenance award based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater" (Domestic Relations Law § 236[B][5-a][g]). Supreme Court failed to comply with the requirements of Domestic Relations Law § 236(B)(5-a) when it determined the amount of temporary maintenance to be awarded to the wife (*Khaira v. Khaira*, 93 A.D.3d at 201, 938 N.Y.S.2d 513; see also *Woodford v. Woodford*, 100 A.D.3d at 876-877, 955 N.Y.S.2d 355; cf. *Goncalves v. Goncalves*, 105 A.D.3d at 902, 963 N.Y.S.2d 686). Accordingly, the Appellate Division remitted the matter to the Supreme Court for a recalculation of the plaintiff's pendente lite maintenance award in accordance with Domestic Relations Law § 236(B)(5-a).

Supreme Court's award of temporary child support was also vacated. The Child Support Standards Act (CSSA) provides the formulas to be applied to the parties' income and the factors to be considered in determining a final award of child support (see Domestic Relations Law s 240[1-b]). However, under some circumstances, particularly where sufficient economic data is available, an award of temporary child support that deviates from the level that would result if the provisions of the CSSA were applied may constitute an improvident exercise of discretion, absent the existence of an adequate reason for the deviation. Here, the Supreme Court improvidently exercised its discretion in fixing the amount of pendente lite child support to be paid by the defendant. The court was presented with sufficient evidence concerning the parties' respective incomes and assets, yet it did not provide any reason why it declined to perform the calculations or consider the factors enumerated in the CSSA, and it ultimately failed to provide any explanation as to how it determined the amount of the award. Accordingly, it remitted the matter to the Supreme Court for a recalculation of the plaintiff's pendente lite child support award.

Maintenance Pendente Lite - Award - Appeal - Appellate Division Reduced Award Where Presumptive Award of Temporary Maintenance Exceeded Plaintiff's Alleged Monthly Expenses

In *Chusid v. Silvera*, --- N.Y.S.2d ----, 2013 WL 5450413 (N.Y.A.D. 2 Dept.) Supreme Court directed the husband to pay the plaintiff temporary maintenance of \$11,735 per month commencing March 9, 2011. The Appellate Division reduced the award to \$9,157.45 per month commencing March 9, 2011.

The Court observed that Domestic Relations Law § 236(B)(5-a) sets forth the substantive and procedural requirements for an award of temporary maintenance, addressing both the amount and the duration of the temporary award (see *Goncalves v. Goncalves*, 105 AD3d 901, 902; *Woodford v. Woodford*, 100 AD3d 875, 876-877; *Khaira v. Khaira*, 93 AD3d 194, 197-198). A court may deviate from the presumptive award of temporary maintenance if that presumptive award is "unjust or inappropriate". In determining whether to deviate, the court must consider a broad range of factors (Domestic Relations Law § 236[B][5-a][e][1][a]-[q]). Here, Supreme Court applied the statutory formulas in Domestic Relations Law § 236(B)(5-a), determined that the "presumptive award" (Domestic Relations Law § 236[B][5-a][b][8]) of temporary maintenance to be paid to the plaintiff was \$11,735 per month, and directed the defendant to pay the plaintiff that sum, per month, commencing March 9, 2011.

The Court noted that an appellate court should rarely modify a pendente lite award, and then "only under exigent circumstances, such as where a party is unable to meet his or her financial obligations, or justice otherwise requires. Here, the presumptive award of temporary maintenance, plus the plaintiff's monthly income, exceeded the plaintiff's alleged monthly expenses by \$2,577.55. As the presumptive award of temporary maintenance exceeded the plaintiff's alleged monthly expenses justice required a reduction of the award, and it reduced the award of temporary maintenance to the extent indicated.

Child Care - Modification - Child Care Properly Terminated Where No Child Care Expense

In *Zengling Shi v. Shenglin Lu*, --- N.Y.S.2d ----, 2013 WL 5451017 (N.Y.A.D. 2 Dept.), the Appellate Division held that as the mother did not actually incur child care expenses for the child, who was 17 years old at the time of the hearing, the father's obligation to pay child care expenses was properly terminated (Family Ct Act §413[1][c][4]; *McBride v. McBride*, 238 A.D.2d 320).

Counsel Fees - Award - Award Reversed Where Significant Portion of the Protracted Litigation Attributable to Plaintiff

In Tenore v Tenore, --- N.Y.S.2d ----, 2013 WL 5451978 (N.Y.A.D. 2 Dept.) the parties were married in May 2001, and there were no children of the marriage. In June 2005, the plaintiff commenced this action for a divorce, and asserted a tort cause of action against the defendant, alleging that he had sexually assaulted her. The parties executed a written settlement agreement dated March 30, 2010; they also entered into a stipulation discontinuing the plaintiff's tort cause of action. After the settlement, the plaintiff moved for an award of an attorney's fee. After a hearing Supreme Court awarded her an attorney's fee of \$60,000, "less any and all previously satisfied awards of counsel fees paid to date or any payments made thereon." Thereafter, in an order dated December 15, 2011, the court granted plaintiff's motion for a determination that she was entitled to a qualified domestic relations order assigning \$14,673.20 of the defendant's retirement account to her, and for an award of an attorney's fee incurred in prosecuting the QDRO motion to the extent of awarding the plaintiff \$2,250. In an order dated March 22, 2012, the court amended the order dated October 11, 2011, by adding the following language: "The credit herein allowed to defendant against the counsel fee award to plaintiff shall not include counsel fee payments made by plaintiff to plaintiff's counsel."

Considering all of the relevant factors, including the fact that the Supreme Court expressly found that a significant portion of the protracted litigation in this case was attributable to the plaintiff, the Appellate Division found that the court improvidently exercised its discretion in granting the plaintiff's motion for an award of an attorney's fee. The court determined that the plaintiff had unnecessarily prolonged the litigation by maintaining a "tenuous" tort claim in order to effectuate a more favorable settlement in the matrimonial case. As noted by the court, counsel for the plaintiff testified at the counsel fee hearing that the tort claim was "strictly window dressing." The court also found that the defendant was prompted to make applications to modify the pendente lite award when the plaintiff's deposition testimony showed that the net worth statement she submitted in support of her application for pendente lite relief contained "nonexistent or highly exaggerated expenses." Accordingly, the court should have denied the plaintiff's application for an attorney's fee. The Appellate Division reversed the orders dated October 11, 2011, and March 22, 2012.

However, the Supreme Court properly granted plaintiff's motion for a determination that she was entitled to a QDRO assigning \$14,673.20 of the defendant's retirement account to her. Where a party fails to trace sources of money claimed to be separate property, a court may treat it as marital property. The defendant failed to meet his burden of demonstrating that certain of the funds used to calculate the QDRO amount were pre-marital. Therefore, the court properly accepted the plaintiff's calculations in connection

with the QDRO. Lastly, the court providently exercised its discretion in awarding the plaintiff an attorney's fee in the sum of \$2,250 incurred in prosecuting the QDRO motion.

Appellate Division, Fourth Department

Maintenance - Award - Not Error to Fail to Direct in Judgment Maintenance Shall Cease If Plaintiff Cohabits with Another Man.

In *Zufall v Zufall*, --- N.Y.S.2d ----, 2013 WL 5394591 (N.Y.A.D. 4 Dept.) during the marriage, plaintiff was primarily a homemaker, raising the parties' children while defendant worked as a correction officer. Shortly before the action was commenced, defendant retired at the age of 50 after 25 years of service with the State of New York, leaving a job that paid him in excess of \$90,000 annually. He now received pension benefits of \$2,798 per month. Although able-bodied, defendant did not work. Plaintiff, on the other hand, had been determined by the Social Security Administration to be 50% disabled, and she received partial Social Security disability benefits of \$622 per month plus workers' compensation benefits of \$400 per month. She also worked 20 hours per week as a bartender, earning \$5 per hour plus tips. Pursuant to the parties' prenuptial agreement the court did not award plaintiff any interest in defendant's pension or in the marital residence, which defendant obtained prior to the marriage, notwithstanding the fact that defendant paid the mortgage on that property during the marriage with marital funds.

The Appellate Division held that the court did not abuse its discretion in awarding weekly maintenance to plaintiff in the amount of \$150 but agreed with defendant that the court's award was excessive insofar as the court ordered defendant to pay maintenance until plaintiff turned 62, i.e., for approximately 18 years. It concluded that a term of seven years from the date of commencement of the action "should afford the plaintiff a sufficient opportunity to become self-supporting". It rejected defendant's related contention that the court erred in failing to order that maintenance shall cease if plaintiff cohabits with another man. Pursuant to Domestic Relations Law § 248, defendant may move to terminate maintenance on the ground that plaintiff is "habitually living with another man and holding herself out as his wife," and defendant cited no authority for the proposition that the court must include such a provision in the judgment of divorce. The Court observed that where, as here, there is no provision for an adjustment of child support upon the termination of maintenance, there is no basis for the court to deduct maintenance from [the] defendant's income in determining the amount of child support.

Adoption - Visitation by Biological Parent - upon Entry of Adoption Order, Mother's Parental Rights Ceased, and She Lacked Standing to Prosecute a Visitation Petition

In Matter of Benzin v. Kutyl,--- N.Y.S.2d ----, 2013 WL 5397315 (N.Y.A.D. 4 Dept.) the Appellate Division affirmed an order dismissing the mother's petition to modify her visitation rights as set forth in a prior order. While this proceeding was pending, an order was entered in Surrogate's Court granting a petition filed by respondent father and his wife seeking adoption of the subject child by the father's wife. Domestic Relations Law §117(1)(a) provides that "[a]fter the making of an order of adoption the birth parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child " except under certain limited circumstances, none of which applies here. Thus, upon entry of the adoption order, the mother's "parental rights ceased, and [s]he lacked standing to prosecute a ... visitation petition regarding the subject child" (Matter of Kevin W. v. Monique T., 38 AD3d 672). Although it appeared that the father and his wife failed to provide notice of the adoption proceeding to the mother as required by Domestic Relations Law §111(3)(a), Family Court lacked authority to vacate or ignore the adoption order on that or any other ground, inasmuch as that court could "not arrogate to [itself] powers of appellate review" with respect to the adoption order (Dain & Dill v. Betterton, 39 A.D.2d 939, 939). If the mother seeks relief from the adoption order, she must seek such relief in "[t]he court which rendered [that] ... order" (CPLR 5015 [a]; see generally Nina M. v Otsego County Social Servs. Dept., 201 A.D.2d 788, 790,lv denied 83 N.Y.2d 755).

Agreements - Stipulations - Set Aside - Unconscionability - Agreement Set Aside Which gave defendant almost all of the marital property, including his pension and retirement assets

In Dawes v. Dawes--- N.Y.S.2d ----, 2013 WL 5496012 (N.Y.A.D. 4 Dept.) the parties entered into a separation agreement on September 18, 2007 and, on December 19, 2011, plaintiff wife moved to rescind it. Following a hearing, Supreme Court vacated the agreement on the grounds that plaintiff signed it under duress and it was the product of defendant husband's overreaching.

The Appellate Division affirmed. It observed that a separation agreement may be vacated if it is manifestly unfair to one party because of the other's overreaching or where its terms are unconscionable. (Tchorzewski, 278 A.D.2d at 870). It agreed with defendant that plaintiff did not sign the agreement under duress. Plaintiff's allegations that defendant threatened to evict her from the marital residence if she did not sign the agreement and that he threw the agreement at her were not substantiated by proof sufficient to justify setting it aside. Even accepting plaintiff's allegation that defendant persistently urged her to sign the agreement, such conduct does not constitute duress, particularly inasmuch as plaintiff signed the agreement after defendant revised it in accordance with her suggested changes. However, the court properly determined that the agreement was " 'one such as no [person] in his [or her] senses and not under delusion

would make on the one hand, and as no honest and fair [person] would accept on the other' " (*Colello v. Colello*, 9 AD3d 855, 859, quoting *Christian*, 42 N.Y.2d at 71;see *Skotnicki*, 237 A.D.2d at 975). The agreement gave defendant almost all of the marital property, including his pension and retirement assets. The agreement further provided that plaintiff could not seek maintenance and, most troubling under the circumstances of this case, that plaintiff waived her right to seek child support. It found that plaintiff did not ratify the agreement by complying with its provisions and failing to object to it for more than four years. During those four years, plaintiff did not receive any of the limited benefits accorded to her under the agreement. The fact that defendant allowed plaintiff to live in the marital residence during that time was no benefit to plaintiff inasmuch as the marital residence constituted marital property and she had an equal right to live there.

October 1, 2013

Appellate Division, Second Department

Maintenance - Award - Denied - Maintenance Award to Husband Reversed Where Award Made in Absence of Evidence of Parties' Standard of Living During the Marriage, and in Absence of Evidence of Need.

In *Lucere v Lucere*, --- N.Y.S.2d ---, 2013 WL 4823668 (N.Y.A.D. 2 Dept.) the Appellate Division held that the Supreme Court's award of maintenance to the plaintiff husband was an improvident exercise of its discretion since the award was made in the absence of any evidence of the parties' standard of living during the marriage, and in the absence of evidence that the plaintiff, who was otherwise self-supporting, needed maintenance to sustain his pre-divorce standard of living. Additionally, the defendant's reasonable needs precluded an award of maintenance to the plaintiff. Under these circumstances, the plaintiff should not have been awarded maintenance. It also held that Supreme Court erred in failing to award the defendant a 50% share of the net rental proceeds that the plaintiff collected from condominiums owned jointly by the parties in Arizona and Florida. It agreed with the plaintiff that the Supreme Court should have directed that his obligation to provide life insurance to secure his obligations to the parties' children shall terminate upon the emancipation of the parties' youngest child (*Sotnik v. Zavilyansky*, 101 A.D.3d 1102, 1104; *Levitt v. Levitt*, 97 A.D.3d 543, 545).

Child Custody - Visitation - Grandparent Visitation - Domestic Relations Law §72 - Grandparents Established Extraordinary Circumstances but Denied Visitation

In *Matter of Noonan v Noonan*, --- N.Y.S.2d ----, 2013 WL 4824275 (N.Y.A.D. 2 Dept.) the Appellate Division found that the petitioners, the maternal grandparents of the children, satisfied their burden of demonstrating the existence of "extraordinary circumstances," necessitating a determination as to the best interests of the children (*Matter of Bennett v. Jeffreys*, 40 N.Y.2d at 548). However, considering the totality of the circumstances it found that the Family Court's determination awarding sole custody of the child James, and joint custody of the child Vanessa with Vanessa's father, Vincent Tardo, to the maternal grandparents was not supported by a sound and substantial basis in the record. The mother's testimony indicated that, at the time of the hearing, she had abstained from drug use for more than 2 1/2 years. The mother's testimony also indicated that there were no recent incidents of domestic violence between her and Tardo. Family Court noted in its order that the mother and Tardo were now "clean and sober," three years having passed between their last instances of drug use and the date of the order, and that "there have been no reports of aggression." The Family Court placed undue emphasis on the forensic evaluation, which was completed almost two years prior to the court's determination. Additionally, while the Family Court did acknowledge the nature of James's wishes, it concluded that the court failed to adequately consider those preferences. It reversed the order, denied the maternal grandparents' petitions, granted the mother's application for sole custody of Vanessa to the extent of awarding her joint custody of Vanessa with Tardo, and award the mother sole custody of James.

Child Custody - UCCJEA - Domestic Relations Law § 76-a[1][a] - Domestic Relations Law §76-f [1] - Inconvenient Forum - Stipulation for Jurisdiction Enforced

In *People ex rel. Libin v. Berkovitch*--- N.Y.S.2d ----, 2013 WL 4824422 (N.Y.A.D. 2 Dept.) the father and his late wife were living in Israel when their daughter was born in February 2008. The father entered into a temporary guardianship agreement with his late wife's parents which awarded them temporary custody of the child, and provided that the child would live with the maternal grandparents in New York. The father commenced a habeas corpus proceeding in the Supreme Court seeking sole custody of the child, and requesting the court to nullify the temporary custody arrangement. On October 2, 2008, the parties entered into a stipulation, which provided that the father would immediately have full custody of the child, and the maternal grandparents would have monthly visitation over a four-day weekend, plus one full week in summer. The stipulation also included a clause that provided that no inference would be drawn to "create[] any form of radius clause" so as to limit the distance between the father's residence and that of the maternal grandparents, and recited that the Supreme Court "shall retain exclusive

jurisdiction over this matter for the purpose of enforcing, modifying or interpreting the terms of this agreement."

Visitation with the maternal grandparents proceeded for more than three years, during which time the child lived with the father's parents on Long Island, where the father appeared to have intermittently resided. When the maternal grandparents contacted the paternal grandparents to arrange for their weekend visit in July 2011, they learned that the father had taken the child to Israel, where the father was getting married. In August 2011, the maternal grandparents moved to adjudge the father in contempt of the stipulation, which also required the parties to endeavor to be in "direct verbal contact" regarding the child and compliance with the stipulation. In his response the father asserted that he had full custody of the child, and that the child was living with him and his new wife in Jerusalem. The father cross-moved to vacate or modify the stipulation so as to substitute a different schedule for the maternal grandparents' visitation with the child, based on the child's residence in Israel, and have the Supreme Court relinquish exclusive, continuing jurisdiction over the modified visitation schedule in favor of the Israeli courts. The Supreme Court retained exclusive jurisdiction, and essentially adopted the visitation schedule proposed by the attorney for the child.

The Appellate Division affirmed. It pointed out that pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act a court in this state that makes an initial custody determination retains exclusive, continuing jurisdiction over such determination until a court of this state finds that jurisdiction should terminate because, inter alia, the child does not have a significant connection with New York, and substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships. (Domestic Relations Law § 76-a[1][a]). In entering into the stipulation, the father expressly agreed that New York courts were to exercise exclusive, continuing jurisdiction over the maternal grandparents' visitation with the child, despite the fact that the Supreme Court had full knowledge that he lived in Israel and would continue to reside in Israel. The no radius clause that was included in the stipulation also reflected that, at the time when the father agreed to the terms of the stipulation, he anticipated that he would not always reside in New York, and that he might move away from New York at some time in the future. During the more than three years in which the paternal grandparents and the maternal grandparents acted as the child's primary caregivers, the father remained in Israel without objecting to the jurisdiction of the courts of this State on the ground that they were "inconvenient." Accordingly, the Supreme Court properly concluded that it retained exclusive, continuing jurisdiction over the stipulation, as modified to reflect the child's new residence in Israel.

Pendente Lite Maintenance - Award - Effect of Prenuptial Agreement - Counsel Fees - Domestic Relations Law §237 - Award - Counsel Fees of \$15,000 Awarded Despite Limitation in Agreement to \$10,000

In Abramson v. Gavares--- N.Y.S.2d ----, 2013 WL 5225047 (N.Y.A.D. 2 Dept.) Supreme Court directed the husband to child support in the sum of \$4,250 per month, temporary maintenance in the sum of \$1,000 per month, interim counsel fees in the sum of \$15,000, 100% of the cost of a forensic evaluation of the parties' child, and 100% of the fee of an attorney for the parties' child. The parties were married in 2004 and had one child, who was born in 2006. The divorce action was commenced in 2009. On appeal, the plaintiff, relying largely on a prenuptial agreement entered into by the parties, challenged certain pendente lite relief awarded to the defendant by the Supreme Court.

The Appellate Division held that contrary to the plaintiff's contention, the parties' prenuptial agreement did not expressly preclude an award of temporary maintenance pendente lite, nor did the defendant expressly waive such an award under the terms of the agreement. However, pendente lite awards should be an accommodation between the reasonable needs of the moving spouse and the financial ability of the paying spouse. Here, it was undisputed that, pursuant to certain provisions of the prenuptial agreement, the plaintiff made a lump sum payment of \$172,215 to the defendant and continued to make payments to her in the amount of \$7,175 per month. On the record presented, including evidence of the defendant's expenses, the defendant's reasonable needs were more than adequately met. Accordingly, under the circumstances of this case, the Supreme Court improvidently exercised its discretion in directing the plaintiff to pay temporary maintenance in the sum of \$1,000 per month. However, the Supreme Court properly awarded the defendant interim counsel fees, notwithstanding a provision in the prenuptial agreement limiting, to the sum of \$10,000, the plaintiff's obligation to pay such fees incurred by the defendant in any divorce action. Because of a strong public policy favoring the resolution of matrimonial matters on a level playing field, the determination of whether to enforce an agreement waiving the right of either spouse to seek an award of an attorney's fee is to 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" (Kessler v. Kessler, 33 A.D.3d at 48, 818 N.Y.S.2d 571). Here, the parties were involved in extensive litigation concerning child custody, a matter not expressly addressed in their prenuptial agreement. Moreover, the plaintiff's net worth was more than \$13 million and his monthly gross income exceeded \$45,000, while the defendant had no income other than what she was receiving pursuant to the agreement. Under these circumstances, the Supreme Court providently exercised its discretion in awarding the defendant \$15,000 in interim counsel fees which, contrary to the plaintiff's contention, properly included, as a component thereof, counsel fees that the defendant incurred defending against a petition for a writ of habeas corpus that the plaintiff filed during the pendency of this divorce action.

In light of the parties' combined parental income, which was greatly in excess of the \$136,000 statutory cap , the Supreme Court providently exercised its discretion in directing the plaintiff to pay interim child support in the amount of \$4,250 per month. Moreover, under the circumstances of this case, the court providently exercised its discretion in directing the plaintiff to pay 100% of the costs of a court-appointed forensic evaluator and an attorney for the parties' child.

Counsel Fees - Domestic Relations Law §237 - Award - Supreme Court Improvidently Exercised its Discretion in Awarding Counsel Fees in of \$10,000 in Light of Distributive Award Where Plaintiff Had an Outstanding Balance of \$3,732.50

In *Gilliam v. Gilliam*--- N.Y.S.2d ----, 2013 WL 5225497 (N.Y.A.D. 2 Dept.) the plaintiff commenced this divorce action after 19 years of marriage. She moved out of the marital residence in 2007, and was living with her mother and receiving Social Security Disability Insurance benefits and food stamps. The defendant was employed as a deputy sheriff with the New York City Sheriff's Department and, pursuant to a stipulation entered into by the parties, was awarded custody of the parties' youngest son, who was 19 years old at the time of the divorce. The defendant lived with the parties' two sons in the marital residence and received rental income from them in the amount of \$7,200 annually. After a nonjury trial, the Supreme Court, inter alia, awarded the plaintiff maintenance of \$1,500 per month until she reached the age of 67, \$10,000 in counsel fees, \$2,450 in expert fees, and 50% of the value of two of the parties' motor vehicles.

The Appellate Division held that contrary to the defendant's contention, since the parties stipulated that they would each receive one half of the proceeds from the defendant's pension and deferred compensation plan when they were distributed, the defendant's maintenance obligation should not be reduced in the future by the amount of that payment because, "[b]y reducing the [defendant]'s obligation to this extent, 'the court, in essence, [would] not award the [plaintiff] any portion of that pension.

The Appellate Division held that Supreme Court improvidently exercised its discretion in awarding counsel fees in the sum of \$10,000. The attorney billing statements admitted into evidence showed that the plaintiff had an outstanding balance of \$3,732.50 and had previously paid her attorney a \$7,500 retainer and an additional \$500 fee to review the file. In light of the equitable distribution award, the award of counsel fees to the plaintiff was reduced to the sum of \$3,732.50, the amount of the outstanding balance.

Supreme Court further awarded the plaintiff \$2,450 in connection with the fee paid to her physician, who testified in court regarding the plaintiff's need for maintenance. An award of expert fees will generally be warranted where, as here, there is a significant disparity in the financial circumstances of the parties. Nevertheless, the plaintiff testified at trial that the medical expert was paid \$1,500 to testify in court and that no further sums were due and owing. The plaintiff failed to present any further evidence to establish the amount of the expert fees and, consequently, an award in the sum of \$2,450 was not supported. Furthermore, in light of the equitable distribution award and the fact that the medical expert's testimony was relevant to issues raised by both parties, the defendant should have been directed to reimburse the plaintiff for one half of the expert fees.

Accordingly, the award of \$2,450 in expert fees to the plaintiff was reduced to \$750, equaling one half of the \$1,500 fee paid to the medical expert.

Paternity - Equitable Estoppel - Abuse of Discretion in Applying the Doctrine of Equitable Estoppel Against Purported Father Where He Had No Contact or Relationship with the Child since the Child Was 18 Months Old. Equitable Estoppel May Be Asserted Defensively by a Purported Biological Father to Prevent a Child's Mother from Asserting Biological Paternity.

In Matter of Karen G v Thomas G, --- N.Y.S.2d ----, 2013 WL 5225787 (N.Y.A.D. 2 Dept.) Thomas G. appealed from an order of filiation of the Family Court which, after a hearing, adjudicated him to be the father of the subject child based on the doctrine of equitable estoppel. The order of filiation was reversed, the petition denied, and the proceeding dismissed.

The mother of the child commenced the paternity proceeding against the appellant, the alleged biological father, when the child was 15 years old. At the time of the best interests hearing, the child was 16 years old. The testimony at the hearing established, among other things, that the appellant and the mother were in a sexual relationship and living together prior to the child's birth, and both the appellant and the mother had children with other people both before and after the child's birth. The appellant did not acknowledge paternity at the birth of the child and was not named on the birth certificate. The mother gave the child the appellant's middle and last names, and told the child at various times that the appellant was his father. The appellant lived with the mother until the child was approximately 7 months old, and thereafter visited the child on occasion until the child was approximately 18 months old. On an unspecified number of occasions, the child visited with some of his alleged half-siblings (the appellant's children) at the home of their aunt, with whom the mother was friendly. The mother conceded that, after the child was 18 months old, the appellant had no further contact with subject child and had no relationship with the subject child. The mother also conceded that her current husband, with whom she had other children, had been in the child's life since the child was two years old.

Further, it was undisputed that the mother commenced a previous proceeding against the appellant when the subject child was eight months old; the appellant contested his paternity, and the court ordered a genetic marker test, which the appellant was willing to undergo and for which he was willing to pay. The appellant appeared but the mother failed to appear for the court-ordered test, and thereafter, she failed to pursue the proceeding, which was dismissed on October 26, 1999, when the child was nearly three years old. The mother commenced the proceeding 13 years later, in 2012.

The appellant defended against the instant proceeding on the ground that it was

inequitable for the mother to seek paternity testing at this late date when she had failed to comply with the court-ordered genetic marker test in 1999, abandoned that proceeding, and thereafter lived with another man from the time the child was two years old. At the close of the hearing, the Family Court found that a genetic marker test was not in the best interests of the child because he was 16 years old, but further determined that the appellant was equitably estopped from denying his paternity because no other man had come forward as the biological father.

The Appellate Division held that the Family Court improvidently exercised its discretion in applying the doctrine of equitable estoppel against the appellant under all of the circumstances, including the undisputed fact that the appellant had no contact or relationship with the child since the child was 18 months old. Moreover, in appropriate circumstances, the doctrine of equitable estoppel may be asserted defensively by a purported biological father to prevent a child's mother from asserting biological paternity where a genetic marker test would not be in the best interests of the child. Here, the Family Court improvidently rejected the appellant's equitable defense. An adverse inference may be taken against the mother for her failure to appear for the court-ordered genetic marker test in 1999, and her failure to pursue that proceeding. Thereafter, the mother failed to commence a new proceeding for 13 years, during which time the child had no relationship with the appellant and lived with the mother, her current husband, and his half-siblings on the mother's side. Accordingly, a genetic marker test was not in the best interests of the subject child, on the ground that the mother was equitably estopped from asserting the appellant's biological paternity.

Supreme Court

Pendente Lite Maintenance - Award - Imputed Income - Not authority to impute income based on Not electing to take "early" retirement- appropriate to impute \$11,000.00 from gifts from family - Not proper to award presumptively correct pendente lite maintenance in addition to an Order directing the wife to continue to pay daily living expenses, including housing costs and medical insurance - deviation from the presumptively correct pendente lite maintenance appropriate based on waste of assets and fact that the wife was paying all of the monthly expenses related to the marital residence where the husband continued to reside (DRL 236[B] (5-a)(e)(1)).

In H.G. v. N.K. 2013 WL 5218056 (N.Y.Sup.) the defendant-husband moved for an order granting him pendente lite support. The parties were married on June 5, 1999. The husband was 64 years old and wife was 54 years old. The husband was 50 years old and the wife was 40 years old when the parties married. There were no children of the marriage.

The wife was a psychologist with a doctorate degree, in private practice. The husband had a high school degree. The husband argued that he was the less-monied spouse and that the wife should be required to pay him pendente lite maintenance in compliance with the temporary maintenance guidelines in Domestic Relations Law 236(B)(5-1). The wife argued that the husband dissipated marital assets and fraudulently misled her to believe that he was gainfully employed during the parties marriage by actively hiding the fact that his business failed in 2005 and that he was no longer earning any income during the past seven (7) years of the parties' marriage. She further argued that a deviation from the presumptively correct sum of monthly pendente lite maintenance would be appropriate based on the husband's fraudulent actions during the marriage which, she argued, amounted to wasteful dissipation as contemplated by DRL 236[B] (5-a) (e)(1)(e). The defendant acknowledged that he purposefully concealed his unemployment from the plaintiff during the final seven (7) years of the parties' marriage and stopped filing the parties' joint tax returns in 2007. The defendant claimed that his financial failures during the marriage were a result of his mental health illness which, he alleged, the plaintiff knew about prior to the marriage. The defendant admitted that he purposefully misled the plaintiff to believe that he was employed during the last seven (7) years of the parties' marriage; however, he alleged that the plaintiff was complicit in any financial losses the parties suffered due to his investment choices and his failure to file tax returns between 2007 and 2011 because she put him in charge of the parties' finances, without supervision, despite knowing of his long history of mental illness and financial failures.

The Court observed that pursuant to the husband's affidavit of net worth his monthly expenses were \$7,211.00. The husband listed his assets as \$64.00 in his checking account as of January 4, 2013, a pearl and gold necklace and bracelet valued in excess of \$500.00, and a mother of pearl bracelet valued in excess of \$500.00.

Plaintiff argued that an award of the presumptively correct pendente lite maintenance would be unjust and inappropriate where the wife was paying all of the parties' daily living expenses and that a deviation from the presumptive amount of pendente lite maintenance was appropriate based on the husband's wasteful dissipation during the parties' marriage. Plaintiff also argued that income should be imputed to the husband because the husband received approximately \$11,000.00 annually in cash gifts from his "wealthy family" during the marriage. The wife further argued that income should be imputed to the husband because he had the ability to elect early Social Security benefits which would yield approximately \$12,000.00 annually.

The Court observed that according to the Social Security Administration, the full retirement age for a person born in 1948 was 66 years of age. The husband had not reached the full retirement age and would be electing "early retirement"- and would receive a monthly sum reduced twenty-five (25%) percent- if he elected to collect retirement benefits now. The court found not authority for it to impute income to the husband based on his electing not to take "early" retirement, as defined by the Social Security Administration, for the purpose of calculating pendente lite maintenance, especially since it would result in a reduction of his benefits at the normal retirement age.

The Court found that it was appropriate to impute \$11,000.00 to the husband for the purposes of determining the presumptively correct pendente lite maintenance award.

Based upon the husband's age and absence from the workforce for more than eight (8) years the Court found that an additional imputation of income to him pendente lite would not be appropriate.

The court calculated that based on the wife's annual gross income, as reported on her 2011 individual tax return (\$151,832.00) and the husband's imputed income (\$11,000.00) from cash gifts from his family, the presumptively correct sum of pendente lite maintenance award would be \$3,612.47 monthly. It observed that calculating the guideline amount and then adding the direct payment for daily living expenses on top of the guideline amount would effectively result in an award above the formula sum. It noted that "there is no indication that the formulas set forth in Domestic Relations Law 236(B)(5-a) were intended to cover the temporary support needs of the nonmonied spouse... but not the carrying charges on a marital residence" (Woodford v. Woodford, 100 AD3d 875, 877 [2 Dept.,2012]). The Court rejected the husband's contention that he was entitled to an award of the presumptively correct pendente lite maintenance under Domestic Relations Law 236(B)(5-a) in addition to an Order directing the wife to continue to pay his daily living expenses, including housing costs and medical insurance. For the Court to do so would be inconsistent with the controlling Appellate case law and would effectively result in a pendente lite award in excess of the amount presumed correct under the formula. The court held that the sums paid by the wife for rent and utilities related to the marital residence, where both parties resided, and the sums paid by the wife for the parties' daily living expenses, including health insurance premiums and personal expenses such as cellular telephone expenses for the parties should be deducted from the presumptively correct pendente lite award in compliance with the controlling case law. The husband's application for an order directing the wife to continue to pay all of the routine and customary expenses associated with the marital apartment, health insurance, and the parties' automobile, including: rent for the martial apartment, maintenance and repairs for the martial apartment, insurance premiums, utilities for the marital apartment (including gas, electric, security, telephone, cable, and internet/DSL), and automobile insurance and repairs for the parties' automobile was granted. The monthly cost for these daily living expenses paid by the wife was \$5,876.00. The Court found that fifty (50%) percent of that \$5,876.00 (\$2,938.00) would be considered as pendente lite maintenance. Based on the wife's annual gross income, as reported on her 2011 individual tax return (\$151,832.00) and the husband's annual imputed income (\$11,000.00), the presumptively correct sum of pendente lite maintenance awarded would be \$3,612.47 monthly. After deducting the sum of \$2,938.00 monthly (50% of the monthly living expenses paid by the wife as admitted by the husband), the wife's remaining pendente lite maintenance obligation for the presumptively correct sum under the statute would be: \$674.47 monthly.

The Court rejected the husband's contention that it was premature for the Court to consider wasteful dissipation in determining a pendente lite award was unavailing as the

statute specifically provides that wasteful dissipation is a factor before the Court when considering whether a deviation from the presumptive award of pendente lite maintenance is appropriate (DRL 236[B] (5-a)(e)(1)(e)). The husband hid his unemployment from the wife for seven (7) years and that his financial decisions during the marriage caused the parties financial detriment. The Court found that a deviation from the presumptively correct pendente lite maintenance was appropriate based on the husband's admitted years of purposeful fraudulent misrepresentation to the wife that he was gainfully employed and the fact that the wife was paying all of the monthly expenses related to the marital residence where the husband continues to reside (DRL 236[B] (5-a)(e)(1)).

The Court concluded that an award of pendente lite spousal support to the husband of \$400.00 monthly was appropriate. The husband's application for an Order directing the wife to maintain medical coverage was granted. The husband's application that the wife be solely (100%) financially responsible for his unreimbursed medical, hospital, dental, optical and pharmaceutical expenses and medical co-pays and deductibles, pendente lite, including all individual psychological counseling was granted to the extent that the wife was directed to continue to be financially responsible as she was previously for plan-participating medical treatment. The husband's unreimbursed medical, dental, orthodontic, pharmaceutical, and therapy expenses for in-plan provider were to be paid by the parties pro rata, based on the parties' gross annually income as follows: the husband, 7%; the wife, 93%. The husband was to be solely (100%) financially responsible for unreimbursed medical expenses incurred for using out-of-plan providers. The husband's application for use of the parties' automobile was denied with the right to renew upon proper papers including sworn Affidavits regarding the parties' past access. The Court found that an award of interim counsel fees to the husband was warranted and that fees of \$17,500.00 were appropriate.

September 16, 2013

Appellate Division, Second Department

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - "Immediate and Ongoing Danger" Requirement Does Not Pertain to Situations Enumerated in Family Court Act § 827(a)(Vii) Other than (5) "The Exposure of Any Family or Household Member to Physical Injury by the Respondent and like Incidents, Behaviors and Occurrences Which

to the Court Constitute an Immediate and Ongoing Danger to the Petitioner, or Any Member of the Petitioner's Family or Household".

In Matter of Kondor v. Kondor, --- N.Y.S.2d ----, 2013 WL 4528616 (N.Y.A.D. 2 Dept.) the Appellate Division modified and affirmed an order of protection of the Family Court, which, after a hearing, and upon a finding that he committed certain family offenses within the meaning of Family Court Act § 812, directed Respondent to stay away from the petitioner until and including July 3, 2017. The order was modified on the law, by adding a decretal paragraph finding that aggravating circumstances exist, including the use of a dangerous instrument by Zsolt Kondor against the petitioner.

The Appellate Division observed that to issue an order of protection with a duration exceeding two years on the ground of aggravating circumstances, the Family Court must set forth "on the record and upon the order of protection" a finding of such aggravating circumstances as defined in Family Court Act §827(a)(vii) (Family Ct Act §842). The statutory definition of "aggravating circumstances" includes five distinct situations, set forth in the disjunctive: (1) "physical injury or serious physical injury to the petitioner caused by the respondent," (2) "the use of a dangerous instrument against the petitioner by the respondent," (3) "a history of repeated violations of prior orders of protection by the respondent," (4) "prior convictions for crimes against the petitioner by the respondent," "or" (5) "the exposure of any family or household member to physical injury by the respondent and like incidents, behaviors and occurrences which to the court constitute an immediate and ongoing danger to the petitioner, or any member of the petitioner's family or household" (Family Ct Act § 827[a][vii]). A finding of aggravating circumstances under the fifth situation set forth in Family Ct Act § 827(a)(vii) must be supported by a finding of "an immediate and ongoing danger to the petitioner, or any member of the petitioner's family or household". The Court held that to the extent that certain language in Matter of Clarke-Golding v. Golding (101 A.D.3d at 1118, 956 N.Y.S.2d 553) might suggest that the "immediate and ongoing danger" requirement pertains to the other four situations enumerated in Family Court Act § 827(a)(vii) as well, it is not to be construed as such. Where the aggravating circumstances involve the use of a dangerous instrument, the "immediate and ongoing danger" requirement does not apply.

Family Court's finding that aggravating circumstances were present was supported by the record. Therefore, it modified the order of protection to include this finding in compliance with Family Court Act § 842.

Agreements - Stipulations - Set Aside - Fraud - Wife's Omissions Concerning Her Health Not Material to the Plaintiff's Decision to Enter Settlement Agreement and Did Not Constitute Fraud

In *Petrozza v. Franzen*, --- N.Y.S.2d ----, 2013 WL 4528973 (N.Y.A.D. 2 Dept.) the plaintiff commenced an action to rescind a settlement agreement he entered into with his now deceased wife during the course of a matrimonial action, based on alleged fraud. The plaintiff alleged that the wife failed to inform him of, and actively concealed, her terminal cancer, which illness resulted in her death after the execution of the settlement agreement but before the entry of a final judgment of divorce. The defendants, executors of the wife's estate, asserted a counterclaim to recover damages for breach of the settlement agreement.

The Appellate Division held that to demonstrate fraud, a plaintiff must show that the defendant "knowingly misrepresented or concealed a material fact for the purpose of inducing [him] to rely upon it, and that [he] justifiably relied upon such misrepresentation or concealment to his ... detriment" (*Schwatka v. Super Millwork, Inc.*, 106 A.D.3d 897;see *Channel Master Corp. v. Aluminum Ltd. Sales*, 4 N.Y.2d 403, 406-407). While a party's health is material to the equitable distribution of marital assets, the plaintiff did not challenge the manner in which the parties agreed to distribute the marital assets. The plaintiff only claimed that he would not have agreed to settle with the wife at all had he known of her condition. Contrary to the plaintiff's contention, the wife's alleged misrepresentations or omissions concerning her health were not material to the plaintiff's decision as to whether to enter into any settlement agreement at all with the wife and, thus, would not warrant the equitable remedy of rescission. To hold otherwise would be to recognize, contrary to public policy favoring settlement and fair dealing, that the plaintiff was entitled to a "fair" opportunity to stall in settling the action with the goal of retaining all of the marital assets upon the wife's death. Equity is not served by permitting the plaintiff to rescind the separation agreement for lack of this opportunity.

Furthermore, because the plaintiff did not dispute the fairness of the division of the marital assets to which the parties agreed, he could not be heard to complain that his decision to fairly settle the matrimonial action, in reliance upon his incorrect notion of the wife's good health, operated to his detriment.

Supreme Court

Child Custody - Award - Split Physical Custody - Joint Custody with Equal Time and Joint Decision Making Awarded.

In *Margaret M.C. v William J.C.*, --- N.Y.S.2d ----, 2012 WL 8960401 (N.Y.Sup.), Supreme Court found that the best interests of the parties twin children would be served by the parties sharing legal custody (such that all significant decisions pertaining to their physical well being and education would be made jointly), and for physical custody to be

shared by the parties alternating weeks with each parent having the children reside with them one week on and one week off. The plaintiff's counsel had argued that she was "unaware of any case where after a trial a parent is awarded joint legal custody, joint physical custody, or anything even approaching a 50/50 time share", citing *Braiman v. Braiman*, 44 N.Y.2d 584 [1978]. The Court found that such arrangement to be in these children's best interests. Unlike the facts in *Braiman*, where the parties were so antagonistic that the Court of Appeals held that "[entrusting the custody of young children to their parents jointly, ..., is unsupportable when parents are severely antagonistic and embattled " the parties demonstrated that they can, and had worked collaboratively when it came to the children.

Child Support - Award - in the Absence of Parties' Acknowledgment That They Have Been Apprised of the Provisions of the Child Support Standards Act ("CSSA"), the Amount That Would Have Been Awarded under the CSSA and the Reason for Deviating from the CSSA Amount, a Stipulation of Settlement That Purports to Waive Child Support Is Invalid and Unenforceable.

In *Janice S. v Christopher S.*, 2012 WL 8960402 (N.Y.Sup.) plaintiff sought, *inter alia*, an order directing defendant to pay child support for the un-emancipated children of the marriage. In support of her application, plaintiff contended that defendant was not initially ordered to pay child support in the Judgment of Divorce because he was not working at the time the Stipulation of Settlement was entered into, but that he had since moved to Florida and was holding himself out as a play producer and seeking other employment in the education industry. In opposition, defendant claimed in his papers that his current medical condition includes a brain tumor, early onset dementia/Alzheimer's Disease, and severe depression. Defendant also testified at the hearing that he is not employed due to various physical, mental and emotional disabilities. Neither plaintiff's submissions nor the testimony at the hearing established that defendant had commenced working. Indeed, the testimony at the hearing by defendant was that he has not, in fact, begun work, and has not worked since the parties separated. Nevertheless, the Court determined that the denial of plaintiff's application for child support was in error and had to be vacated. The law is clear that in the absence of the parties' acknowledgment that they have been apprised of: (a) the provisions of the Child Support Standards Act ("CSSA") set forth in Family Court Act s 413, (b) the amount that would have been awarded under the CSSA and (c) the reason for deviating from the CSSA amount, a Stipulation of Settlement that purports to waive child support is invalid and unenforceable. *Tartaglia v. Tartaglia* 260 A.D.2d 628 [2nd Dept 1999]; *Matter of Phillips v. Phillips* 245 A.D.2d 457 [2nd Dept 1997]; *Matter of Bill v. Bill* 214 A.D.2d 84, 91 [2nd Dept 1995]. Although in the Stipulation of Settlement plaintiff waived any right to child support until such time as defendant obtained employment, and that waiver was later incorporated into the Judgment of Divorce, the Stipulation made no reference to the CSSA. Where a stipulation makes no reference to the CSSA, does not provide the amount that would be awarded presumptively under the Act, or fails to give the parties' reasons for deviating

from the statutory formula, it cannot be upheld. *Bright v. Freeman*, 24 AD3d 586, 588, 808 N.Y.S.2d 359 [2nd Dept 2005].

Here, neither the Stipulation of Settlement placed on the record nor the subsequent Judgment of Divorce so much as mentioned the CSSA, let alone ensured that plaintiff was aware of the presumptive amount to which she was entitled or her right to even a nominal payment of child support from defendant pursuant to its provisions. Rather, the parties' attorneys indicated on the record that "[i]t is further understood that we are not currently setting an obligation for child support to the wife, however, if he commences working that will be something for which the wife may seek child support" The Stipulation was incorporated, but not merged, into the Judgment of Divorce which provided that "the defendant shall not pay child support to the plaintiff at this time due to the fact that the defendant has no income and has been in long term treatment at Rockland Psychiatric Center ..." . While, arguably, a reason was stated for plaintiff waiving her right to child support [defendant's long standing unemployment due to his hospitalization for psychiatric care], neither the Stipulation nor the Judgment made any mention, even in passing, of the CSSA. Hence, plaintiff's waiver of support from defendant was invalid. Thus, the Court concluded that plaintiff's application for child support should have been granted, not because she demonstrated that defendant had become gainfully employed, but rather, because the Stipulation of Settlement violated the CSSA. The Court held that it perpetuated plaintiff's improper waiver of child support by denying her application for same in an earlier Order which was error and which the Court now corrected.

In the exercise of its discretion, the Court imputed income to defendant in the amount of \$35,000 per year based on his educational background and past work history. In addition, Defendant had income in the form of the spousal support payments of \$10,400 per year which plaintiff made to him. The Court awarded child support to plaintiff based on the combination of the income from spousal support and the income imputed to defendant for a total amount of \$45,400 per year.

The Supreme Court denied plaintiff's application for a downward modification of her maintenance obligation finding that she failed to establish extreme hardship. Although plaintiff contended that she had been forced to expend virtually all of her net share of the proceeds from the sale of the marital residence and has taken on a large, unmanageable debt load in her effort to meet her obligations, she fell short of demonstrating extreme hardship. Plaintiff's voluntary undertaking to pay her older children's obligations was legally irrelevant. Plaintiff possessed substantial assets that she could, albeit with potential tax penalties, if so inclined, access to ease her load. In denying plaintiff's application, the Court has considered plaintiff's current employment status, income and ability to meet her needs as required by case law. *Pintus v. Pintus* 104 A.D.2d 866 [2nd Dept 1984]. The court pointed out that the legal burden of "extreme hardship" is extremely difficult to achieve, particularly where one is earning in excess of one hundred thousand dollars (\$100,000) per year.

The Court held that Defendant, too, failed to demonstrate extreme hardship. Defendant, age 57, had a bachelor's degree from the University of Notre Dame, (BA), and a

graduate degree obtained, apparently via Dartmouth, Columbia, Harvard, Yale & CUNY. He stated that he had not worked since his discharge from the psychiatric hospital, contending that he was disabled as a result of various ailments. No medical proof of any disability: mental, emotional or physical, was provided at the hearing. No physician was called to testify and no medical records were entered. Defendant failed to "adequately establish the nature and extent of his medical condition, which he characterized as a permanent disability." *Praeger v. Praeger*, 162 A.D.2d 671, 673, 557 N.Y.S.2d 394 [2nd Dept 1990] (Cf. *V.P v. C.P*, 936 N.Y.S.2d 62 [NY Sup.Ct.2011], (a physician was called to testify as to the medical condition of the husband who was applying for the modification.) Defendant testified that he has applied for employment with over 7000 companies and 4,000 schools; without success. He testified that each time he applied for a job, he made certain to notify prospective employers of his psychiatric history and the fact that from 1992-2008 he was a "Stay-At-Home Dad". He had money in retirement accounts. Plaintiff produced a photograph which showed defendant's mobile home and a late model Corvette in the driveway along with another vehicle, a Chrysler PT Cruiser which plaintiff bought for defendant at some time in the past. Defendant admitted that the Corvette (model year 2001) was his, purchased for \$10,000 in November 2009 with a portion of the net proceeds from the sale of the marital residence. However, he contended that he sold it in November 2011 for \$50 when it broke down and he could not afford to repair it. The Court found this testimony to be incredible. Defendant testified that he had drawn approximately \$35,000 from his retirement accounts to pay a portion of his counsel's fees. Defendant admitted that he had approximately \$28,000-\$30,000 remaining in various accounts. Defendant ignored the fact that he agreed to the \$200 per week at a time when his employment situation was no different than it was now. Consequently, the Court denied defendant's application for an upward modification of spousal support.

Family Court

Child Custody - Modification - Relocation - Family Court Holds That a Relocation Case Does Not Include an Enforcement - Modification Case Brought Some 7 Months after an Actual Relocation of a Parent and Child

In *Matter of Samantha J.M. v. Anthony T.C.*, --- N.Y.S.2d ----, 2013 WL 4605792 (N.Y.Fam.Ct.) in May of 2009 the parties entered into a stipulated order in Saratoga County for 50/50 shared custody of their child, Lillian (DOB 9/23/05). At that time both Anthony C. ("father") and Samantha M. ("mother") lived in Saratoga County and had resided together there. The parties reconciled in early 2010 and for approximately 20 months after reconciling, the parties lived together without modifying the 50/50 order. They lived with their child Lillian and the father's teenage son, and with frequent visits by the father's other two children. In September 2011 they split up again, after a physical incident between the

father's teenage son and the mother which it is agreed included the mother threatening the son with a sharp object, which led to the father telling the mother "she no longer had rights to his children". By that he testified he meant, for example, she could not tell the kids to go to their rooms if they were "acting up" as she had before. The reason the mother moved out, as quoted by the father's attorney in her brief, was as follows: His eldest son and I had a disagreement and T. had told me I no longer had rights to his children. And if I didn't like it, I needed to pack and get out. She chose to move out, and a few weeks later she took Lilly with her to live with her parents in the Rochester area. Mother testified the father consented to her moving, without conditions, and helped her pack for the move. Even the father testified he "allowed" her to move, but said it was only temporary permission, and he claims the mother agreed to come back in six months-and had represented to him that she was going to get a job which would lead to a job back in Saratoga County in six months. The mother disputed that there was a temporary agreement, and disputed that she agreed to come back in six months. The father started this litigation more than six months after the mother had moved with the child to Monroe County to live with her mother and stepfather and argued the mother's alleged promise to come back to Saratoga County justified his failure to file his enforcement petition regarding her move for some seven months. The father's enforcement petition was filed in Saratoga County on April 24, 2012, alleging that the move violated his 50/50 parenting time provided by the May 2009 order, and that he was duped by the mother into thinking she was only moving temporarily to Monroe County to get a job which would lead to a job back in Saratoga County. The mother filed a modification petition. There was no express provision in the parties' order prohibiting relocation without a court order or written agreement.

The Court held that a relocation case does not include an enforcement - modification case brought some 7 months after an actual relocation of a parent and child. The court concluded this case was not a relocation case at the time it was belatedly filed, even if it might have been a relocation case if filed immediately upon the mother's move. When a party does what the father did here, i.e., not file for 7 months to stop a move or immediately pull it back, the facts change. The conclusion is unavoidable that at some perhaps hard-to-define point, once a party has moved with a child significantly far away from the other parent's home, a standard relocation case necessarily becomes no longer a relocation case, but simply a custody battle between two parents living in two different places, based on a change of circumstances when there is a prior order. If there is no prior order, it is just an initial custody case. What exactly is the time at which a relocation case transforms into a change of circumstances or initial custody case need not be decided here-as this particular case was so clearly past that point. While this case could have been a relocation case, due to the passage of time, it was not. At some point, a case is no longer appropriate for relocation case treatment. Permission to relocate need not be granted. Relocation had occurred.

The father sought to enforce his 50/50 time with the child under the prior order while the mother sought a modification of a prior order as 50/50 no longer worked. Since this was not a relocation case, she had to establish a change of circumstances sufficient

to warrant an inquiry into whether the best interests of the child warranted a change in custody. A change of circumstances occurred since the prior order. The parties had moved back in together since their prior order, then separated, and moved far apart so that the sharing schedule would no longer work. Thus, the mother established a sufficient change of circumstances.

The Court held that the best interests of the child demanded that the mother be awarded primary physical residence and that she be allowed to live in the Rochester area. The mother had been the primary caretaker since May of 2009 while the parties were separated, while they lived together, and since they separated again. The mother made a common sense and appropriate decision to go live with her mother and stepfather, taking her child. She had to move as she recognized it was not reasonable to continue living with the father under his terms. The child was in a fine, small home with three adults to love her and take care of her on a daily basis. She had her own room. The evidence showed she was doing well in school, and had friends at school and in the neighborhood. There was no reason to upset the status quo by forcing the mother to return to Saratoga County, where she would have to live off someone less appropriate than her own mother and stepfather, or get an unusually high-paying job for someone with her skills and work history, in order to continue having Lillian live with her.

September 3, 2013

Appellate Division, Second Department

Child Support - Award - Drl § 240(1-b) - Proper Consideration of the Subparagraph (F) Factors, as Required in Determining the Amount of Child Support for Income in Excess of the Statutory Limit Did Not Support the Supreme Court's Finding That a Monthly Support Obligation of \$2,076.75 "Adequately Reflects a Support Level That Meets the Needs and Continuation of the Children's Lifestyle, as Dictated by the past Spending Practices of the Parties."

In *Beroza v. Hendler*, --- N.Y.S.2d ----, 2013 WL 4082325 (N.Y.A.D. 2 Dept.) the plaintiff and the defendant were married in 1990, and the plaintiff commenced an action for a divorce in 2001, when the oldest of the parties' three children was 4 ½ years old and their twins were 18 months old. The parties were both educated professionals. The plaintiff was a veterinarian with a private practice devoted to horses, and owned a related business which boarded horses and rented the premises for polo matches, and the defendant was a

partner in a group anesthesiology practice. Both parties worked throughout the marriage and lived an affluent lifestyle in Laurel Hollow.

In its decision after trial, Supreme Court imputed gross annual income to plaintiff of \$259,100.00, calculated the plaintiff's annual child support obligation as 29% of \$200,000.00, or \$4,833.33 monthly, and concluded that the plaintiff's pro rata share of certain additional expenses for the children was to be 40%, based on the parties' respective incomes. These figures were reflected in the judgment of divorce entered August 19, 2008. On the plaintiff's appeal from the Judgment, the Appellate Division agreed with the determination imputing annual gross income to the plaintiff of \$259,100.00, but remitted the matter to the Supreme Court "for a recalculation of the plaintiff's child support obligation" because the Supreme Court had failed to set forth the parties' pro rata shares of child support and to adequately explain its application of the " 'precisely articulated, three-step method for determining child support' " pursuant to the Child Support Standards Act. (*Beroza v. Hendler*, 71 A.D.3d 615, 617, 896 N.Y.S.2d 144, quoting Domestic Relations Law § 240[1-b]). On remittitur, and after considering submissions by the parties, the Supreme Court determined their respective annual net incomes to be \$248,721.00 for the plaintiff and \$487,693.00 for the defendant, for a net combined parental income of \$736,414.00. However, for the purpose of determining the plaintiff's child support obligation, the court capped the combined parental income at \$255,000.00. The Supreme Court found that, considering the factors set forth in Domestic Relations Law § 240(1-b)(f) \$255,000.00 "adequately reflects a support level that meets the needs and continuation of the children's lifestyle, as dictated by the past spending practices of the parties ."After correspondingly revising the plaintiff's pro rata share of the children's expenses from 40% to 33.7%, the Supreme Court applied the statutory percentage to combined parental income capped at \$255,000.00, and calculated that the plaintiff's support obligation for the parties' three children was to be in the annual amount of \$24,921.00, or \$2,076.75, monthly.

The Appellate Division held that Supreme Court improvidently exercised its discretion in capping the parties' combined parental income at \$255,000.00. Proper consideration of the subparagraph (f) factors, as required in determining the amount of child support for income in excess of the statutory limit did not support the Supreme Court's finding that a monthly support obligation of \$2,076.75 "adequately reflects a support level that meets the needs and continuation of the children's lifestyle, as dictated by the past spending practices of the parties." Rather than remit, it recalculated the amount of child support. The parties' annual net combined parental income was \$736,414.00. Plaintiff's pro rata share of the combined parental income was 33.77%. The plaintiff's share of the basic annual support obligation was 33.77% of \$23,200.00, or the annual sum of \$7,834.64." As applicable here, the subparagraph (f) factors included a consideration of the financial resources of the custodial and noncustodial parent, and the standard of living the child would have enjoyed had the marriage or household not been dissolved (Domestic Relations Law § 240 [1-b][f][1][3]). Supreme Court providently exercised its discretion in applying the statutory child support percentage of 29% to the amount of the combined parental income it considered in excess of \$80,000.00, but

improvidently exercised its discretion in capping the amount of combined parental income at \$255,000.00, an amount which was only marginally higher than the plaintiff's net annual income of \$248,721.00. The capped amount, in effect, improperly excluded consideration of the mother's net annual income of \$487,693, contrary to the cost-sharing scheme directed by the CSSA. In considering the relevant subparagraph (f) factors, including the affluent lifestyle which the children undisputedly enjoyed during the parties' marriage, commensurate with the parties' education and net combined annual parental income of \$736,414.00, it found that \$400,000.00 was an appropriate cap to the parties' combined annual parental income for purposes of calculating the plaintiff's support obligation pursuant to the statutory percentage. Thus, it applied the child support percentage of 29% to the amount of the cap in excess of \$80,000.00, or \$320,000.00, which yielded the annual amount for both parents of \$92,800.00, the plaintiff's share of which was 33.77%, or \$31,338.56. Adding this amount to the plaintiff's basic annual support obligation of \$7,834.64 yielded an annual obligation of \$39,173.20, or \$3,264.43 per month.

Attorneys - Legal Fees - Right of Attorney to Apply for Counsel Fees May Not Be Extinguished by Agreement of Client Without Consent of Attorney

In *Gregory v Gregory*, --- N.Y.S.2d ----, 2013 WL 4437197 (N.Y.A.D. 2 Dept.), appellant Karson, an attorney commenced a proceeding on behalf of his client, Mary Gregory against the petitioner's husband seeking child support and maintenance. The Family Court entered an order of support and advised the petitioner to file a motion as to the issue of an attorney's fee. Karson then moved for an order pursuant to Family Court Act § 438 directing the respondent to pay his attorney's fee. After Karson's motion was filed, but before it was decided, the petitioner and the respondent, without Karson's knowledge, executed a stipulation of settlement that provided that "each party shall pay his attorneys" in connection with the support proceeding and that "each party agrees to indemnify and hold the other party free and harmless against ... the claims of any other attorney or person who rendered or claims to have rendered legal services to him or her" in connection with the support proceeding. Family Court denied Karson's motion, concluding that the stipulation of settlement barred Karson's claim.

The Appellate Division reversed. It held that a lawyer who represented a nonmonied spouse may seek an attorney's fee from the monied spouse even after his or her client has discharged him or her without cause (see *Frankel v. Frankel*, 2 N.Y.3d 601). The stipulation of settlement executed by the petitioner and the respondent was not binding on Karson, who was not a party to the stipulation. The petitioner's agreement to indemnify the respondent against claims made by Karson did not relieve the respondent of any obligation he had to pay Karson (see *Raquet v. Braun*, 90 N.Y.2d 177; *Weissman v. Sinorm Deli*, 88 N.Y.2d 437). Thus, the Family Court erred in determining that the stipulation of settlement barred Karson's claim. It remitting the matter to the Family Court to consider whether to grant Karson's motion and indicated that in "making its determination, the

Family Court must consider factors such as "the parties' ability to pay, the merits of the parties' positions, the nature and extent of the services rendered, the complexity of the issues involved, and the reasonableness of counsel's performance and the fees under the circumstances" (Matter of Westergaard v. Westergaard, 106 A.D.3d 926).

Equitable Distribution - Property Distribution - Credit for Contribution of Separate Property to Marital Property.

Child Support- Award - Imputed Income - Court May Impute Income Based upon the Parent's Past Income or Demonstrated Earning Potential.

Child Support - Award - DRL § 240(1-b)(c)(7) - College Expenses - Child Support Obligation Should Be Decreased by the Amount of College Room and Board Expenses Incurred While Child Attends College.

In *Patete v Rodriguez*, --- N.Y.S.2d ----, 2013 WL 4437223 (N.Y.A.D. 2 Dept.) the plaintiff appealed from a judgment which, inter alia, awarded the defendant counsel fees of \$78,000, and failed to award him counsel fees, awarded the defendant child support of \$1,303.34, a month, retroactive to October 1, 2011, until the parties' youngest daughter attains the age of 21 or is sooner emancipated, and directed him to pay 50% of the college tuition and related expenses for the parties' youngest child, computed with a "SUNY cap," retroactive to commencement of the action for a period of three years.

The Appellate Division found that parties married for the first time on December 24, 1978. On May 14, 1980, during this marriage, they jointly purchased a house located on 68th Street in Maspeth, Queens. The parties entered into a separation agreement on February 8, 1981, pursuant to which the defendant conveyed her interest in the 68th Street property to the plaintiff. The parties divorced on March 5, 1981. The divorce decree incorporated but did not merge the separation agreement. The defendant's name was never placed back on the deed to the house prior to their second marriage, in 1985. The plaintiff sold the 68th Street property on February 17, 1987, and used a total of \$125,000 of the proceeds to purchase the former marital home, located on 64th Street in Maspeth, Queens. The Appellate Division held that since the defendant failed to adduce any evidence to rebut the presumption that the deed was duly executed, it validly transferred the defendant's pre-marital interest in the 68th Street property to the plaintiff. Since this property remained solely titled in the plaintiff's name until he sold it in 1987, it remained his separate property until the sale. Accordingly the documented use of two checks from the sale of the 68th Street property in the sums of \$82,500 and \$42,500 (totaling \$125,000) to purchase the 64th Street property, which was clearly marital property, entitled him to a separate property credit for this contribution of separate funds to purchase the former marital home. Nonetheless, the plaintiff did not overcome the presumption that the funds used to make mortgage payments with respect to the 68th Street property during the

course of the second marriage, until February 17, 1987 (when the house was sold), were marital. Thus, the defendant should have receive a credit for one-half of the marital funds used to the pay this mortgage on the plaintiff's separate property in the sum of \$3,669.47.

Although a property located in Puerto Rico consisting of a vacant lot, known as "El Verde," was the husbands separate property, the Appellate Division held that defendant should have been awarded a credit for one-half of the marital funds used to pay for taxes and maintenance of the "El Verde" property. It also held that Supreme Court should have granted the plaintiff's request for a separate property credit of \$15,000, since the defendant admitted in her response to the plaintiff's notice to admit that the plaintiff inherited funds in that amount which were used to remodel an upstairs bathroom at the 64th Street property during the marriage.

The Appellate Division declined to disturb the Supreme Court's award of \$78,000 in counsel fees to the defendant. It observed that 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 and whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation. Although the parties were on relatively equal financial footing, the record supported the Supreme Court's conclusion that, but for the plaintiff's conduct in this case, the defendant would not have incurred significant legal fees.

The Appellate Division rejected the plaintiff's contention that the Supreme Court erred in concluding that the income that he reported earning in his 2007 tax returns, rather than the income he reported in his 2009 tax returns, was an accurate reflection of his current earning capacity for the purpose of calculating his child support obligation. "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 his or her employment history, future earning capacity, educational background, or money received from friends and relatives" In light of the plaintiff's earning power and substantial assets, the Supreme Court did not improvidently exercise its discretion in imputing his 2007 reported income to him for the purpose of determining his child support obligation . The court did not improvidently exercise its discretion by not also imputing to the defendant her 2007 income. The defendant made financial disclosure to the court, and appeared to be earning income consistent with her " 'education and opportunities' "

The Appellate Division agreed with the plaintiff that he should have been directed to pay only his pro rata share of 39%, rather than 50%, of the college tuition and related expenses for the parties' youngest child, computed with a "SUNY cap," and only retroactive to that child's first year of college and continuing until she graduates, reaches the age of 21, or is sooner emancipated . Plaintiff correctly argued that the Supreme Court should have directed that his child support obligation be decreased by the amount of any college room and board expenses he incurs while the child attends college.

Supreme Court

Foreign Divorce - Bilateral - Recognition - Comity -

In **Sergy P. v Svetlana B.**, 2013 WL 4080441 (N.Y.Sup.) on February 3, 1994, plaintiff and defendant were married in Odessa, Ukraine. In or about 1997, while expecting her first child, plaintiff and her parents immigrated to the United States as refugees. Shortly thereafter, in March, 1997, a daughter was born as a result of the marriage. Between 1997 and or about 2012, while defendant resided in the United States with her daughter, plaintiff resided in Russia where he worked for a time period in a well-paid position as Chief Financial Officer for a corporation in Russia. During this period, plaintiff made periodic visits to defendant and their daughter in the United States. On February 3, 2009, a divorce decree was issued by a district court in the Russian Federation dissolving plaintiff and defendant's marriage. During this divorce proceeding, both parties appeared by proxies who had power of attorney. On March 16, 2009 and October 1, 2009, defendant's proxy and plaintiff-movant himself executed two agreements entitled: "Agreement regarding the division of marital property" whereby certain real property located in Russia was transferred from plaintiff to defendant. At some point after the divorce, a second child was conceived by defendant by in vitro fertilization using plaintiff's previously frozen sperm. This child, a daughter, was born in 2010.

On August 9, 2012, plaintiff commenced an action against defendant by filing a verified complaint seeking a divorce pursuant to Domestic Relations Law §170(7), in addition to equitable distribution of the marital property and joint custody of the parties' children. Among other things, the complaint alleged that, "[u]pon information and belief there is no valid judgment in any court for a divorce and no other matrimonial action for divorce between the parties is pending in this court or in any other court of competent jurisdiction." On August 24, 2012, defendant served an answer generally denying the allegations in the complaint and asserting affirmative defenses.

Defendant moved to dismiss. Supreme Court observed that in or about October of 2012, plaintiff filed a claim in a Russian court seeking an order declaring the March 16, 2009 and October 1, 2009 division of marital property agreements invalid and void and to reinstate his rights of ownership in the property transferred by these agreements. In this regard, plaintiff's statement of claim alleged that: [Defendant] convinced me to divorce and transfer all real property in her name, since she was not considered a Resident of Russia for tax purposes and had a legal right not to pay taxes on sale of real property on the territory of Russia. She promised me, that as soon as I will move my residence permanently to the USA, we will reinstate our marital status. Moreover, she, in all ways emphasized, that regardless of who formally owns our property, it is still considered mine,

and she has no claim to it. The statement of claim also alleged that "the dissolution of our marriage was of fictitious nature and factually our marital relationship did not end." In a decree dated February 27, 2013. "Having considered the evidence submitted by the parties in their entirety, the court finds that there are no grounds for the annulment of the agreements on the division of the jointly owned property of the spouses, which were entered into by the plaintiff and defendant on March 16, 2009 and October 1, 2009, and therefore there are no grounds for the application of the consequences of the invalidity of transactions." The Russian court determined that plaintiff's claims were barred by an applicable three-year statute of limitations.

Supreme Court granted the motion. It observed that it is well-settled that "comity should be extended to uphold the validity of a foreign divorce decree absent a showing of fraud in its procurement or that recognition of the judgment would do violence to some strong public policy of the state" (*Farag v. Farag*, 504 [2004]). Further, "a departure from settled comity principles can be justified only as a rare exception ... [and][s]ome evidentiary basis to support the proposition that the particular divorce decree of the foreign country was the product of individualized fraud or coercion or oppression or rested on proximately related public policies fundamentally offensive and inimical to those of this State must be demonstrated" (*Matter of Gotlib v. Ratsutsky*, 83 N.Y.2d 696, 699-700 [1994]). With respect to the issue of fraud, a foreign judgment cannot be attacked on the ground that is procured by intrinsic fraud, "which goes to the existence of a cause of action, and is held to be no defense" (*Altman v. Altman*, 150 A.D.2d 304, 306 [1989]). Rather, courts will only refuse to extend comity to foreign judgments which are obtained by extrinsic fraud, whereby the aggrieved party is deprived of the opportunity to make a full and fair defense in the foreign action through some deception (*Greschler v. Greschler*, 51 N.Y.2d 368, 376 [1980]; *Altman*, 150 A.D.2d at 306; *Tamimi v. Tamimi*, 38 A.D.2d 197, 199-200 [1972]). In particular, "[t]he rule is that there must be facts which prove it to be against conscience to execute the judgment, and which the injured party could not make available in a court of law, or which he was prevented from presenting by fraud or accident, unmixed with any fraud or negligence in himself or his agents ' "

Crediting plaintiff's version of the events surrounding the Russian divorce proceeding as being accurate, it was clear that he was not deprived of the opportunity to participate in the proceeding through some deception on defendant's part. Plaintiff was fully aware of the divorce proceeding, appeared in the proceeding by proxy and was represented by counsel throughout the pendency of the matter. The court noted that even after plaintiff commenced this action, plaintiff continued to litigate matters related to the divorce in the Russian court. In particular, plaintiff (unsuccessfully) sought to invalidate agreements dividing the marital property. However, at no point did plaintiff seek to have the Russian court itself invalidate the divorce decree. Plaintiff's claim that he was deprived of the opportunity to defend himself in the Russian divorce proceeding inasmuch as he relied upon defendant's fraudulent misrepresentation that the parties would remarry was unavailing. The elements of fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages (*Fromowitz v. W. Park Assocs., Inc.*, 106 AD3d

950 [2013]). Even assuming that plaintiff could demonstrate that defendant had no intention of remarrying plaintiff at the time the alleged false promise was made, plaintiff could not have reasonably relied upon a promise to remarry which is legally unenforceable (*Dalessio v. Kressler*, 6 AD3d 57, 62 [2004], citing Civil Rights Law §80-a). In any event, a party claiming that he or she was deprived of the opportunity to make a full and fair defense in a foreign action through some fraudulent deception must themselves be untainted by fraud. Here, by plaintiff's own admission, defendant's alleged fraudulent promise to remarry him was part of a larger fraud in which plaintiff himself was a willing and active participant. In particular, the parties obtained a divorce decree from the Russian court under false pretexts as part of a tax avoidance scheme.

Supreme Court held that under the circumstances, this was not one of those "rare" instances where a departure from the principles of comity was justified and the court had to recognize the 2009 Russian divorce decree dissolving the parties' marriage. Accordingly, defendant's motion which sought to dismiss plaintiff's divorce cause of action pursuant to CPLR 3211(a) was granted. Those branches of plaintiff's cross motion which sought to set aside the Russian judgment of divorce and to amend the complaint to assert a cause of action to set aside the Russian judgment of divorce were denied.

Family Court

Child Support - Award - Emancipation - Conduct of Child in Voluntarily Placing himself out of the Care and Control of the Parent by Means of His Criminal Acts and His Subsequent Decisions Constitutes Emancipation

In *Matter of H.M. v. B.M.*, 2013 WL 4415756 (N.Y.Fam.Ct.) petitioner, the eighteen-year-old son of the respondent, requested that an order of child support be entered on his behalf. The respondent argued that the petitioner constructively emancipated himself. The matter came to trial and the Support Magistrate made the following findings: (1) the respondent adopted the petitioner when he was 10 years old, and petitioner was one of five adopted children in a single-parent home; (2) the petitioner was currently eighteen years old and residing with a non-relative family; (3) the petitioner was attending high school, working part time at a fast food restaurant, and planning to attend college; (4) the petitioner was arrested in November 2011 and pled guilty to the commission of sexual acts on multiple occasions on his younger siblings; (5) the petitioner spent seven months in jail in connection with his conviction and an order of protection was entered prohibiting him from returning to the home of the respondent; the petitioner's criminal acts were completely without justification, and the respondent was justified in having no contact with the petitioner. The Support Magistrate concluded that the respondent met her burden of proving that the petitioner has constructively abandoned the respondent and that the respondent had no obligation to pay support to the petitioner.

In denying the Petitioners objection Family Court found that the Support Magistrate did not make an error of law or abuse her discretion by dismissing the petition and denying the application for attorney fees. The evidence overwhelmingly showed that the petitioner, who was of employable age, had voluntarily placed himself out of the care and control of the respondent by means of his criminal acts and his subsequent decisions. (Matter of Roe v. Doe, 29 N.Y.2d 188; Chamberlain v. Chamberlain, 240 A.D.2d 908.) There was credible testimony that the petitioner had developed a pattern of insubordinate and violent behavior prior to his arrest for sexual abuse involving his brother and his sister. The evidence also showed that the respondent provided therapeutic psychological intervention to the petitioner. However, after pleading guilty to several counts of sexual abuse of his siblings in criminal court, the respondent was sentenced to a term of incarceration. A multi-year, stay-away order of protection was also entered against the petitioner directing him to stay away from the respondent and his siblings. Therefore, it was a direct result of the petitioner's own conduct that he was unable to reside with the respondent. Additionally, there was credible testimony that the petitioner rejected the respondent's wish that he enter a residential treatment program after he was released from jail. Again, it was the petitioner's choice to place himself outside of the control of the respondent.

August 16, 2013

Court Rules Amended

The Uniform Civil Rules for the Supreme Court and the County Court, were amended by adding a new section 202.10, relating to appearances at conferences, to provide that any party may request to appear at a conference by telephonic or other electronic means. It appears that "other electronic means" refers to video conference or computer video services such as "skype". The rule encourages the court to grant the request where "feasible and appropriate".

Appellate Division, Second Department

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Disorderly Conduct -

Burden of Proof - Petitioner must Demonstrate Respondent's Conduct Was Intended to Cause, or Recklessly Created a Risk of Causing, Public Inconvenience, Annoyance, or Alarm.

In *Casie v Casie*, --- N.Y.S.2d ----, 2013 WL 3813824 (N.Y.A.D. 2 Dept.) the Second Department, in an opinion by Judge Skelos, held that to establish the family offense of disorderly conduct, a petitioner must demonstrate that the challenged conduct was intended to cause, or recklessly created a risk of causing, public inconvenience, annoyance, or alarm.

On February 15, 2012, the petitioner, Dionne Cassie, filed a family offense petition against her husband, Richard Cassie which alleged that, on February 11, 2012, the parties engaged in a dispute or altercation because the husband had promised that he was going to leave the marital home and had "reneged on his promise." According to the wife, the husband attempted, unsuccessfully, to push her down a flight of stairs, twisted her arm, causing pain, and pushed her against a wall. Based upon this alleged conduct, the wife asserted that the husband had committed the family offenses of, among others, attempted assault, assault in the second or third degree, harassment in the first or second degree, and disorderly conduct. The wife requested an order of protection requiring the husband to stay away from her and the marital home.

At a hearing on the petition, the wife testified that the parties had been married since 1988, and lived in a two-family house. The wife asserted that, prior to the incident, the husband had promised that he was leaving the marital home. On February 11, 2012, the wife changed the locks of the home and packed a suitcase for the husband. The wife testified that, at approximately 10:00 p.m. on that day, she and the husband became engaged in an altercation in the home, during which he tried to push or pull her down the stairs, he pushed her up against a wall, and he twisted her arm. The wife denied having pushed or struck the husband, but admitted that she bit him. The husband called the police, who responded to the scene, but did not make any arrests. The wife did not file a police report or seek medical attention. The husband testified that, around the time of the incident, he was not working full time, and the wife was angry and told him that he had to leave the home because he had not paid the electric bill. On February 11, 2012, when the husband tried to open the door to the home, his key did not work. The husband rang the bell and "[s]omeone" opened the door. The husband then started to walk up the stairs while the wife was coming down the stairs. According to the husband, the wife started to push the husband down the stairs, and scratched, bit, and hit him, because she did not want him in the house. The husband showed the court some marks on his arm that he claimed were bite marks. At that point, the husband called the police. The husband ultimately left the home voluntarily, and slept in the garage of the home that night. No one else witnessed the incident. The husband asserted that he never tried to push the wife down the stairs, and was never actually above her on the staircase.

At the close of the evidence, the Family Court found that the incident on February 11, 2012, was "a really bad fight" and that both parties were "fighting with each other." However, the court observed, it only had one petition before it, and "to the extent that it's only [the wife's] petition," the court found that the husband "engaged in the offense of disorderly conduct in the home, in that he fought with [the wife]." The court thereupon issued a two-year order of protection, directing the husband to refrain from various forms of conduct, such as harassment and disorderly conduct.

The Court observed that in a family offense proceeding, the petitioner has the burden of establishing, by a "fair preponderance of the evidence," that the charged

conduct was committed as alleged in the petition. (Family Ct Act § 832). Under the Penal Law, "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: 1. He engages in fighting or in violent, tumultuous or threatening behavior; or 2. He makes unreasonable noise; or 3. In a public place, he uses abusive or obscene language, or makes an obscene gesture;..."(Penal Law § 240.20).

Justice Skelos pointed out that critical to a charge of disorderly conduct is a finding that the disruptive statements and behavior were of a public rather than an individual dimension". In that respect, a person may be guilty of disorderly conduct only when the situation extends beyond the exchange between the individual disputants to a point where it becomes a potential or immediate public problem. In assessing whether an act carries public ramifications, relevant factors to consider are the time and place of the episode under scrutiny; the nature and character of the conduct; the number of other people in the vicinity; whether they are drawn to the disturbance and, if so, the nature and number of those attracted; and any other relevant circumstances.

The complicating factor in this case, which was a family offense proceeding rather than a criminal action, is that Family Court Act § 812 provides: "For purposes of this article, 'disorderly conduct' includes disorderly conduct not in a public place" (Family Ct Act §812[1]). The husband contends that, even though the Family Court Act specifies that the conduct need not occur in a public place, the petitioner must nonetheless prove either an intent to cause public inconvenience, annoyance, or alarm, or the reckless creation of a risk thereof.

Justice Skelos pointed out that the First and Fourth Departments had held, albeit summarily, that lack of proof of an intent to cause, or reckless creation of a risk of causing, public ramifications, required dismissal of those branches of family offense petitions that charged the respondent with disorderly conduct. *Matter of Janice M. v. Terrance J.*, 96 A.D.3d 482, 945 N.Y.S.2d 693 (1st Dept); *Matter of Brazie v. Zenisek*, 99 A.D.3d 1258, 951 N.Y.S.2d 458(4th Dept). Here, the Court now held that even where the conduct at issue is alleged to have occurred in a private residence, in order for a petitioner to meet his or her burden of establishing the family offense of disorderly conduct, there must be a prima facie showing that the conduct was either intended to cause, or recklessly created a risk of causing, public inconvenience, annoyance, or alarm. The intent to cause, or recklessness in causing, public harm, is the mens rea of the offense of disorderly conduct. The plain language of the provision of Family Court Act § 812, in contrast, provides only that the conduct need not occur in a public place. The plain language of Family Court Act § 812 therefore pertains only to the actus reus of the offense-specifically, the place where it is committed-and does not speak to the mens rea of the offense. Indeed, since Family Court Act § 812 does not specify an alternative culpable mental state, if the mens rea provided for in the Penal Law were not applicable in family offense proceedings, it is unclear what the mens rea of this family offense would be.

The Court held that that the wife was required to prove that the husband's conduct was committed with the intent to cause, or recklessly posed a risk of causing, public inconvenience, annoyance, or alarm. The wife did not sustain that burden. She did not adduce any testimony regarding the layout of the marital home, or the proximity of neighbors or other members of the public. Nor did she testify that the husband was screaming or otherwise being so loud that others might reasonably be expected to hear him. While the husband testified that his two daughters were upstairs watching television at the time of the incident, assuming arguendo that they could constitute "the public," there was no evidence that the husband intended to cause them inconvenience, annoyance, or alarm, and the evidence was insufficient to demonstrate that he recklessly created a risk thereof. In that respect, there was no evidence regarding how close the daughters were to the confrontation or whether the husband's conduct would have been noticeable to someone not in the immediate vicinity. Accordingly, the wife failed to establish the family offense of disorderly conduct. Accordingly, the order of protection was reversed, on the facts, the petition was denied, and the proceeding is dismissed.

Child Custody - Right to Counsel - FCA § 262 - Denial of Right Requires Reversal Regardless of Merits of Case

In *Matter of Feliciano v King*, --- N.Y.S.2d ----, 2013 WL 3814261 (N.Y.A.D. 2 Dept.) the mother filed a petition to modify a prior order of the Family Court so as to award her sole legal and physical custody of the parties' child and to require that visitation with the father be supervised. After the third day of a hearing on the petition, during cross-examination of the mother, the mother requested that she be allowed to substitute her court-appointed counsel with counsel that she privately retained. The privately retained counsel sought a one-week adjournment of the hearing to obtain the transcript of the prior testimony and to prepare for the continuation of the hearing. The Family Court denied the request for an adjournment and advised the mother that she could choose to continue with one or both counsel, who were present in the courtroom, or proceed without counsel that afternoon, or have the court make a decision based on the incomplete record. The mother chose the latter option. Based upon the evidence adduced by the mother until the point of the adjournment request, the Family Court denied the mother's petition and dismissed the proceeding with prejudice. The Appellate Division reversed and remitted for a new hearing. It held that while the granting of an adjournment for any purpose is a matter resting within the sound discretion of the Family Court the range of the court's discretion is narrowed where a fundamental right such as the right to counsel in a matter involving custody of a child is involved. Under the circumstances of this case, the Family Court should have exercised its discretion to grant the one-week adjournment request rather than requiring the mother to choose between proceeding with the hearing that afternoon with the court-appointed attorney, whom the mother expressed she no longer wanted to represent her and who made an application to be relieved as counsel, or the privately retained attorney or both of them, or submitting the matter for a decision even though the record was incomplete.

Child Custody - Practice and Procedure - Pre-Trial Forensic Evaluations - Although Not Required, Evaluations May Be Appropriate Where There Exist Sharp Factual Disputes That Affect the Final Determination

In *Shanika M. v. Stephanie G.*, --- N.Y.S.2d ----, 2013 WL 3814304 (N.Y.A.D. 2 Dept.), Shanika M. and Stephanie G. were in a domestic partnership. In March 2003, the parties traveled to Grenada, where Stephanie's family lived. While there, they met one-month-old Jada, the child, who was the daughter of Stephanie's sister, Allison G. With Allison's consent, the parties agreed to bring Jada to the United States with the intention of formally adopting Jada. One month later, Stephanie brought Jada to New York, and Jada lived with the parties until she was two years old, when the parties separated. The adoption was never formalized, although Jada continued to live with Stephanie. Stephanie and Shanika then entered into a voluntary visitation arrangement that they adhered to for several years and which was modified by the parties at various times. Following an altercation in August 2008, Stephanie refused to allow Shanika to have any further contact with Jada. In December 2008, Shanika filed a custody petition. During the pendency of the custody matter, Shanika and Stephanie each filed a petition to be appointed as Jada's legal guardian. The Family Court conducted a hearing on the petitions. Despite a request by the attorney for the child that forensic evaluations be performed, no such evaluations were conducted. After the hearing, the Family Court denied Shanika's custody and guardianship petitions and granted Stephanie's guardianship petition, appointing Stephanie as Jada's sole guardian.

The Appellate Division held that Family Court erred in deciding the issue of guardianship without the aid of forensic evaluations of Stephanie, Shanika, and Jada. Although forensic evaluations are not always necessary, such evaluations may be appropriate where there exist sharp factual disputes that affect the final determination (see *Matter of Rovenia G.M. v. Lesley P.A.*, 44 A.D.3d 942, 943-944, 846 N.Y.S.2d 192; see also *Ekstra v. Ekstra*, 49 A.D.3d 594, 595, 854 N.Y.S.2d 439; *Stern v. Stern*, 225 A.D.2d 540, 541, 639 N.Y.S.2d 80). Under the circumstances of this case, the record was inadequate to determine the best interests of the child, particularly as there was no expert assessment of the psychological impact of separating Jada from Shanika. In addition, given Stephanie's allegations of alcohol abuse by Shanika, and Shanika's allegations of alienation by Stephanie and Stephanie's current partner, forensic evaluations of Stephanie, Shanika, and Jada were proper to aid in the resolution of these factual issues. It remitted the matter to the Family Court, for complete forensic evaluations of Shanika, Stephanie, and Jada, for a reopened hearing on the issue of guardianship at which any forensic evaluation report "shall be admitted and the parties shall have the opportunity to cross-examine the evaluator should they so desire," and thereafter, for a new determination of the guardianship petitions based on the forensic evaluations, any

testimony regarding such evaluations, and the evidence already adduced at the hearing on this matter.

Child Support- Award - Imputed Income - Court May Impute Income Based upon the Money Received from Family

In *Matter of Kiernan v Martin*, --- N.Y.S.2d ----, 2013 WL 3927693 (N.Y.A.D. 2 Dept.) the Appellate Division held that a determination to impute income will be rejected where the amount imputed was not supported by the record, or the imputation was an improvident exercise of discretion. (*Matter of Ambrose v. Felice*, 45 AD3d 581, 582). It found that the Support Magistrate improvidently exercised her discretion by failing to impute additional income to the father for money he received from his family for the children's college expenses. The father's testimony established that the funds he received from his family to pay for the children's college expenses were not loans that he was obligated to repay. Thus, the mother's objections to the order which directed her to pay arrears for college expenses and to pay for 67% of the children's future college expenses should have been granted, and the matter remitted to the Family Court for a new determination of the parties' respective obligations to pay college expenses following a report from the Support Magistrate on the amount of money the father received from his family members for the children's college expenses.

Family Court - Support Enforcement - Family Ct Act § 439(e) - Objections to Order of Support Magistrate - Party Challenging Support Magistrate's Order of Wilful Violation Recommending Commitment Must Appeal Rather than Make Specific Objections to obtain Review

In *Matter of Flanagan v Flanagan*, --- N.Y.S.2d ----, 2013 WL 4007536 (N.Y.A.D. 2 Dept.), the Appellate Division observed that 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" (Family Ct. Act § 439[a], [e]). In an order dated January 17, 2012, the Support Magistrate determined that the father was in willful violation of a prior support order. On the same date, the Family Court confirmed the determination of willfulness and thereupon issued an order of commitment which committed the father to the custody of the Nassau County Correctional Facility for a period of 14 days. The father failed to pursue his sole remedy, which was to appeal from the order of commitment dated January 17, 2012, entered upon confirmation of the Support Magistrate's determination. Since the father improperly filed written objections to the nonfinal order of the Support Magistrate, the Family Court correctly denied

the father's objections on procedural grounds.

Appearance - Appearance by an Attorney Is Not a Default -

In Matter of N, 108 A.D.3d 551, 969 N.Y.S.2d 92 (2d Dept, 2013) an adoption proceeding pursuant to Domestic Relations Law article 7, the mother appealed from an order of the Family Court which, after a hearing, determined that her consent to the adoption of the child was not required pursuant to Domestic Relations Law § 111(2)(a). In affirming the order the Appellate Division held that, the order appealed from was not rendered upon the mother's default. The mother appeared at all court dates except the last one, and her attorney participated in the hearing on the final date by reviewing the evidence and objecting to the proffered testimony. Accordingly, the mother could appeal from the order.

Paternity - Acknowledgment - Family Court Act § 516-a - Petition to Vacate an Acknowledgment of Paternity -

In Matter of Angelo A.R. v Tenisha N. W. ,108 A.D.3d 560, 969 N.Y.S.2d 107 (2d Dept,2013) the Appellate Division affirmed an order which denied the petition pursuant to Family Court Act § 516-a to vacate an acknowledgment of paternity. It observed that a party seeking to challenge an acknowledgment of paternity more than 60 days after its execution must prove that it was signed by reason of fraud, duress, or material mistake of fact (Family Ct. Act § 516-a[b][ii]). If the petitioner meets this burden, the court is required to conduct a further inquiry to determine whether the petitioner should be estopped, in accordance with the child's best interests, from challenging paternity. If the court concludes that estoppel is not warranted, the court is required to order genetic marker tests or DNA tests for the determination of paternity, and to vacate the acknowledgment of paternity in the event that the individual who executed the document is not the child's father.

The Appellate Division found that there was no dispute that the petitioner executed the acknowledgment of paternity based upon a material mistake of fact. Contrary to the petitioner's contention, however, the Family Court providently exercised its discretion in concluding that, nonetheless, he was equitably estopped from denying his paternity of the child, Mikayla R. The purpose of equitable estoppel "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" (Matter of Shondel J. v. Mark D., 7 N.Y.3d 320, 326). Thus, a man who has held himself out to be the father of a child, so that a parent-child relationship developed between the two, may be estopped from denying paternity, in light of the child's justifiable reliance upon such representations, and the resulting harm that

his denial of paternity would engender . The doctrine in this way protects the status interests of a child in an already recognized and operative parent-child relationship" In all cases, "the doctrine of equitable estoppel will be applied only where its use furthers the best interests of the child. The hearing evidence demonstrated that the petitioner, and Mikayla R.'s mother, along with Mikayla R. and the couple's older daughter, all lived together as a family for at least four years. During that time, the mother gave birth to another daughter as well. After the petitioner and the mother separated, the petitioner maintained overnight weekend visits with Mikayla R. and her two siblings at least once a month for approximately two years. At all relevant times, the petitioner held himself out as Mikayla R.'s father, and she recognized him as such. Under these circumstances, the Family Court properly determined that the petitioner was equitably estopped from denying paternity of Mikayla R., as there had been a recognized and operative parent-child relationship in existence for approximately six years.

Supreme Court

Attorneys - Legal Fees - Effect of Disciplinary Rules - 22 NYCRR 1400.2 (60 Day Billing Rule) - 22 NYCRR 1400.3 (Substantial Compliance) - Fees For Attorney for Child

In *Mary E. v Usher E*, 2013 WL 3814369 (N.Y.Sup.), 2013 N.Y. Slip Op. 51196(U) the wife commenced this divorce proceeding against the husband on May 18, 2010. The Court issued a written decision on February 25, 2013 (see *Mary E. v. Usher E.*, 38 Misc.3d 1229(A), Slip Copy, 2013 WL 823322).

On March 1, 2013, the attorney for the children moved for an order of the Court directing, inter alia, enforcement of the orders of appointment, and immediate payment by plaintiff and defendant of the outstanding sums. The Court pointed out that on August 11, 2010, the Court appointed Ms. Bonaldes as attorney for the parties' three (3) minor female children on consent of both parties who were represented by privately retained counsel of their own choosing. The appointment order provided that the allocation of the financial responsibility between the parties for the attorney for the children's counsel fees would be determined on the adjourn date of August 18, 2010. At the court appearance on August 18, 2010, the Court found that neither the plaintiff nor the defendant was indigent and both parties were found capable of paying the hourly rate of \$200.00 an hour. After an inquiry on the record regarding the parties' finances and ability to pay, the Court found that the parties should be financially responsible for the payment of the fees associated with the attorney for the children as follows: 20% by the plaintiff and 80% by the defendant. In her Affirmation in Support of her application, the attorney for the children averred that the plaintiff paid her 20% share (\$400.00) and the defendant paid his 80% share (\$1,600.00) of the initial retainer of \$2,000.00 shortly after the Court issued the Amended Appointment Order on August 25, 2010. She averred that as of February 28,

2013, the parties were billed a total sum of \$41,309.80 for legal services rendered for the children pursuant to the Court's August 25, 2010 appointment order. Of that \$41,309.80, she averred that the plaintiff paid the sum of \$2,850.00 and the defendant paid the sum of \$6,480.00. In her Affirmation in Support of Cross Motion, dated February 28, 2013, the attorney for the children affirmed that, as of the last invoice sent to the parties, dated January 26, 2013, the parties' respective shares of the outstanding balance were as follows: \$5,411.96 by the plaintiff and \$26,597.84 by the defendant.

Supreme Court observed that the joint rules adopted by the Appellate Divisions relating to attorney conduct in domestic relations matters require that attorneys provide "an itemized bill on a regular basis at least every 60 days" which the attorney for the children had not done (22 NYCRR 1400.2). The Appellate Division, Second Department has held that attorney fees need not be denied "where there is substantial compliance with 22 NYCRR 1400.3 (see *Wagman v. Wagman*, 8 AD3d 263, 777N.Y.S.2d 678 [2 Dept.,2004]). Whether or not a violation of 22 NYCRR 1400.2 vitiates the ability of an attorney to seek fees has been the subject of numerous appellate cases. The rule that emerges from a survey of the existing Appellate Division case law is that an attorney's "utter failure to abide by these rules" precludes the attorney from collecting fees, even if the services were already rendered but where there has been "substantial compliance" with the matrimonial rules, an attorney will be allowed to recover the fees owed for services rendered, but not yet paid for. Generally, the finding of a lack of substantial compliance has been based upon a complete, nearly complete or flagrant disregard for the applicable rules. On the other hand, a technical violation which does not undermine the underlying policy of protecting the public from known abuses in the field of matrimonial law will not prevent a recovery. The defendant did not object to the accounting in the bills sent but objects to the bills on the basis that they were not sent within the sixty (60) days provided for in the court appointment order and under 22 NYCRR 1400.2. The Court found credible the attorney for the children's representation that she did not submit itemized bills more frequently than every 60 days because she interpreted that portion of the Court's amended appointment order, dated August 25, 2010, providing that bills shall be sent "no less often than every 60 days from the date of this order" to mean that she must send bills to the parties more than 60 days apart. The attorney for the children annexed bills to her cross-motion dated January 7, 2011 (4 months after the appointment order); March 7, 2011 (2 months from previous bill); April 20, 2011 (less than 2 months from previous bill); July 12, 2011 (less than 2 months from previous bill); October 3, 2011 (3 months from previous bill); February 10, 2012 (3 months from previous bill); May 1, 2012 (2 months from previous bill); August 16, 2012 (3 months from previous bill); January 26, 2013 (4 months from previous bill). The Court noted that the attorney for the children sent bills approximately every two (2) to three (3) months, and that the defendant did not contest the attorney for the children's representation that he repeatedly represented through his counsel that he was actively seeking a loan in order to pay his outstanding balance to the attorney for the children. The Court found that the attorney for the children's technical violation of the sixty (60) day billing requirement did not rise to the level of "substantial noncompliance" and it would not preclude her from collecting the sum due and owing to her for legal services rendered to the parties' children

pursuant to this Court's appointment order which was on consent of the parties through counsel. The attorney for the children's application seeking summary judgment on the issue of the balance due and owing in the sum of \$35,971.06 was granted. The Court directed that if either of the parties fail to make payment within ten (10) days of service upon his or her counsel of this decision and order, the attorney may enter a judgment with the Clerk of the Court with costs and interest from said date, upon ten (10) days notice to the defaulting party, and without further application to this Court, for the amount due and owing, plus statutory costs and interest.

August 1, 2013

Appellate Division, Second Department

Maintenance - Award - Factors Considered - Need of the Defendant to Maintain a Separate Household and Have Money to Live on after Support Payments Are Made must Be Taken into Account by the Awarding Court

In *Jaramillo v Jaramillo*, --- N.Y.S.2d ----, 2013 WL 3718079 (N.Y.A.D. 2 Dept.), Supreme Court directed the defendant husband to pay maintenance to the plaintiff of \$2,000 per month for a period of six years and to pay \$7,500 toward the plaintiff's counsel fees. The Appellate reversed and remitted. It observed that Supreme Court found that the defendant's net income was \$62,567 annually, or \$5,213.92 each month. After paying his monthly expenses, which the court found to be \$3,818.80, the defendant would be left with \$1,395.12 per month with which to pay maintenance and his child support obligation of \$235.34 per week. Recognizing the fact that the need of the defendant to maintain a separate household and have money to live on after support payments are made must be taken into account by the awarding court the Appellate Division concluded that the court improvidently exercised its discretion in directing the defendant to pay maintenance to the plaintiff \$2,000 per month. It remitted the matter to the Supreme Court for a recalculation of the amount of the plaintiff's maintenance award. However, the Appellate Division also found, contrary to the defendant's contention, the Supreme Court providently exercised its discretion in determining the duration of the maintenance award. Spousal support should be awarded for a duration that would provide the recipient with enough time to become self-supporting.

Children - Immigration - 8 USC § 1101(a)(27)(J) -Special Immigrant Juvenile Status - a Child Support Order Does Not Satisfy the Requirement for Special Immigrant Juvenile Status That a Child Be "Dependent on a Juvenile Court" (8 Usc § 1101[a][27][J][I]).

In re Hei Ting C.,--- N.Y.S.2d ----, 2013 WL 3718750 (N.Y.A.D. 2 Dept.) a brother and sister appealed from orders of the Family Court in a child support proceeding, denying their petitions for the issuance of an order declaring that each of them was dependent on the Family Court, and making specific findings so as to enable them to petition the United States Citizenship and Immigration Services for special immigrant juvenile status.

In an opinion by Justice Cohen the Appellate Division held that Family Court, after issuing a support order in a related child support proceeding, properly denied the petitions of a sister and brother for the issuance of orders declaring each of them to be dependent on the Family Court, and making the specific findings required to enable them to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101(a)(27)(J).

The Court observed that a form of immigration status known as special immigrant juvenile status is now offered to a class of undocumented immigrant children, providing them with a gateway to lawful permanent residency in the United States. Before a child can petition the United States Citizenship and Immigration Services for special immigrant juvenile status, a state court must first acquire jurisdiction and make certain declarations with respect to the child. Specifically at issue in this case was whether a child becomes dependent on a juvenile court within the meaning of the federal statute when one of the child's parents files a petition for child support upon which the Family Court enters an order of support. Although several decisions of this Court and the Appellate Division, First Department, have addressed the questions of whether a guardianship petition and an adoption proceeding satisfy the dependency prong for special findings relative to special immigrant juvenile status, answering both questions in the affirmative no appellate decisions in this State have addressed the question of whether an order issued by the Family Court that does not award or affect the custody of a child satisfies the dependency prong. The Court held that a child support order does not satisfy the requirement for special immigrant juvenile status that a child be "dependent on a juvenile court" (8 USC § 1101[a][27][J][i]).

Justice Cohen pointed out that in New York, a child may request that the Family Court, recognized as a juvenile court, issue an order making special findings and a declaration so that he or she may petition the United States Citizenship and Immigration Services for SIJS. Specifically, the findings of fact must establish that: (1) the child is under 21 years of age; (2) the child is unmarried; (3) the child is dependent upon a juvenile court or legally committed to an individual appointed by a State or juvenile court; (4) reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis; and (5) it is not in the child's best interests to be returned to his or her home country (see 8 USC § 1101[a] [27] [J][ii]; 8 CFR 204.11[c]). With the declaration and special findings, the eligible child may then seek the consent of the Department of Homeland Security for SIJS (see 8 USC § 1101[a][27][J][iii]).

Hei Ting C. and Wai C., were a sister and brother who were born in Hong Kong. Their parents were divorced in Hong Kong in 2006, and the father and Wai moved to New

York in the summer of 2008. Although the father was awarded full custody of the children, Hei Ting remained in Hong Kong with her mother until she finished the school year. Her mother refused to care for her, and Hei Ting alleges that she had to support herself using a credit card provided to her by her father. After completing the school year, Hei Ting relocated to New York to join her father and brother. Hei Ting and Wai currently lived in Queens with their father, and both children remained unmarried. Both Hei Ting and Wai described their mother as physically and verbally abusive. Although their mother also subsequently relocated to New York, they lived exclusively with their father and have little or no contact with her. They received no emotional or voluntary financial support from their mother. The father filed a petition pursuant to Family Court Act article 4 in the Family Court, seeking a support order on consent. In December 2011, the Family Court entered the requested support order on consent. Hei Ting and Wai then filed a joint motion, within the support proceeding, for the issuance of special findings necessary for them to obtain SIJS, arguing that the existence of a support order made them dependent upon the Family Court. At the time the motion was filed, they were both under the age of 21 and contended that reunification with their mother was not viable, as she was physically and emotionally abusive toward them. They also argued that it would not be in their best interests to return to Hong Kong, since their father, who was their source of care and support, was in the United States, and their return would remove them from further educational opportunities. There would also be no adults to take care of them in Hong Kong. In two orders dated December 20, 2011, made after a hearing, the Family Court, in effect, converted the motion to separate petitions for the issuance of special findings, and denied the petitions.

The Appellate Division held that in determining whether a child becomes "dependent on a juvenile court" for SIJS purposes when a child support order is entered, this Court must examine the facts of each particular case. While the appellants made well-reasoned arguments for allowing orders directing child support payments to satisfy the requirement for SIJS that a child be "dependent on a juvenile court" (8 USC s 1101[a][27][J][i]), the Court declined to adopt that position. The impetus behind the enactment of the SIJS scheme was to protect a child who is abused, abandoned, or neglected and to provide him or her with an expedited immigration process. The requirement that a child be dependent upon the juvenile court or, alternatively, committed to the custody of an individual appointed by a State or juvenile court, ensures that the process is not employed inappropriately by children who have sufficient family support and stability to pursue permanent residency in the United States through other, albeit more protracted, procedures. In this case, there had been no need for intervention by the Family Court to ensure that the appellants were placed in a safe and appropriate custody, guardianship, or foster care situation, and the appellants had not been committed to the custody of any individual by any court. While the appellants met all of the other requirements for SIJS, the Family Court correctly determined that the dependency requirement had not been satisfied. A child becomes dependent upon a juvenile court when the court accepts

jurisdiction over the custody of that child, irrespective of whether the child has been placed in foster care or a guardianship situation. The Family Court has only granted applications for SIJS special findings where dependency upon the court was established by way of guardianship, adoption, or custody. It rejected the argument that their case is analogous to guardianship cases. However, as the Family Court correctly noted, "[a] child support application does not address custody issues, rather it addresses a parent's failure to pay child support to the custodial parent." Proceedings for child support involve litigation between the parents regarding the required financial responsibility each parent has with respect to the child (Family Ct Act § 413[1][a]). There are no determinations in a child support proceeding commenced pursuant to Family Court Act § 413 that relate to the actual guardianship and custody of the child.

Child Custody - UCCJEA - Domestic Relations Law §76-f [1] - Inconvenient Forum - the Inquiry Is Not Completed Merely by a Determination That a Jurisdictional Predicate Exists in the Forum State, for Then the Court must Determine Whether to Exercise its Jurisdiction

In *Matter of Balde v. Barry*, --- N.Y.S.2d ----, 2013 WL 3455610 (N.Y.A.D. 2 Dept.) the Appellate Division found that the Family Court erred in determining that it lacked jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (Domestic Relations Law art 5-A). A New York Family Court has jurisdiction to make an initial custody determination if "(a) 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 ... continues to live in this state" (Domestic Relations Law § 76[1][a])." 'Home state' means 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" (Domestic Relations Law § 75-a[7]). Although the mother and the children had been living in Georgia since moving there in February or March 2011, they had resided in New York for at least six consecutive months prior to that move. Thus, the Family Court had jurisdiction over the father's visitation proceeding, commenced on February 17, 2011, because New York was the children's "home state" either on the date of commencement of the proceeding or within six months prior thereto. The inquiry is not completed merely by a determination that a jurisdictional predicate exists in the forum State, for then the court must determine whether to exercise its jurisdiction" (*Vanneck v. Vanneck*, 49 N.Y.2d 602, 609). A court of this state which has jurisdiction under the UCCJEA may decline to exercise it if it finds, upon consideration of certain enumerated factors, that New York is an inconvenient forum and that a court of another state is a more appropriate forum (Domestic Relations Law § 76-f [1]). While the Family Court did not consider the enumerated factors, the record was sufficient to permit the Court to consider and evaluate those factors and based on the record it found that New York was an inconvenient forum. The record demonstrated that, since February or March 2011, the children resided in the relatively distant state of Georgia, where the children had been enrolled in school and had

connected with the mother's extended family. Most significantly, the evidence regarding their care, well-being, and personal relationships was more readily available in Georgia. Under these circumstances, Georgia was the more appropriate and convenient forum. Domestic Relations Law § 76-f(3) specifies that "[i]f a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state." It remitted the matter to the Supreme Court for further proceedings pursuant to Domestic Relations Law § 76-f(3), including the entry of an order staying all proceedings in the above-entitled proceeding on condition that a child custody proceeding be promptly commenced in Georgia.

Appellate Division, Fourth Department

Equitable Distribution - Property Distribution - Qdro and Retirement Benefits Cases - Appellate Division Rejects Argument That Supreme Court Should Have Ordered the Retirement System to Calculate "Retirement Allowance" as Being the "Hypothetical" Benefit Husband Would Have Received Based on His Years of Service as of the Date on Which the Divorce Action Was Commenced, Rather than as Being the Actual Benefit He Later Received upon Retirement.

In *Loy v Loy*, --- N.Y.S.2d ----, 2013 WL 3770696 (N.Y.A.D. 4 Dept.), a postjudgment matrimonial proceeding, defendant appealed from a qualified domestic relations order (QDRO) that directed the New York State and Local Retirement System (retirement system) to pay his ex-wife her marital share of defendant's pension pursuant to the *Majauskas* formula (see *Majauskas v. Majauskas*, 61 N.Y.2d 481, 489-491). The Appellate Division rejected the defendant's argument that Supreme Court should have ordered the retirement system to calculate his "retirement allowance" as being the "hypothetical" benefit he would have received based on his years of service as of the date on which the divorce action was commenced, rather than as being the actual benefit he later received upon retirement. According to defendant, the QDRO entered by the court improperly awards plaintiff a portion of his separate property, i.e., the increases in his "retirement allowance" attributable to step increases and promotional increases in his pay that occurred after the date of commencement of the divorce action. It observed that the Court of Appeals stated in *Majauskas*, where the pension participant made a similar argument, the fact that a participant's three highest years of earnings may occur after divorce does affect the alternate payee's marital share of the pension benefits, "for as the Delaware Supreme Court held in *Jerry L.C. v. Lucille H.C.* [448 A.2d 223, 226], '[s]ince each employment year is counted for pension purposes each contributes to the high salary years' " (*id.* at 492). The cases relied upon by defendant were distinguishable because they involved defined contribution retirement plans, whereas here defendant has a defined benefit plan.

Supreme Court

Attorneys - Legal Fees - Judiciary Law § 475 - Charging Lien - Charging Lien Can Be Asserted Against Arrears of Child Support.

In *Piccarretto v Mura*, --- N.Y.S.2d ----, 2013 WL 3752137 (N.Y.Sup.) a post-divorce dispute, the wife sought to dismiss a charging lien against a child support obligation. The lien was asserted by her former counsel, who rigorously prosecuted the recovery action. A default divorce occurred in 1993, the husband was ordered to pay child support, and the court in 1993 awarded a judgment for \$25,226.72 in unpaid child support. In 2012, the wife moved, originally in family court, to recover all the accumulated child support, which with accumulated interest, totaled \$549,403.62 as of September 2011. The husband eventually moved to modify his on-going child support obligation based on his current income and the emancipation of his oldest son. In the midst of these legal steps, the husband sold a house and the court, through an order sought by the wife's counsel, allowed the wife to escrow the husband's share of the net proceeds, in anticipation of a final judgment for unpaid child support. During the course of the wife's pursuit of her ex-husband, wife's counsel applied for interim attorney fees. Wife's counsel sought the fees from the sequestered proceeds from the husband's sale of his real property. In an order issued July 12, 2012, the court granted fees of \$15,000 to the wife's counsel and allowed this sum to be paid from the house proceeds, which were held in escrow by the husband's attorney. Husband's counsel argued that the fees, on their face, were the property of the husband. As a consequence, husband's counsel requested \$5,000 in fees to cover the husband's legal expenses, or he would be without resources to finance a defense to the claims of the wife. The court granted that request as well. Importantly, at the time of the application for counsel fees, the court made no finding regarding the appropriate child support to be paid by the husband. There had been no determination what amount of the house sale proceeds were necessary to pay any child support arrears owed by the husband. The court had not heard proof on any claimed offsets against the child support obligation. During the midst of serious settlement negotiations, wife's counsel moved to withdraw, citing friction with his client and her failure to communicate with him. The attorney also sought judgment for fees in the amount \$30,545.91, and a charging lien under Section 475 of the Judiciary Law against the house proceeds set aside by the court under its earlier order.

The wife retained new counsel, who cross-moved to dismiss the attorney's claim for a charging lien, and sought disgorgement of the sums advanced to both the wife's former counsel, and husband's counsel. The Supreme Court held that the lien was valid and denied the request for disgorgement.

Wife's new counsel argued that those sums were erroneously paid from the "wife's child support." Wife's new counsel claimed, inter alia, that the prior counsel cannot have a charging lien against child support, and cannot, under any circumstances, be paid

attorney fees from the wife's child support. He argued that the former attorney did not create any "new funds" on which the charging lien under Section 475 of the Judiciary Law could attach because the entire amount owed to the wife was child support and no liens are permitted against child support.

Supreme Court held, inter alia, that while wife's current attorney claimed the former attorney "did not create an interest in anything," in fact, his legal work, after a delay of 16 years, had actually created the only available money to pay amounts owed by the husband to his wife. Prior to the former attorney's work, the wife had a 16-year-old judgment and a child support order, which she had never enforced against her former husband. But for the former attorney's work-just as the husband was selling his Ontario County house-the wife would now have no available funds to satisfy the child support obligation. It was undisputed that the former attorney's efforts to collect the judgment created a readily-available fund of house sale proceeds from which the wife might soon collect heretofore only illusory decades-old child support obligations owed by the husband.

Supreme Court pointed out that pursuant to Section 475 of the New York Judiciary Law the charging lien automatically came into existence, without notice or filing, upon commencement of the action to recover funds on behalf of the wife, and is measured by the reasonable value of the attorney's services in the action, unless fixed by agreement. In a matrimonial action, a charging lien is available only to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interests already held by the client. Several New York courts have held that an charging lien does not attach to maintenance or alimony. *Theroux v. Theroux*, 145 A.D.2d 625, 536 N.Y.S.2d 151 (2nd Dept.1988); *Turner v. Woolworth*, 221 N.Y. 425, 430, 117 N.E. 814 (1917); *Indell v. Tabor*, 185 N.Y. 873, 874-75 (1920). On the question of the charging lien asserted against child support, there is less judicial authority from New York's appeals courts. The Appellate Division, Fourth Department suggested that no retaining lien could be asserted against child support arrears. *Schelter v. Schelter*, 206 A.D.2d 865, 614 N.Y.S.2d 853, 854 (1994). But the Fourth Department's omission in *Schelter v. Schelter* to cite any then-existing New York authority, the acknowledged difference between the common law retaining lien and the broad reach of the statutorily-mandated charging lien in New York left the question undefined.

The Court noted that while the apparent substantial weight of judicial authority condemns charging liens against child support, the same courts almost uniformly acknowledge the unintended consequence of such a ban: attorneys will seldom be willing to assist parents in their collection efforts because there will be a diminished expectation of payment for their services. The court was chary about the inherent complication created by the conclusion in *Shipman* that an agreement between a parent and an attorney, in which the parent hires the attorney to recover child support arrears and in which the attorney seeks to recover the cost of collection from child support arrears is void as against public policy. This conclusion was impractical and troubling to the everyday

business of this court. The court routinely encountered applications from unpaid parents of children, demanding child support arrears, often after service of a divorce complaint, and before the initial preliminary conference. The parents often have no independent means to fund the attorney's efforts to collect arrears. If the court held, as Shipman did, that such an agreement which contains an agreed charging lien against any collected sums is void, then, in this court's judgment, few attorneys-apart from pro bono efforts-would assist in that collection process. The court pointed out that the law requires that it be paid by the payor for the benefit of the child, but there is no law requiring it be spent by the recipient exclusively for the child. A parent, after receiving child support, can use the funds to pay any costs or any legal fees, even legal fees unrelated to their collection of support or any pending marital claim. She can elect to use the funds to pay off a credit card for dining expenses, or depart on a vacation. The recipient spouse can choose to pay the attorney from collected child support but the attorney cannot enforce his right to payment from the discretionary use of collected child support funds after they are collected. The court could not reconcile this inequitable result, which shifts the discretion to pay accrued fees solely to the client, and ignores the sweeping language of Section 475 of the Judiciary Law, which permits the charging lien to attach to any funds in "what ever hands they may come."In addition, the voiding of an attorney charging lien against child support would lead to the inevitable consequence that: lawyers, faced with no prospect for recovery of fees from child support arrears, will simply decline to assist indigent or less wealthy parents who are owed child support. For these reasons the court declines to follow the reasoning in Shipman v. City of New York Collection Unit and it declared the retainer agreement and the agreement to permit a charging lien between the wife and her former attorney void.

To determine what portion of such proceeds may be utilized to pay the charging lien, the court adopts a comparable analysis from Balanoff v. Niosi, 16 A.D.3d 53, 791 N.Y.S.2d 553 (2nd Dept.2005) where the court laid out the protocol for determination of the wife's reasonable requirements, as a judgment debtor and the attorney's right to collect his fees pursuant to CPLR 5205(d). The court elected to abide by CPLR 5226, and the holding in Balanoff v. Niosi, and proceed to a calculation of the children's reasonable requirements via an installment payment plan. In Balanoff v. Niosi, the court, having concluded that the attorney-creditor had not pursued the proper method for determining the amount of his claim, nonetheless, held that the attorney was permitted, without prejudice, to apply for an installment payment order pursuant to CPLR 5226. The court held that the amounts held in escrow shall remain in escrow. The former attorney for the wife may file such a proceeding within 20 days of the order. He must raise the issue of the children's reasonable requirements in his motion papers and the burden then shifts to the wife or the children to establish "reasonable requirements" of the children. If there is an amount in excess of the children's reasonable requirements, the attorney may access payment of that surplus from the escrow account through his charging lien.

July 15, 2013

Appellate Division, Second Department

Grandparent Visitation - DRL §72 - Standing - No Standing Where Grandparents Failed to Demonstrate That Either or Both of the Parents, Who Divorced in 2011, Terminated or Frustrated Their Visitation with Their Grandson

In *Bender v Bender*,--- N.Y.S.2d ----, 2013 WL 3198404 (N.Y.A.D. 2 Dept.) on February 10, 2012, the appellants commenced a proceeding pursuant to Domestic Relations Law § 72 for visitation with their then-10-year-old grandson, who was the son of their daughter, the respondent Lisa Cendali (mother), and the respondent John Cendali (parents). The Supreme Court, in effect, denied the petition and dismissed the proceeding on the ground that the appellants lacked standing to seek visitation since they failed to show that conditions exist in which equity would see fit to intervene (Domestic Relations Law § 72[1]).

The Appellate Division affirmed. In a grandparent visitation proceeding, "the burden of establishing standing lies with the grandparent and it is 'conferred by the court, in its discretion, only after it has examined all the relevant facts' " (*Matter of Roberts v. Roberts*, 81 AD3d 1117, 1118, quoting *Matter of Emanuel S. v. Joseph E.*, 78 N.Y.2d 178, 182). In determining whether grandparents have standing or a right to be heard on a petition for visitation with a grandchild, the essential components to the inquiry are the "nature and extent of the grandparent-grandchild relationship" (*Matter of Emanuel S. v. Joseph E.*, 78 N.Y.2d at 182) and "the nature and basis of the parents' objection to visitation". "The evidence necessary will vary in each case but what is required of grandparents must always be measured against what they could reasonably have done under the circumstances". A hearing to determine the issue of standing is not necessary where the submitted papers do not raise a triable issue of fact (see *Matter of Lipton v. Lipton*, 98 AD3d 621, 622). Here, the Supreme Court providently exercised its discretion in, in effect, denying the petition and dismissing the proceeding. While it was undisputed that the appellants had enjoyed a relationship with their grandson since his birth, they failed to demonstrate that either or both of the parents, who divorced in 2011, terminated or frustrated their visitation with their grandson. It was undisputed that the appellants had visitation with their grandson on February 4, 2012, just six days before commencing this proceeding. Regarding that particular visit, although the appellants were upset that they received only Saturday visitation instead of the customary overnight alternate weekend visitation, the mother represented that she encouraged and supported the grandparent-grandchild relationship and had no intention of depriving the appellants of visitation with their grandson, although sometimes schedules may conflict, necessitating changes. Under these circumstances, the Supreme Court providently exercised its discretion in, in effect, denying the petition and dismissing the proceeding on the ground of lack of standing.

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Granted - Petitioner Established Harassment in the Second Degree (Penal Law 240.26 by Showing Respondent Shoved the Petitioner, Causing Her to Fall Backwards onto the Floor .

In Matter of Kostatine v Kostatine, --- N.Y.S.2d ----, 2013 WL 3198436 (N.Y.A.D. 2 Dept.), the Appellate Division reversed, on the facts, an order which denied petitioner an order of protection, granted the petition and remitted to the Family Court, for the entry of an appropriate order of protection. It found that the record did not support the Family Court's determination that the petitioner failed to prove the family offense of harassment in the second degree. In order to establish that the respondent committed that offense, the petitioner was required to show that "with the intent to harass, annoy or alarm" her, the respondent struck, shoved, kicked or otherwise subjected her to "physical contact" or attempted or threatened to do so (Penal Law TM 240.26). The credible evidence demonstrated that the respondent, whose father owned the petitioner's apartment, came to the petitioner's apartment in his capacity as his father's employee, and demanded that she vacate the apartment for failure to pay rent. When the petitioner refused, and threatened to call the police, the respondent shoved the petitioner, causing her to fall backwards onto the floor. Thus, the evidence demonstrated that the respondent shoved the petitioner with the intent to alarm her, so as to encourage her to vacate the apartment as he demanded. Accordingly, the family offense petition should have been granted.

Foreign Divorce - Unilateral - Recognition - Comity - Pakistan Muslim Divorce (Obtained by Performing Talaq and Providing Written Notice of the Pronouncement of Talaq) Recognized.

In Siddiqui v Siddiqui, --- N.Y.S.2d ----, 2013 WL 3199064 (N.Y.A.D. 2 Dept.) the plaintiff and the defendant were married in Pakistan in 1994 and subsequently moved to the United States. In 2005, the defendant commenced divorce proceedings in New York. The plaintiff alleged that while the divorce proceedings were pending in New York, the defendant, purportedly without her knowledge, obtained a divorce by performing talaq in Pakistan. Under Pakistan's Muslim Family Laws Ordinance, a man may obtain a divorce by performing talaq, which consists of stating or writing three times that the man is divorcing his wife, and following various other procedures. In particular, written notice of the pronouncement of talaq must be given to a certain Pakistani governmental official, and a copy of such notice must be provided to the wife. The divorce will be given effect by the Pakistani government upon the expiration of 90 days from the day on which such notice was delivered to the governmental official. A woman does not have a right to talaq without her husband's permission.

In June 2008, after obtaining the foreign divorce, the defendant withdrew the divorce pleadings in New York. He subsequently remarried in July 2009. In August 2010, more than two years after the parties were divorced under Pakistani law, the plaintiff

commenced this action for a judgment declaring that the foreign divorce was void and unenforceable and that the defendant's subsequent remarriage was void, bigamous, and illegal. The plaintiff moved for summary judgment declaring that the foreign divorce was void, and the defendant cross-moved, for summary judgment dismissing the complaint. The Supreme Court denied the plaintiff's motion and granted the defendant's cross motion.

The Appellate Division affirmed but limited its holding to the particular facts and circumstances of this case. The defendant set forth evidence in the form of, inter alia, an affidavit of service of the foreign divorce decree which established that the plaintiff was, at the very least, notified of the foreign divorce several weeks before it was given effect by the Pakistani government, but did not challenge the validity of the divorce until more than two years later. In the interim, the defendant, in reliance on the divorce, remarried. Moreover, the foreign divorce obtained by the defendant simply terminated the parties' marriage, while the parties had filed petitions in the Family Court to determine issues of child custody, maintenance, and child support (cf. *Aleem v. Aleem*, 404 Md 404). Under these particular circumstances, the plaintiff was not entitled to the declaratory relief she seeks. The Court stated that it expressed no opinion on the issue of whether the foreign divorce was fundamentally offensive to the public policy of this State.

Appellate Division, Third Department

Child Support - Award - Family Court Act § 413(1) - Family Ct Act § 424-a [a] - Requirement of Financial Disclosure - Order of Support Affirmed in the Absence of Complete Financial Disclosure Where Reliable Evidence Otherwise Appeared on the Face of the Record

In *Matter of Mata v Nebesnik*, --- N.Y.S.2d ----, 2013 WL 3213688 (N.Y.A.D. 3 Dept.), Petitioner (father) and respondent (mother) were the parents of one daughter (born in 2005). Pursuant to a November 2007 order of support, the father was required to pay \$275 per month in child support and to provide health insurance for the child through his employment. The parties commenced competing modification proceedings-with the father seeking a downward modification of his child support obligation based upon his inability to work due to the severe injuries he suffered in a December 2011 automobile accident. Both parties subsequently filed sworn financial disclosure affidavits without the required paycheck stubs and recent income tax returns (Family Ct Act § 424-a [a]). Following an April 2012 hearing, a Support Magistrate granted the father's petition, reducing his child support obligation to \$25 per month and ordering that health insurance for the child continue to be provided by the mother's husband. The mother's written objections were denied by Family Court.

The Appellate Division affirmed. Although Family Court was entitled to deny the father's requested relief based upon his failure to comply with Family Ct Act § 424-a, the

Appellate Division pointed out that it has approved orders of support in the absence of complete financial disclosure where reliable evidence otherwise has appeared on the face of the record. Here, the father's sworn statement of net worth and testimony, the latter of which was subject to examination by the Support Magistrate and cross-examination by the mother, was sufficient to demonstrate the requisite change in circumstances. Accordingly, it did not find that Family Court abused its discretion in granting the requested modification.

Equitable Distribution - Property Distribution - QDRO and Retirement Benefits Cases - Fact That Husband Elected Pension Option That Provided the Wife with One-half His Monthly Amount If He Predeceased Her, Which Results in a Current Lower Monthly Payment, Is Not a Sufficient Reason to Award the Wife less than 50% of the Current Monthly Payment.

In *Bellizzi v Bellizzi*--- N.Y.S.2d ----, 2013 WL 3213711 (N.Y.A.D. 3 Dept.) the parties were married in June 1969, and they had three children, all of whom were adults. Plaintiff (husband) commenced a divorce action in October 2008 that was dismissed following a trial (*Bellizzi v. Bellizzi*, 82 AD3d 1541, 1542 [2011]) and this second divorce action was commenced in November 2011. Both parties were in their mid-60s, have had serious health issues, were retired and received Social Security (the husband \$1,648 per month and the wife \$1,137 per month). In the second action, they stipulated that a divorce would be granted pursuant to recently enacted Domestic Relations Law § 170(7). After trial the wife received the marital home (\$270,000), a retirement account (\$7,798.62) and part of the cash in bank accounts (\$20,093.25), for a total value of \$297,891.87; (The wife was also found to have separate property of about \$74,000, reflecting the value of an inheritance from her family.. and the husband received retirement accounts (\$172,485.83) and part of the cash in bank accounts (\$65,969.66), for a total value of \$238,455.49. Significantly, the husband also has two pensions in pay status; one for service in the Air Force of \$1,689 per month and a New York State pension of \$6,818 per month. Supreme Court made no distribution of his two pensions, but treated them as income streams for purposes of maintenance, which was made nondurational and set at \$2,800 per month. The court further determined in its February 2012 decision that, although the wife was entitled to retroactive maintenance from January 2009 for a total of \$103,600 (37 months), the husband was entitled to credits for payments already made of \$131,000 and, thus, he did not owe retroactive maintenance. The wife's application for counsel fees was denied and the husband's application for an order of protection was granted.

The Appellate Division pointed out that there is no requirement that each item of marital property be distributed equally and the trial court has discretion in fashioning a division of property . However, relative parity was appropriate here in light of the 40-plus years of marriage and no factors justifying an unequal distributive award. It found persuasive the wife's argument that the husband's pay status government pensions should have been equitably distributed rather than simply treated as an

income stream for purposes of maintenance. It noted that care must be taken to avoid double counting of the interdependent issues of distribution of a pension and maintenance , and there may be situations where maintenance would be more appropriate. Nonetheless, maintenance looks to factors and implicates discretion, which permitted Supreme Court in this case to arrive at a monthly amount less than the monthly value of the pensions. Under the circumstances, awarding a percentage of the pay status pensions more accurately and equitably reflected the value to the wife of these assets earned during the long-term marriage.

The Court held that the husband's state pension was earned entirely during the marriage and, accordingly, the wife should receive 50% of the monthly payment. The fact that the husband elected an option at the time of his retirement that provided the wife with one-half his monthly amount if he predeceased her, which results in a current lower monthly payment, is not a sufficient reason to award the wife less than 50% of the current monthly payment. The military pension was earned as a result of the husband's full-time active duty and also part-time service from 1966 to 1993. The husband testified that the pension was based on a point system with a larger number of points earned during an active duty year as opposed to a part-time duty year. The husband related that he was commissioned in July 1966, commenced active duty in February 1968, ended active duty and joined the reserves in September 1973, and separated from service in December 1993. Although approximately 75% of active duty and 90% of part-time service ostensibly occurred during the marriage and it appeared that the wife should receive about 40% to 45% of that pension, the record was not sufficiently complete regarding when and how points were earned toward the husband's military pension. Accordingly, it remitted to Supreme Court to determine the percentage after considering submission of relevant proof on that issue. The Court indicated that since the wife received almost \$60,000 more than the husband in the distribution of the other primary marital assets and she had been receiving reasonable monthly maintenance, the pension distribution need not be retroactive under the circumstances and the amounts shall apply prospectively from the date of this decision.

The Appellate Division held that as conceded by the wife and necessary to avoid double-counting, her maintenance shall cease upon the pension distribution taking effect since those pensions were the primary source of the husband's income upon which maintenance was calculated. This rendered academic the wife's contention that the maintenance award was inadequate, except to the extent that she sought an increase for purposes of retroactive maintenance and also sought retroactivity to a date earlier than set by Supreme Court. Since the record reflected that the wife first requested maintenance two months earlier than found by Supreme Court it held that the proper amount of retroactive maintenance should have been \$109,200.

Although Supreme Court credited the husband with payments of \$131,000 against the retroactive maintenance, the Court found merit in the wife's assertion that this included amounts that predated the first action. The record revealed that \$78,500 of those payments were made for various matters between June 2007 and September 2008, before

commencement of the first matrimonial action or any request for an order regarding temporary maintenance. Thus, the husband should have been permitted a credit of \$52,500, resulting in retroactive maintenance owed of \$56,700. It remitted to Supreme Court to fashion the manner in which this retroactive amount should be paid (i.e., length of time and amount of payments or lump sum).

The Court pointed out that directing a party to make a former spouse the beneficiary of a life insurance policy generally rests in the trial court's discretion, and in light of, among other things, the fact that the wife would continue to receive one-half the husband's considerable state pension if he predeceases her, Supreme Court did not abuse its discretion in refusing to require the husband to make the wife the beneficiary of his life insurance policies.

Family Court - Support - Family Ct Act § 439(e) - Objections to Order of Support Magistrate- Family Court Lacks Authority to Review Order to Which No Objections Had Been Filed. Power of Family Court to Review Order and Make its "Own Findings of Fact" Does Not Extend to Matters to Which Respondent Did Not Object.

In *Matter of Hubbard v Barber*, --- N.Y.S.2d ----, 2013 WL 3213808 (N.Y.A.D. 3 Dept.) the parties were the divorced parents of two children, born in 1998 and 2002. A separation agreement was incorporated but not merged into their divorce judgment, and resolved all issues of custody, visitation and child support. Respondent (father) specifically agreed to pay weekly child support to petitioner (mother), as well as one half of certain expenses related to the children.

The mother filed a modification petition that the Support Magistrate dismissed, without prejudice, as failing to detail how changed circumstances warranted a support modification. She filed a second petition and, following a hearing, the Support Magistrate issued an order finding that a sufficient change in circumstances had occurred and altering the father's support obligation in various respects. The father filed objections to the order, contending that documents related to his 2011 tax return should have been considered in calculating his support obligation and seeking "clarification" as to the relationship between that obligation and his right to visitation. Despite those discrete and specific objections, Family Court embarked upon a "full review" of the two modification petitions and determined that both should have been dismissed.

The Appellate Division reversed. It pointed out that it is well established that "an order from a Support Magistrate is final and Family Court's review under Family Ct Act § 439(e) is tantamount to appellate review and requires specific objections for issues to be preserved" (*Matter of Commissioner of Social Servs. v. Segarra*, 78 N.Y.2d 220, 222 n1 [1991]). Family Court therefore lacked the authority to review the order dismissing the mother's first modification petition, to which no objections had been filed. The father did

lodge objections to the order granting the second modification petition, which entitled Family Court to review that order and make its "own findings of fact". That power, however, did not extend to matters to which the father had not objected. The order was reversed and remitted so that Family Court could conduct an appropriately limited review and resolve the specific objections lodged by the father.

Equitable Distribution - Property Distribution - Marital Residence - Exclusive Possession of the Marital Residence to the Wife, Where She Was Custodial Parent Child and Immediate Sale Would Not Have Resulted in Proceeds to Be Distributed.

In *Cornish v Cornish*, --- N.Y.S.2d ----, 2013 WL 3213848 (N.Y.A.D. 3 Dept.) the parties were married in 1991 and had three children (born in 1991, 1994 and 1997). In 2010, plaintiff (husband) commenced an action for divorce. After custody was resolved Supreme Court, among other things, granted the wife exclusive possession of the marital residence until the youngest child's 21st birthday, ordered the wife to pay \$100 per week in maintenance for one year and child support of \$59.09 per week, awarded the husband 30% of the wife's pension and equitably distributed the parties' marital assets and debts.

The Appellate Division affirmed the award of exclusive possession of the marital residence to the wife. The wife was the custodial parent of the parties' youngest child and was financially able to pay the mortgage and meet the other maintenance costs of the residence. At the time of trial, the father was living rent-free with his parents, and the marital residence was encumbered by tax liens and the mortgage such that an immediate sale would not have resulted in proceeds to be distributed.

It rejected the husband's argument that Supreme Court erred in allocating the parties' outstanding income tax liability, which was attributable in part to the wife's earnings and in part to distributions received by the husband from an inheritance that was his separate property. Each party presented expert testimony as to the appropriate allocation of this liability. The court agreed with the husband's expert that the allocation proposed by the wife's expert imposed a lower marginal tax rate on the wife's earnings than on the husband's inheritance income. Nonetheless, this favorable treatment was deemed appropriate as the wife's earnings were marital income that had provided the family's primary means of support throughout the marriage, while the husband's inheritance was "fortuitously" acquired as separate property and was exhausted after several years of withdrawals.

With regard to the equitable distribution of the parties' credit card debt, while the record reflected that the debt was largely incurred to meet household expenses, there was also evidence that the husband frequently used the parties' credit cards to make unnecessary purchases. Thus, given the long duration of the marriage, the sources of the debt and the parties' relative earning capacities, it found no abuse of discretion in Supreme Court's equal distribution of this debt between the parties.

The Court rejected the husband's argument that Supreme Court should have awarded him one half of the wife's pension. The record indicated that the parties' arrangement was for the husband to take on the responsibilities of homemaker and primary caretaker of the children while the wife provided financial support for the family, but it further revealed that the husband's alcoholism interfered with his ability to contribute to the household and that his parents provided a substantial amount of the children's care. The wife testified that, after the children had attained school age, she repeatedly asked the husband to find employment or return to school. Despite the family's financial difficulties and reliance upon financial assistance from the husband's mother, the husband refused. Thus, there was no abuse of discretion in Supreme Court's award of 30% of the pension to the husband in light of his limited contribution to the economic partnership of this marriage.

Given the length of the marriage and the husband's role as caretaker of the children and home, an award of maintenance was appropriate. However, there was scant evidence that the husband sacrificed educational or career opportunities in favor of his role in the family. The husband refused to seek employment or further his education after the parties' children were in school, despite the wife's requests that he do so and the family's financial distress. He refused to take advantage of several opportunities to advance his education, including utilizing tuition credits available through the wife's employment. The record reveals that the husband had stopped drinking before the divorce, had no mental or physical barriers to employment, and was operating an eBay business at the time of trial. Although he provided no accounting of this business, his statement of net worth reflected an income level that could not be attributed to his newspaper delivery job, maintenance and child support alone. It found no error in the amount of annual income that Supreme Court imputed to the husband.

The Court held that Supreme Court did not abuse its discretion in precluding the husband's testimony regarding his search for employment, as he failed to provide a meaningful response to the wife's interrogatory concerning this issue or a reasonable excuse for this failure. The record also supported the court's finding that the family's financial stability before the divorce was "illusory" and that their relatively high standard of living resulted in large part from spending beyond their means.

Similarly, the child support award was appropriate based upon the income imputed to the parties and was consistent with the provisions of the Child Support Standards Act Domestic Relations Law § 240[1-b]). However, as the parties stipulated that the wife would pay maintenance and child support through the Chemung County child support collection unit rather than directly to the husband, the order was modified to provide for such payment in the manner directed by that entity.

The husband's counsel was hired as substitute counsel in April 2010, after the statement of net worth was filed, but his counsel did not file a retainer agreement until after Supreme Court ordered him to do so in September 2010. The record thus supported the court's determination that the husband's counsel failed to substantially comply with 22

NYCRR 1400.3 and was precluded from seeking a fee (see *Bentz v. Bentz*, 71 AD3d 931, 931-932 [2010]).

Finally, the Court observed that it is the responsibility of the party seeking the qualified domestic relations order to submit such order to the court on notice. Accordingly, the order appealed from was modified to direct that the husband shall submit a qualified domestic relations order to Supreme Court.

Appellate Division, Fourth Department

Child Support - Award - Shared Custody - Where Neither Parent Has Children for a Majority of the Time, Party with Higher Income Deemed to Be Noncustodial Parent for Purposes of Child Support, Despite Fact He Is Awarded Sole Custody. Court Is Required to State Reasons for Denial of Counsel Fee Request.

In *Leonard v Leonard*, --- N.Y.S.2d ----, 2013 WL 3242643 (N.Y.A.D. 4 Dept.), a matrimonial action, the Appellate Division agreed with the defendant that the court erred in awarding child support to plaintiff who had sole legal custody of the children but the residency schedule afforded the parents equal time with the children, and that the court instead should have awarded child support to her. It observed that the case law holds that in shared residency arrangements, where neither parent has the children for a majority of the time, the party with the higher income is deemed to be the noncustodial parent for purposes of child support. The residency schedule afforded the parties equal time with the children, and neither party has the children for the majority of the time. Inasmuch as plaintiff's income exceeded that of defendant-at the time of trial, plaintiff earned \$134,924.48 annually, while the JHO imputed income of \$25,000 to defendant, whose actual earnings were \$14,109.53-plaintiff was the "noncustodial" parent and, as such, he was required to pay child support to defendant. Here, unlike the cases where there is joint legal custody, the father was awarded sole legal custody; that fact should not affect the child support determination. Although the award of sole legal custody to plaintiff allowed him to make important decisions in the children's lives, that decision-making authority does not increase his child-related costs. A parent's child-related costs are dictated by the amount of time he or she spends with the children, and, here, plaintiff spent no more time with the children than did defendant.

The Court also agreed with the defendant that the JHO failed to set forth the required reasons for the denial of her request for an award of counsel fees, and that the provision concerning counsel fees must therefore be vacated. There is a "rebuttable presumption that counsel fees shall be awarded to the less monied spouse" (Domestic Relations Law § 237[a]), and defendant was the less monied spouse. The JHO was thus required to articulate why defendant was not entitled to an award of counsel fees. It reversed that part of the judgment and remitted to Supreme Court to articulate its reasons

for its denial of an award of counsel fees to defendant or, in the alternative, to reconsider its determination.

Editors Note: In Rubin v. Salla, --- N.Y.S.2d ----, 2013 WL 1681220 (N.Y.A.D. 1 Dept.) the First Department rejected the rule that in an equally shared custody case the parent who has the greater income should be considered the noncustodial parent for purposes of support.

Appeal - Child Custody - Changed Circumstances During Pendency of Appeal - Order Reversed Where Changed Circumstances and Record No Longer Sufficient.

In Matter of Kennedy v Kennedy, --- N.Y.S.2d ----, 2013 WL 3242675 (N.Y.A.D. 4 Dept.) Petitioner father and the Attorney for the Children appealed from an order that awarded primary physical custody of the parties' two children to respondent mother. The Appellate Division decision stated that it was advised of facts and circumstances that had changed during the pendency of the appeal, and it therefore concluded that "the record before us is no longer sufficient for determining [the mother's] fitness and right" to primary physical custody of the children (Matter of Michael B., 80 N.Y.2d 299, 318). Specifically, in deciding the custody issue in the mother's favor, the court relied on evidence that the mother had become self-supporting and was living in her own apartment. It was now informed that the mother has since lost her job and her apartment and had moved in with her own mother. It therefor reversed the order and remitted the matter to Family Court for an expedited hearing on the issue whether the alleged change of circumstances affected the best interests of the children.

Supreme Court

**Equitable Distribution - Factors Considered - (12) Wasteful Dissipation of Assets by Either Spouse
- Wife Who Squandered Assets Had No Legal or Equitable Interest in What Was Now Plaintiff's Separate Property Acquired as a Result of Parties 2003 Oral Asset Division, and Was Awarded No Portion of the Plaintiff's Current Assets.**

In Christoper C. v Bonnie C., --- N.Y.S.2d ----, 2013 WL 3213082 (N.Y.Sup.) the divorce action was transferred to the Model Integrated Guardianship Part. The matrimonial case was commenced on January 27, 2009 by the plaintiff, Christopher C., against his wife, Bonnie C. During the course of that proceeding, after it became apparent that Mrs. C. was having difficulty processing issues and assisting her attorney, the judge suggested that an Article 81 Guardianship proceeding be initiated. Thereafter, in February 2011, the

defendant's brother Ronnie Atanasio filed an Article 81 petition seeking to be appointed as the guardian for his sister. On March 30, 2011, the Court conducted a guardianship hearing at which the defendant readily acknowledged her need for a guardian. After the hearing, the Court, with Mrs. C.'s consent, appointed the defendant's brother as her guardian. The guardian was given, inter alia, the power to participate in the divorce proceeding and to decide whether to negotiate a settlement or proceed to trial.

The Supreme Court observed that the Model Integrated Guardianship Part was established in 2005 by then Chief Judge Judith Kaye to extend the "one-family one-judge" approach successfully employed in Integrated Domestic Violence Parts to guardianship cases. The Model Part hears all court cases involving the alleged incapacitated person (i.e.: foreclosure actions, summary eviction proceedings, civil forfeiture proceedings, felony and misdemeanor criminal proceedings [including elder abuse], matrimonial actions, and any matter involving an order of protection) once a guardian has been appointed. While a guardian ad litem can be appointed in a matrimonial case to assist a party suffering from a mental or emotional difficulty, a guardian ad litem can only serve as an advisor to the party. A guardian (appointed pursuant to Mental Hygiene Law Article 81), however, can be given any power that the individual himself or herself possesses. This could include the power to decide whether to negotiate a settlement or proceed to trial in the matrimonial action.

The evidence at trial established that the parties were married on October 19, 1990. The plaintiff was currently 51 years old and the defendant was currently 56 years old. In 1990, the plaintiff suffered a back injury from a fall. In 1996 he was found by the Department of Social Services to be permanently partially disabled. He remained out of work from the time of his injury until 2000 when he became employed at L'egent International (defendant's brother's company) selling women's accessories. Since the time of his back injury, the plaintiff alleges he has lived in constant pain. The plaintiff stopped working for L'egent in 2008 and has not worked since. The defendant also worked at L'egent International from 2000-2003. She eventually was promoted and ran all overseas operations including purchasing, shipments and tracking. The parties lived a lavish lifestyle from 2000 to 2003. Together they had owned financial investments worth over one million dollars, a 50% interest in a beach house on Dune Road in West Hampton Beach worth approximately \$3,000,000.00, a 50% interest in a 48-foot Sea Ray boat purchased in 1999 for \$635,000.00, and Rolex watches worth over \$22,000.00. The plaintiff testified that his income dropped in August of 2008 when he stopped working for L'egent and became unemployed. Since that time, he paid his living expenses by drawing on two home equity loans established in 2006 and 2007, one for \$145,714.00 and the other for \$129,377.00, respectively.

The defendant apparently suffered from a variety of mental and emotional issues which her attorney and guardian argued had prevented her from presenting a cogent explanation for her past conduct. Although the defendant now vehemently denied any mental health issues, her conduct both on and off the witness stand established the

contrary. Determining the full extent and nature of the defendant's mental and/or emotional problems was extremely difficult given the fact that she consented to the guardianship, thereby obviating the need for a determination on the issue of her incapacity. Also, there was no medical or expert testimony offered concerning the state of the defendant's mental health. Thus, the court was left to rely on its own observations of the defendant's bizarre behavior during the trial, the defendant's squandering of over one million dollars in assets from 2003 to the present, her demonstrated lack of impulse control, and her consent to have a guardian appointed for her property, to discern the level of impairment caused by her mental and emotional difficulties.

The court found that the credible evidence established that the defendant had not worked since 2003 and was currently unable to do so due to her severe emotional and mental deficiencies. There was no evidence that the defendant received any income or has filed any individual tax returns after 2006. Her only reliable source of income was social security disability which she claimed was \$742.00 per month.

The plaintiff failed to present persuasive or competent proof of any present impairment that precluded employment. Although the plaintiff did not appear to have sufficient income, without working, to maintain the high standard of living he currently enjoyed and at the same time pay lifetime maintenance, he was responsible to support his wife who, the evidence established, could not support herself. This might necessitate that he become employed again. It was clear that the goal of economic independence is not a realistic one for this defendant given her mental and emotional difficulties.

The defendant had no assets of value and she squandered over \$1,000,000.00 between 2003 and the present. In 2011, the defendant filed for bankruptcy protection and was subsequently discharged. The credible evidence established that the plaintiff and defendant stopped living together in January 2003. At that time, when there was no question as to the defendant's capacity, the parties went to an attorney for assistance in dividing their assets. According to Mr. C., the attorney advised them that there was no need to reduce the agreement to writing. Thus, no written agreement was made. Their broker, a financial planner for Oppenheimer, testified that he was directed in a written letter signed by both parties in 2003, to divide all of the parties' brokerage accounts equally. The witness indicated that each party received approximately \$575,000.00. The parties' financial planner further testified that after the division of assets, pursuant to Mrs. C.'s direction, he began to transfer funds out of her personal brokerage account. Some monies were transferred to Mr. Koplan, the gentleman with whom the defendant resided at that time, while other sums were transferred into the defendant's personal bank account. The broker testified that Mrs. C. also had the broker transfer money directly to various family members and friends. In addition, the defendant purchased a timeshare, a deli and a mobile home. The broker testified that although he warned the defendant, she continued to deplete her assets. The defendant also purchased a home in Lindenhurst and a 50% interest in a home in Quogue. The credible evidence established that the Lindenhurst home was currently in foreclosure. No evidence regarding the Quogue home's value had

been submitted. Both homes were purchased with Mrs. C.'s remaining assets after the parties' 2003 separation. The Court found that the defendant had no legal or equitable interest in what was now the plaintiff's separate property acquired as a result of the parties 2003 asset division, and that defendant would receive no portion of the plaintiff's current assets. The court noted that it was not requiring the plaintiff to divide his brokerage accounts with the defendant as she had requested, nor was the Court granting the defendant an equitable interest in the former marital residence. The Court was, however, determined that under the circumstances presented here, in particular the defendant's inability to be self-supporting, it was necessary for the defendant to receive permanent maintenance.

The Court ordered that plaintiff pay non-durational permanent maintenance to the defendant of \$2,500.00 per month until the defendant was eligible to receive full social security benefits, the defendant's remarriage or the death of either party, beginning July 10, 2013, and by the 10th of each month thereafter; and directed plaintiff is directed to pay the defendant's attorney's fees of \$37,506.64 in addition to the amount of \$22,664.95 as previously awarded to the defendant for attorney's fees, to the defendant's attorney.

July 1, 2013

United States Supreme Court

Supreme Court Holds Defense of Marriage Act Unconstitutional as a Deprivation of the Equal Liberty of Persons That Is Protected by the Fifth Amendment

In *United States v. Windsor*, ___ U.S. ___ (2013) the State of New York recognized the marriage of New York residents Edith Windsor and Thea Spyer, who wed in Ontario, Canada, in 2007. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the federal estate tax exemption for surviving spouses, but was barred from doing so by §3 of the federal Defense of Marriage Act (DOMA), which amended the Dictionary Act—a law providing rules of construction for over 1,000 federal laws and the whole realm of federal regulations—to define “marriage” and “spouse” as excluding same-sex partners. Windsor paid \$363,053 in estate taxes and sought a refund, which the Internal Revenue Service denied. Windsor brought a refund suit, contending that DOMA violates the principles of equal protection incorporated in the Fifth Amendment. While the suit was pending, the Attorney General notified the Speaker of the House of Representatives that the Department of Justice would no longer defend §3's constitutionality. In response, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend §3's constitutionality. The District Court permitted the intervention. On the merits, the court ruled against the United

States, finding §3 unconstitutional and ordering the Treasury to refund Windsor's tax with interest. The Second Circuit affirmed.

The United States Supreme Court in an opinion delivered by Justice Kennedy, in which Justices Ginsburg, Breyer, Sotomayor, and Kagan, joined, held that DOMA was unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States. Congress has enacted discrete statutes to regulate the meaning of marriage in order to further federal policy, but DOMA, with a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations, has a far greater reach. Its operation is also directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect. Assessing the validity of that intervention requires discussing the historical and traditional extent of state power and authority over marriage. Subject to certain constitutional guarantees, see, e.g., *Loving v. Virginia*, 388 U. S. 1, "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States," *Sosna v. Iowa*, 419 U. S. 393. The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States," *Ohio ex rel. Popovici v. Agler*, 280 U. S. 379–384. Marriage laws may vary from State to State, but they are consistent within each State. DOMA rejects this long-established precept. The State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. But the Federal Government uses the state-defined class for the opposite purpose—to impose restrictions and disabilities. The question was whether the resulting injury and indignity was a deprivation of an essential part of the liberty protected by the Fifth Amendment, since what New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect. New York's actions were a proper exercise of its sovereign authority. They reflected both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

The Court held that by seeking to injure the very class New York seeks to protect, DOMA violates basic due process and equal protection principles applicable to the Federal Government. The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. DOMA cannot survive under these principles. Its unusual deviation from the tradition of recognizing and accepting state definitions of marriage operates to deprive same-sex couples of the benefits and responsibilities that come with federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of a class recognized and protected by state law. DOMA's avowed purpose and practical effect are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States. DOMA's history of enactment and its own text demonstrated that interference with the equal dignity of same-sex marriages, conferred by the States in the

exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. BLAG's arguments were just as candid about the congressional purpose. DOMA's operation in practice confirmed this purpose. It frustrated New York's objective of eliminating inequality by writing inequality into the entire United States Code. DOMA's principal effect was to identify and make unequal a subset of state-sanctioned marriages. It contrived to deprive some couples married under the laws of their State, but not others, of both rights and responsibilities, creating two contradictory marriage regimes within the same State. It also forced same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect.

United States Court of Appeals, Second Circuit

Treaties - Hague Convention on Civil Aspects of International Child Abduction - ICARA - Defenses - Grave Risk of Harm - Fundamental Freedoms - Evidence of Spousal Conflict Alone, Without a Clear and Convincing Showing of Grave Risk of Harm to the Child, Is Insufficient to Decline Repatriation

In *Souratgar v. Fair*, --- F.3d ----, 2013 WL 2631375 (C.A.2 (N.Y.)) Lee Jen Fair appealed the grant of a petition brought by her husband Abdollah Naghash Souratgar for repatriation of their son from New York to Singapore. In May 2012, Lee removed the boy to Dutchess County, New York, in direct violation of a Singapore court order. The District Court granted Souratgar's petition pursuant to the Hague Convention. (*Souratgar v. Lee Jen Fair*, No. 12 CV 7797(PKC), 2012 WL 6700214 (S.D.N.Y. Dec. 26, 2012). The Second Circuit affirmed rejecting her "grave risk of harm" and "fundamental freedoms' defenses.

Four-year-old Shayan, was born in Singapore in January 2009 to Lee and Souratgar, who were both residents of that country. Souratgar was an Iranian national who has owned a business in Singapore since 1989. Lee was a Malaysian national. She converted to Islam, Souratgar's faith, just prior to their marriage in Singapore in 2007. Shayan was a citizen of Malaysia with Malaysian and Iranian passports. At the district court hearing, the parties traded accusations and denials of domestic abuse. Souratgar accused Lee, among other things, of biting him, repeatedly threatening him with a knife and chopper, having suicidal tendencies, and inflicting injuries on herself. Lee asserted in her testimony more serious allegations-that Souratgar repeatedly slapped, beat, shook, and kicked her, and that he forced her to perform sex acts against her will. The district court found spousal abuse by Souratgar, including "shouting and offensive name-calling," and several incidents of physical abuse in which he "kicked, slapped, grabbed, and hit" . The district court found no credible evidence of any harm directed against the child. Both parties acknowledged

the other's love for Shayan, and was not disputed that the boy dearly loves both of his parents.

In April 2011, when Shayan was two, Lee filed an ex parte application in the Singapore High Court for sole custody. On May 16, the Subordinate Court of Singapore issued an ex parte order directing Souratgar to hand over Shayan's passports and personal documents to Lee and barring Souratgar from removing the child from Singapore without court approval and Lee's knowledge or consent. Souratgar complied with the order, denied Lee's charges, and cross-applied for sole custody. While the custody proceedings were pending in Singapore, Lee moved out of the marital home with Shayan and refused to disclose their whereabouts to Souratgar. He eventually found them in Malaysia, where Lee denied him access to the boy. Souratgar then filed a custody application in the Syariah Court of Malaysia, which granted joint custody to the couple in early July. Thereafter, Lee succeeded in obtaining a dismissal of that order from the Malaysian Syariah Court for lack of jurisdiction.

After Lee and Shayan returned to Singapore, the custody proceedings in Singapore's Subordinate Court resumed. Following a mediation session on July 14, 2011, the Subordinate Court barred either parent from removing Shayan from Singapore without the other's consent and ordered interim supervised visitation for Souratgar at Singapore's Centre for Family Harmony. Following another mediation session on February 16, 2012, both parties agreed to a consent order by the Subordinate Court to have custody decided by the Syariah Court of Singapore. In the meantime, Shayan remained in Lee's care, while Souratgar's visitation time was doubled. In late 2011, Lee had filed for divorce in Singapore's Syariah Court and used that proceeding to dismiss the temporary joint custody order of the Malaysian Syariah Court. On May 20, 2012, Lee removed Shayan from Singapore, in violation of the Singapore Subordinate Court's order.

Souratgar, through a private investigator, eventually located Lee and Shayan in Dutchess County, and on October 18, 2012 filed an ex parte application in the district court under the Convention for Shayan's return to Singapore. The district court heard testimony from nine witnesses over a nine-day evidentiary hearing, and on December 26, granted Souratgar's petition.

The Court of Appeals for the Second Circuit affirmed. The parties did not dispute either that Singapore was the country of Shayan's habitual residence or that his removal from Singapore was wrongful under the Convention. The issue on appeal was whether the two affirmative defenses that Lee raised under Articles 13(b) and 20 of the Convention precluded repatriation. Under Article 13(b), the judicial or administrative authority of the requested State is not bound to order the return of the child if [the party opposing repatriation] establishes that ... 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. Under Article 20, repatriation also "may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." The respondent parent opposing the

return of the child has the burden of establishing "by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies." 42 U.S.C. § 11603(e)(2)(A). Subsidiary facts may be proven by a preponderance of the evidence..

The Second Circuit observed that it reviews the district court's interpretation of the Convention de novo and its factual determinations for clear error. Its "review under the 'clearly erroneous' standard is significantly deferential." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 623 (1993). It must accept the trial court's findings unless it has a "definite and firm conviction that a mistake has been committed."

The Second Circuit rejected Lee's argument that returning Shayan to Singapore would expose him to "a grave risk" of "physical or psychological harm" or "otherwise place him in an intolerable situation" and that the district court's finding to the contrary was error. The harms he could face upon return, she asserted, were (1) exposure to spousal abuse; (2) direct abuse from his father; or (3) the loss of his mother. The Court found that Lee's arguments were permeated with conjecture and speculation and that there was no error in the district court's determination that Lee had failed to meet her burden to establish the Article 13(b) defense.

The Second Circuit held that under Article 13(b), a grave risk of harm from repatriation arises in two situations: "(1) where returning the child means sending him to a zone of war, famine, or disease; or (2) in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection." *Blondin IV*, 238 F.3d at 162. The potential harm to the child must be severe, and the level of risk and danger required to trigger this exception has consistently been held to be very high. The grave risk involves not only the magnitude of the potential harm but also the probability that the harm will materialize. This grave risk' exception is to be interpreted narrowly, lest it swallow the rule.

The Second Circuit indicated that while many cases for relief under the Convention arise from a backdrop of domestic strife spousal abuse is only relevant under Article 13(b) if it seriously endangers the child. The Article 13(b) inquiry is not whether repatriation would place the respondent parent's safety at grave risk, but whether so doing would subject the child to a grave risk of physical or psychological harm. The exception to repatriation has been found where the petitioner showed a sustained pattern of physical abuse and/or a propensity for violent abuse that presented an intolerably grave risk to the child. Evidence of prior spousal abuse, though not directed at the child, can support the grave risk of harm defense, as could a showing of the child's exposure to such abuse. Evidence of this kind, however, is not dispositive in these fact-intensive cases. Sporadic or isolated incidents of physical discipline directed at the child, or some limited incidents aimed at persons other than the child, even if witnessed by the child, have not been found to constitute a grave risk. In this case, the district court found that, while Lee was

subjected to domestic abuse on certain occasions, albeit less than she claimed, at no time was Shayan harmed or targeted.

The Court noted that it has held that Article 13(b) relief could be granted if repatriation posed a grave risk of causing unavoidable psychological harm to the child. See *Blondin IV*, 238 F.3d at 160-61 (affirming denial of petition to repatriate after an expert psychologist opined that returning the boy and girl to France, where they had been abused by their father, would likely trigger recurrence of PTSD, and that no arrangement could mitigate this risk). The holding in *Blondin IV* depended on the fact, due to the nature of the potential harm at issue, recurrence of PTSD that would occur as soon as the children entered France, there was nothing the courts could do to prevent it. In this case, there was nothing in the record beyond speculation that Shayan would suffer unavoidable psychological harm if returned to Singapore. Neither party nor the guardian ad litem requested a psychological evaluation of the boy, and the guardian ad litem reported, after observing Shayan's interactions with both parents and interviewing him separately, that the boy appeared to be an active and happy child, who seemed distressed about the difficulties between his parents. Shayan expressed unqualified love for both parents and indicated that he was never physically disciplined and never saw or heard either parent hit the other or try to hurt the other parent. In contrast, the girl in *Blondin IV* had herself been abused and expressed fear of her father. The circuit court cases affirming denial of repatriation cited by Lee were distinguishable in that the petitioning parent had actually abused, threatened to abuse, or inspired fear in the children in question. The Court emphasized that it on held " that in this case, the evidence, which did not match the showing in those cases, did not establish that the child faced a grave risk of physical or psychological harm upon repatriation.

Lee contended that the district court erred in discounting the likelihood that Shayan would be exposed to renewed domestic strife and suffer grievous psychological harm upon his return to Singapore. She also faulted the district court for refusing to credit expert testimony characterizing Souratgar as having a coercive and controlling personality type with a tendency to hurt women and children. At the hearing, the district court heard a psychological expert describe abusive spouses of the "coercive control" type and of the "situational" type and placed Souratgar in the former category. The coercive control type is said to demand domination and control and grows more dangerous upon separation from the victim. On this basis, the expert concluded that Souratgar still posed an "extreme danger" to Lee even though they had been estranged for more than a year. The experts assessment of Souratgar was based entirely on Lee's answers to a survey, which the district court found to contain inaccuracies. The district court therefore discredited the experts conclusions. There was no basis in the record for disagreement with the district court's finding.

The Second Circuit held that for it "to hold evidence of spousal conflict alone, without a clear and convincing showing of grave risk of harm to the child, to be sufficient to decline repatriation, would unduly broaden the Article 13(b) defense and undermine the central premise of the Convention: that wrongfully removed children be repatriated so that

questions over their custody can be decided by courts in the country where they habitually reside. Our holding today is not that abuse of the kind described by Lee can never entitle a respondent to an Article 13(b) defense; rather it depends on the district court's finding that Shayan would not be in danger of being exposed to a grave risk of physical or psychological harm and that the Singapore court system has demonstrated its ability to adjudicate the dispute over his custody." It found no clear error in the district court's finding that the facts did not indicate a grave risk of harm to the child in this particular instance.

Lee also contended that Shayan faced a direct risk of harm from his father, who, having been abusive to Lee, was also likely to turn on Shayan, citing the description of the "coercive control" type in the social science literature that draws certain correlations between perpetrators of spousal abuse and child abuse. However, given the problems with the experts methodology in type-casting Souratgar, the lack of any indicia of ill-will on the part of Souratgar toward Shayan, and contrary credited evidence of a loving father-son relationship, there was no clear and convincing showing that the boy faced a grave risk of harm from his father.

Lee also posited various scenarios in which the boy would be deprived of his mother post-repatriation. She claimed Souratgar may (a) resort to Syariah court proceedings in Singapore or Malaysia to win custody outright; (b) abscond with Shayan to Iran; or (c) expose her to the charge of apostasy (leaving the Muslim faith), a religious crime punishable by death in her home country of Malaysia. The district court dismissed these claims as lacking factual support. As an initial matter, the Second Circuit held that the court could not conclude that the prospect that one parent may lose custody of the child, post-repatriation, necessarily constitutes a grave risk to the child under the Convention. Since the Convention defers the determination of custody to courts in the country where the child habitually resides, it is quite conceivable that in some cases one or the other parent may lose legal custody after repatriation and be deprived of access to the child. Thus, the possible loss of access by a parent to the child does not constitute a grave risk of harm per se for Article 13(b) purposes. Even assuming that the prospect of the child losing his mother posed a grave risk to the child's well-being, there was no basis to disturb the district court's finding that Lee had not made a clear and convincing showing that any of the scenarios that she raised was likely to occur.

The Second Circuit pointed out that the Article 20 defense allows repatriation to be denied when it "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." This defense is to be "restrictively interpreted and applied." Article 20 is a unique formulation that embodies a political compromise among the states that negotiated the Convention, which might never have been adopted otherwise.. The defense is to be invoked only on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process. It is not to be used as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child

was removed. This defense has yet to be used by a federal court to deny a petition for repatriation.

Lee argued that Syariah Courts are incompatible with the principles "relating to the protection of human rights and fundamental freedoms" of this country. The Second Circuit declined to make this categorical ruling as a legal matter. Moreover, Lee failed to show that the issue of custody was likely to be litigated before Singapore's Syariah Court. Given that failure, it was not inclined to conclude simply that the presence of a Syariah Court in a foreign state whose accession to the Convention has been recognized by the United States is per se violative of "all notions of due process." It noted that such a holding would contradict the State Department's view expressed upon Singapore's accession as a bilateral partner under the Convention, that Singapore is a "role model" among states in the region. It was also mindful of the need for comity, as the careful and thorough fulfillment of our treaty obligations stands not only to protect children abducted to the United States, but also to protect American children abducted to other nations-whose courts, under the legal regime created by this treaty, are expected to offer reciprocal protection. In the exercise of comity, we are required to place our trust in the court of the home country to issue whatever orders may be necessary to safeguard children who come before it.

For all of the above reasons, it concluded that the district court did not err in rejecting Lee's Article 20 defense.

Appellate Division, Second Department

Appeals - Rare Remittal by Appellate Division, Second Department For Report

In *McCoy v McCoy*, --- N.Y.S.2d ----, 2013 WL 3024417 (N.Y.A.D. 2 Dept.), plaintiff appealed from stated portions of a judgment of the Supreme Court, which directed the defendant to pay child support in the sum of only \$321.10 per week, failed to award her arrears for pendente lite child support, directed that the former marital residence be listed for immediate sale or that the plaintiff be permitted to "buy out" the defendant's interest, directed that the plaintiff is solely responsible for that part of the balance of a home equity line of credit that exceeds \$34,000, and directed the equitable distribution of the parties' retirement accounts. Inasmuch as the record did reveal the Supreme Court's reasons for its choice not to include income above the statutory cap, the Appellate Division remitted the matter to Supreme Court, for the Supreme Court to set forth in a report the factors considered and the reasons for its determination as to child support, and the appeal was held in abeyance in the interim.

Equitable Distribution - Marital Residence - Valuation - Proper to Value Marital Residence Based upon Price for the Residence Set Forth in Listing Agreement That Had Been Entered into by the Plaintiff with a Realtor

In *Rubackin v Rubackin*, --- N.Y.S.2d ----, 2013 WL 3032397 (N.Y.A.D. 2 Dept.), the Appellate Division affirmed a judgment of the Supreme court which, after a nonjury trial, inter alia, awarded the defendant her entire pension as a distributive award, free of any claims by the plaintiff, determined that the defendant had validly exercised her right of first refusal to purchase the marital residence, and valued the marital home at \$479,000.

The Appellate Division found that contrary to the plaintiff's contention, the Supreme Court considered each of the statutory factors of Domestic Relations Law § 236(B)(5)(d) and adequately based its pension determination upon the defendant's role in recent years as the parties' primary wage earner and the primary caregiver to the parties' children. In addition, the Supreme Court properly considered the plaintiff's receipt of a \$2 million inheritance in arriving at its pension determination. It also found, contrary to the plaintiff's contention, the Supreme Court properly valued the marital residence at \$479,000, which was the price for the residence set forth in a listing agreement that had been entered into by the plaintiff with a realtor (citing generally *Taverna v. Taverna*, 56 AD3d 461; *Moody v. Moody*, 172 A.D.2d 730; *Wegman v. Wegman*, 123 A.D.2d 220). Moreover, the Supreme Court did not err in determining that the defendant had validly exercised her right of first refusal to purchase the marital residence at that price.

Agreements - Construction - College Education Provision - Absent a Provision to the Contrary, in Determining Parents' Respective Obligations Towards College, Court Should Not Take into Account Any College Loans for Which the Student Is Responsible

In *Bungart v. Bungart*, --- N.Y.S.2d ----, 2013 WL 2495826 (N.Y.A.D. 2 Dept.) plaintiff moved to have the Supreme Court direct the defendant to contribute toward the college expenses of the parties' children, including student loans which the children were responsible to repay, up to the monetary cap set forth in the parties' stipulation of settlement that was incorporated by reference but not merged into the judgment of divorce. The Supreme Court denied the motion, reasoning that the amounts of the student loans should be deducted from the college expenses that the parties were required to pay pursuant to the stipulation.

The Appellate Division reversed. It held that contrary to the Supreme Court's determination, in the absence of a clear and unambiguous provision to the contrary in the stipulation of settlement concerning the matter, 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. The parties' stipulation of settlement did not contain a clear and unambiguous provision expressly authorizing the deduction of the children's student loans from the college expenses toward which the parties were required to contribute. Accordingly, Supreme Court erred in denying the plaintiff's motion, and the matter was remitted for a hearing and determination as to the parties' respective obligations for college expenses.

Paternity - Family Ct Act § 516-a[b][ii] - Acknowledgment of Paternity - Acknowledgment Vacated for Mistake of Fact

In Matter of Oscar FX --- N.Y.S.2d ----, 2013 WL 2500583 (N.Y.A.D. 2 Dept.) \the Appellate Division reversed an order of the Family Court which, after a hearing, dismissed the petition to vacate an acknowledgment of paternity. It observed that a party seeking to vacate an acknowledgment of paternity more than 60 days after it was executed must establish that it was signed by reason of fraud, duress, or material mistake of fact (Family Ct Act § 516-a[b][ii]). If the petitioner satisfies this burden, the court is required to conduct a further inquiry to determine whether the petitioner should be estopped, in accordance with the child's best interest, from challenging paternity. The respondent conceded, the petitioner demonstrated that he executed the acknowledgment of paternity based upon a material mistake of fact. The petitioner testified that he and the respondent engaged in sexual relations during the relevant time period and that at the time he executed the acknowledgment of paternity, he thought that he was the child's father. The petitioner further testified that at the time he signed the acknowledgment, he was not aware that the respondent had another sexual partner during the relevant time period. The respondent's testimony confirmed that she had another sexual partner during the relevant time period. In addition, the respondent testified that she later received DNA test results which excluded the petitioner as the child's biological father. Consequently, the record established that the petitioner executed the acknowledgment of paternity due to a material mistake of fact. The petition was reinstated and the matter remitted to the Family Court for a hearing to determine whether the petitioner should be estopped, in accordance with the child's best interest, from vacating the acknowledgment of paternity.

Appellate Division, Third Department

Equitable Distribution - Award - Factors Considered - Any Other Factor Which the Court Shall Expressly Find to Be Just and Proper.

Maintenance - Award - Factors Considered - Any Other Factor Which the Court Shall Expressly Find to Be Just and Proper.

Third Department Holds That in Appropriate Circumstances Evidence of Egregious Economic Fault in Mismanaging, Dissipating and Wasting Separate Assets Can and Should Be Considered under The "just and Proper" Factor for Equitable Distribution and Maintenance

In Owens v Owens, --- N.Y.S.2d ----, 2013 WL 2631442 (N.Y.A.D. 3 Dept.), Plaintiff wife and defendant husband were married in 1985. At that time, the husband owned an apartment building in Manhattan as well as a one-half interest in real property located in Sullivan County, the marital residence, where the parties resided for the duration of their marriage. The husband inherited the other one-half interest in the marital residence in 1986, following his father's death. After the birth of the parties' first child in 1987, the husband gradually gave up his photography business, and the family lived on the income generated by the NYC rental property. A second child was born in 1993 and, in 1998, the wife earned a Bachelor's degree in nursing and obtained her license as a registered nurse. During the marriage, aside from very brief periods of employment, the wife was not employed as a nurse or otherwise. In 2007, the husband sold the NYC rental property for \$6 million and, thereafter, the family was supported by the proceeds.

The parties separated in 2008 and, in 2009, the wife commenced the action for divorce. In October 2010, the wife was granted pendente lite spousal support of \$3,500 per month and \$7,500 in interim counsel fees. At the time of the bench trial in March 2011, the parties' oldest child was emancipated and the youngest child, who had reached the age of 18, was residing with the husband in the marital residence. Following a trial the court adjudged both the NYC rental property and the marital residence to be the separate property of the husband, awarded him a 30% share of the wife's enhanced earning capacity as a nurse and awarded her a 40% share of the appreciation of the marital residence during the marriage which, when offset by the husband's enhanced earnings share, resulted in a net equitable distribution award to the wife of \$100,400. The court further awarded the wife maintenance of \$18,000 to be paid over a period of nine months, as well as additional counsel fees in the amount of \$25,000 and 40% of the \$335,000 of appreciation in the marital residence.

The Appellate Division affirmed Supreme Court's classification of the real property as separate property not subject to equitable distribution. It was undisputed that the husband purchased the NYC rental property in 1978-seven years prior to the marriage-for \$130,000 and, when he sold it for \$6 million in September 2007, he ultimately received \$4.6 million. The husband testified that he utilized an absentee management system wherein tenants of the rental units would communicate directly with maintenance and utility workers, and that the wife never had any involvement in managing the property. While the husband may have treated the rental income as marital income, the proceeds

from the sale of the property were wired to a bank account that was in his name only. The record fully supported Supreme Court's conclusion-crediting the husband's testimony-that this property constituted separate property. The court also properly concluded that the marital residence, which remained in the husband's name alone throughout the marriage, was his separate property. The husband did not challenge the court's determination that the wife was entitled to a share of the appreciation in value of the marital residence.

The Supreme Court found that the husband had wastefully dissipated his substantial separate property, but concluded that, because it was separate property, as distinguished from marital property, such dissipation was not encompassed in the statutory factors of Domestic Relations Law § 236(B); thus, the court did not consider this dissipation in its otherwise thorough determination of the wife's equitable distribution and maintenance awards. The Appellate Division agreed with the wife, however, that in appropriate circumstances evidence of egregious economic fault in mismanaging, dissipating and wasting separate assets can and should be considered under the statutory catchall "just and proper" factor for equitable distribution and maintenance. Considering that economic fault, which includes conduct that unfairly prevents the court from making an equitable distribution of marital property, has generally been considered relevant to the distribution, and that the catchall factors provide substantial flexibility to fashion an appropriate decree based on what is fair and equitable under the circumstances it concluded that, in compelling circumstances, a spouse's wasteful dissipation of his or her separate assets, may justly and properly be considered relevant to equitable distribution and maintenance.

By the time of the 2011 trial, most of the proceeds from the 2007 sale of the NYC rental property (\$4.6 million) had been spent or lost as a result of the husband's poorly made and/or mismanaged investments. His incredible losses within a relatively short period of time were not merely the product of market forces but, rather, were also attributable to his gross mismanagement and wasteful spending. The Appellate Division agreed with the court's finding that the husband wastefully dissipated millions of dollars of his separate property and was "extremely cavalier" about the condition of his investments. Supreme Court also found that there were numerous withdrawals of large sums of cash from the husband's accounts over the year leading up to the parties' separation, for which he offered no explanation. The evidence suggested that the husband's claimed poverty was contrived.

The Appellate Division modified the wife's maintenance award finding that her ability to be self-supporting must be considered within the context of the parties' predivorce standard of living. The parties' marital residence was a well-furnished, 4,500-square-foot home overlooking the Delaware River, situated on five acres of land, with superior amenities. Throughout the majority of their marriage, the parties and their children enjoyed a very comfortable lifestyle in a dwelling that was beyond the average home. It was not necessary for either party to be employed to sustain that lifestyle, and the husband conceded, at trial, that this more than comfortable lifestyle became lavish after he

sold the NYC rental property. By contrast, from the time of the parties' 2008 separation to the time of the 2011 trial, the wife was virtually without assets or a steady income. Although she had a 2004 Mercedes station wagon, it was not operable and needed extensive costly repairs, which she testified compounded her difficulty in finding suitable employment. She testified that she was without health insurance, owed her mother \$15,000, owed her attorney approximately \$49,000 and had only about \$1,000 in her checking account. Significantly, Supreme Court recognized that the maintenance award of \$2,000 per month for nine months was "insufficient" to meet the wife's basic monthly expenses while she prepared to reenter the nursing field. The husband, on the other hand, was collecting Social Security and held in excess of \$80,000 in documented assets in banks and in E-trade accounts at the time of trial. He owned a 2005 Mercedes that he had purchased in 2007 for \$42,000

and a 1995 Jaguar convertible with no stated value. Additionally, he held title to the marital residence-which was not encumbered by any mortgage or liens and was valued by the court at \$465,000-had paid over \$65,000 to his matrimonial attorneys and was virtually debt free. Its review of the record supported the conclusion that, under the circumstances of this case, the fact that the wife had the ability to be self-supporting by some standard of living did not mean that she was self-supporting in the context of the marital standard of living. In modifying this award we determine "the amount of earnings necessary to enable the [wife] to become self-supporting [by] ... reference to the standard of living of the parties, as well as the earning capacity of each party; and these factors carry more weight in [this] marriage of long duration" (Garvey v. Garvey, 223 A.D.2d 968, 970 [1996]). Imputing to the husband the substantial income that he would have earned had he not been so cavalier and wasteful in the manner in which he blatantly risked virtually all of his capital, and affording the wife more time to prepare for and find suitable employment, it extended the wife's maintenance award of \$2,000 per month for nine months to a period of 24 months, for a total of \$48,000. It also modified the award of equitable distribution-taking into account the parties' assets at the commencement of the action and the husband's economic fault-to award the wife 50%, rather than 40%, of the appreciation in the value of the marital residence. It decline to modify Supreme Court's award to the husband of 30% of the enhanced earnings attributable to the wife's nursing degree, as he encouraged her to pursue her dream, financed her education and was the primary caregiver for the children while she pursued her degree full time.

Supreme Court's finding that the husband was able to maintain his previous lifestyle with thousands of dollars in liquid assets, which conflicted with its rationale that he was unable to pay a more substantial portion of the wife's counsel fees, justified an increase in the award of counsel fees to the wife. Supreme Court found that the approximately \$64,000 in counsel fees incurred by the wife were "necessary based on the complexity of the issues" and warranted by her attorney's experience, ability and reputation. It awarded her an additional \$10,000 in counsel fees for a total of \$35,000 in counsel fees.

Appellate Division, Fourth Department

Fourth Department Holds Charging Lien of Attorney Has Priority over Wives Judgment for Counsel Fees, from Date of Commencement, in Clients Interest in Proceeds from Sale of the Marital Residence.

In *Schmitt v Schmitt*, --- N.Y.S.2d ----, 2013 WL 2670888 (N.Y.A.D. 4 Dept.) The Appellate Division rejected plaintiff's contention that Supreme Court erred in awarding defendant durational maintenance of \$16,833.75 per year for 10 years. The court providently exercised its discretion in making that award to allow defendant the opportunity to become self-supporting after 25 years of marriage during which she was the stay-at-home parent . It also rejected plaintiff's further contention that the court erred in failing to subtract maintenance payments from his income for the purpose of calculating his child support obligation. The relevant statute provides that maintenance paid or to be paid should be subtracted from the payor's income only where "the order or agreement provides for a specific adjustment ... in the amount of child support payable upon the termination of alimony or maintenance" (Domestic Relations Law 240[1-b][b][5][vii][C]). Here, the judgment did not provide for an automatic adjustment of child support upon the termination of maintenance, and such an adjustment was not warranted because plaintiff's maintenance obligation would outlast his child support obligation.

The Appellate Division agreed with plaintiff, however, that the court erred in concluding that defendant met her burden of establishing that the parties' third eldest child was emancipated during the time she resided with plaintiff in 2011. Although the child in question worked two jobs in 2010, defendant did not submit any evidence regarding the child's income in 2011. The fact that plaintiff paid for the subject child's rent and utility costs demonstrated that the child was not economically independent and self-supporting. Inasmuch as the record was insufficient for us to determine defendant's child support obligation it modified the judgment in appeal by vacating the paragraphs relating to plaintiff's child support obligation, and remitted the matter to Supreme Court for consideration of defendant's child support obligation and for a recomputation of the parties' respective child support obligations, following a hearing if necessary.

The Appellate Division agreed with plaintiff that the court failed to set forth the statutory factors it relied upon in allocating all of the marital debt to him. In distributing debt, a court is required to consider the factors set forth in Domestic Relations Law § 236(B)(5)(d) and to state the factors that influenced its decision in accordance with section 236(B)(5)(g). It remitted the matter to Supreme Court for further consideration of that issue, including a hearing if necessary.

Finally, it agreed with plaintiff that the court erred in failing to afford the charging lien of his attorney priority in plaintiff's interest in the proceeds from the sale of the

marital residence over the judgment awarding defendant attorney's fees. Although plaintiff's attorney did not timely file the retainer agreement as required by 22 NYCRR 1400.3, it is the right of the client, not the adversary spouse, to assert noncompliance with those rules as a basis for refusing to pay attorney's fees. The record established that plaintiff submitted an affidavit waiving his attorney's compliance with that filing requirement. It therefore concluded that the court erred in determining in the context of plaintiff's posttrial motion that plaintiff's attorney did not have a charging lien with priority from the date of commencement of the action (see Judiciary Law §475). Thus, the court erred in directing plaintiff's attorney to satisfy the judgment filed on January 17, 2012 with respect to the attorney's fees of defendant from plaintiff's share of the proceeds of the sale of the marital residence, which was held in the attorney trust account of plaintiff's attorney.

Supreme Court

Child Support - Award - Income - Deductions - Drl § 240(1-b)(B)(5)(Vii)a - Union Dues Qualify as a Deduction under Subsection (A), "Unreimbursed Employee Business Expenses Except to the Extent Said Expenses Reduce Personal Expenditures but Court must Also Determine If "Said Expenses Reduce Personal Expenditures."

In *Hatlee v Hatlee*, --- N.Y.S.2d ----, 2013 WL 2996127 (N.Y.Sup.) on June 25, 2012, the plaintiff Shane Hatlee commenced an action for divorce. The Supreme Court, in a decision after trial held that union dues paid by Mr. Hatlee should not be deducted from Mr. Hatlee's gross income prior to calculating Mr. Hatlee's income for child support purposes.

Mr. Hatlee was employed at Mohawk Fine Papers and paid monthly union dues to the United Steel Workers of between \$60.00 and \$80.00 per month depending on the number of hours Mr. Hatlee worked. The Court observed that Domestic Relations Law § 240(1-b) sets forth the methodology the Court must follow to determine the non-custodial parent's child support obligation. Pursuant to DRL § 240(1-b)(b)(5) income for support purposes "shall mean, but shall not be limited to, the sum of the amounts determined by the application of clauses (i), (ii), (iii), (iv), (v) and (vi) of this subparagraph reduced by the amount determined by the application of clause (vii) of this subparagraph." The delineated clause (vii) deductions do not specify union dues, and union dues do not fall under DRL §§ 240(1-b)(b)(5)(vii)(B), (C), (D), (E), (F), (G), or (H). DRL § 240(1-b)(b)(5)(vii) does not provide for any additional deductions nor does it contain a catch all "other" category left to the Court's discretion. The Court concluded that union dues qualify as a deduction under subsection (A), "unreimbursed employee

business expenses except to the extent said expenses reduce personal expenditures." The Court found it appropriate to look to IRS regulations and publications for guidance as to how union dues are treated for tax purposes. It noted that the IRS defines unreimbursed employee expenses (subject to limitations) as those expenses (1) that are paid or incurred during the individual's tax year; (2) that are for carrying on the individual's trade or business of being an employee; and, (3) that are ordinary and necessary. See, IRS Publication 529, Miscellaneous Deductions [2012 Returns]. The IRS defines an expense as ordinary if "it is common and accepted in your trade, business, or profession" and defines an expense as necessary "if it is appropriate and helpful to your business." An expense "does not have to be required to be considered necessary." Thus, union dues may be considered (subject to restrictions not relevant herein) by the IRS as unreimbursed employee expenses. For purposes of determining whether union dues are deductible under DRL §240(1-b)(b)(5)(vii)(A), however, the Court must do more than apply the IRS criteria. To conclude that the expenses are deductible, the Court must also determine if "said expenses reduce personal expenditures." DRL § 240(1-b)(b)(5)(vii)(A).

The Court found that the ability to deduct union dues for purposes of calculating an individual's income for child support purposes must be determined on a case by case basis. As Mr. Hatlee was the party who benefitted if union dues were deducted from his earnings for purposes of calculating his child support obligation, he had the burden of proof on this issue. Mr. Hatlee offered insufficient evidence to substantiate a claim for a deduction for union dues. Accordingly, the Court would not reduce Mr. Hatlee's income for child support purposes by the amount Mr. Hatlee paid for union dues.

Family Court

Family Court Directs E-mail Service of the Proceeding upon Respondent in Custody Case as Reasonably Calculated to Inform Him of the Proceeding Where He Had Recently Communicated with His Children Using His E-mail Address

In Matter of N.Z. v. A.G., --- N.Y.S.2d ----, 2013 WL 3013674 (N.Y.Fam.Ct.) the petitioner-mother filed a petition on May 3, 2013, pursuant to Article 6 of the Family Court Act and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), seeking to modify the parties' October 21, 2002 divorce decree from the Court of Common Pleas, Division of Domestic Relations, in Ohio. The mother seeks an award of sole legal custody for the minor children L. G., J. G.; and L.G. The mother made an application for an alternative means of service on the respondent-father who had been been deported from

the United States and Canada and forbidden to enter the United States. His exact whereabouts were unknown. Prior attempts at personal service were made during a 2011 custody proceeding which was dismissed without prejudice for lack of personal jurisdiction on the respondent. The respondent had allegedly made contact with the minor children via e-mail in the past three months.

Family Court observed that CPLR 308 (5) allows alternative means of service if traditional service is deemed impracticable by the Court. In a recent decision, the Appellate Division, Fourth Department held that service by e-mail was permissible in a matrimonial case where the defendant was living in Iran and ordinary attempts at personal service were ineffectual. (*Safadjou v. Mohammadi*, 105 AD3d 1423) The Fourth Department held that e-mail service was reasonably calculated to apprise the defendant of the pending proceeding and noted that there was no express prohibition against this form of service in state or federal law. Here, the Court found that personal service by personal delivery or mail was impracticable due to unknown whereabouts of the respondent. The Court further found that e-mail service of the proceeding upon the respondent was reasonably calculated to inform him of the proceeding inasmuch as he had recently communicated with his children using his e-mail address. The court ordered that that service of process via electronic mail at the respondent's most recent e-mail address on or before May 18, 2013 was deemed acceptable.

June 17, 2013

Court of Appeals

Agreements - Prenuptial - Validity - Domestic Relations Law § 236 (B) (3) - Court of Appeals Holds That Because Affidavit of Notary Was Insufficient to Raise a Question of Fact Precluding Summary Judgment the Court Did Not Need to “Definitively Resolve the Question of Whether a Cure Is Possible” Where There Is Omission in the Requisite Language of the Certificate of Acknowledgment, Signatures on the Prenuptial Agreement Are Authentic, and No Claims of Fraud or Duress.

In *Galetta v Galletta*, __NY3d__, 2013 WL 2338421 (2013) a matrimonial action, plaintiff Michelle Galetta sought a determination that a prenuptial agreement she and defendant Gary Galetta signed was invalid due to a defective acknowledgment. The Court

of Appeals concluded that plaintiff was entitled to summary judgment declaring the agreement to be unenforceable under Domestic Relations Law § 236B(3), and reversed the order of the Appellate Division, which held there was a triable question of fact on that issue.

Michelle Galetta and Gary Galetta were married in July 1997. About a week before the wedding, they each separately signed a prenuptial agreement. Neither party was present when the other executed the document and the signatures were witnessed by different notaries public. The parties' signatures and the accompanying certificates of acknowledgment were set forth on a single page of the document. The certificates appeared to have been typed at the same time, with spaces left blank for dates and signatures that were to be filled in by hand. The certificate of acknowledgment relating to Michelle's signature contained the boilerplate language typical of the time. However, in the acknowledgment relating to Gary's signature, a key phrase was omitted and, as a result, the certificate failed to indicate that the notary public confirmed the identity of the person executing the document or that the person was the individual described in the document.

The Court of Appeals, in an opinion by Judge Graffeo, observed that Prenuptial agreements are addressed in Domestic Relations Law § 236B(3), which provides: "An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded." In *Matisoff v. Dobi* (90 N.Y.2d 127 [1997]), where it held that an unacknowledged postnuptial agreement was invalid, the Court observed that the statute recognizes no exception to the requirement that a nuptial agreement be executed in the same manner as a recorded deed and "that the requisite formality explicitly specified in DRL 236B(3) is essential" (*id.* at 132, 659 N.Y.S.2d 209, 681 N.E.2d 376). Judge Graffeo noted that Real Property Law § 291, governing the recording of deeds, states that "[a] conveyance of real property ... on being duly acknowledged by the person executing the same, or proved as required by this chapter, ... may be recorded in the office of the clerk of the county where such real property is situated." Thus, a deed may be recorded if it is either "duly acknowledged" or "proved" by use of a subscribing witness. The Court pointed out that an acknowledgment serves to prove the identity of the person whose name appears on an instrument and to authenticate the signature of such person and it imposes on the signer a measure of deliberation in the act of executing the document. The Court noted in *Matisoff* that the acknowledgment requirement imposed by Domestic Relations Law § 236B(3) is onerous and, in some respects, more exacting than the burden imposed when a deed is signed. Although an unacknowledged deed cannot be recorded (rendering it invalid against a subsequent good faith purchaser for value) it may still be enforceable between the parties to the document (i.e., the grantor and the purchaser). The same is not true for a nuptial agreement which is unenforceable in a matrimonial action, even when the parties acknowledge that the signatures are authentic and the agreement was not tainted by fraud or duress.

In the certificate of acknowledgment relating to the husband's signature, the "to me known and known to me" phrase was omitted, leaving only the following statement: "On the 8[sic] day of July, 1997, before me came Gary Galetta described in and who

executed the foregoing instrument and duly acknowledged to me that he executed the same." Absent the omitted language, the certificate does not indicate either that the notary public knew the husband or had ascertained through some form of proof that he was the person described in the prenuptial agreement. As New York courts have long held that an acknowledgment that fails to include a certification to this effect is defective, the Court agreed the Appellate Division, which unanimously concluded that the certificate of acknowledgment did not conform with statutory requirements.

Because the certificate of acknowledgment was defective, the Court of Appeals addressed the questions of (1) whether such a deficiency can be cured and, if so, (2) whether the affidavit of the notary public prepared in the course of litigation was sufficient to raise a question of fact precluding summary judgment in the wife's favor. Because the affidavit of the notary was insufficient to raise a question of fact precluding summary judgment the Court did not need to "definitively resolve the question of whether a cure is possible".

Judge Graffeo observed that in *Matisoff*, the Court found it was unnecessary to decide whether the absence of an acknowledgment could be cured. Since *Matisoff*, the Appellate Divisions have grappled with the "cure" issue, which has largely arisen in cases where a signature was not accompanied by any certificate of acknowledgment and the weight of Appellate Division authority is against permitting the absence of an acknowledgment to be cured after the fact, unless both parties engaged in a mutual "reaffirmation" of the agreement. When there is no acknowledgment at all, it is evident that one of the purposes of the acknowledgment requirement—to impose a measure of deliberation and impress upon the signer the significance of the document—has not been fulfilled. Thus, a rule precluding a party from attempting to cure the absence of an acknowledgment through subsequent submissions appeared to be sound. However, because this case did not involve the complete absence of an acknowledgment - there was an attempt to secure an acknowledged document but there was an omission in the requisite language of the certificate of acknowledgment - the Court noted that a compelling argument could be made that the door should be left open to curing a deficiency like the one that occurred here where the signatures on the prenuptial agreement are authentic, there are no claims of fraud or duress, and the parties believed their signatures were being duly acknowledged but, due to no fault of their own, the certificate of acknowledgment was defective or incomplete. The Court observed that the husband made a strong case for a rule permitting evidence to be submitted after the fact to cure a defect in a certificate of acknowledgment when that evidence consists of proof that the acknowledgment was properly made in the first instance—that at the time the document was signed the notary or other official did everything he or she was supposed to do, other than include the proper language in the certificate. By considering this type of evidence, courts would not be allowing a new acknowledgment to occur for a signature that was not properly acknowledged in the first instance; instead, parties who properly signed and acknowledged the document years before would merely be permitted to conform the certificate to reflect that fact. In this case, however, the proof submitted

was insufficient. In his affidavit, the notary public did not state that he actually recalled having acknowledged the husband's signature, nor did he indicate that he knew the husband prior to acknowledging his signature. The notary averred only that he recognized his own signature on the certificate and that he had been employed at a particular bank at that time (corroborating the husband's statement concerning the circumstances under which he executed the document). As for the procedures followed, the notary had no independent recollection but maintained that it was his custom and practice "to ask and confirm that the person signing the document was the same person named in the document" and he was "confident" he had done so when witnessing the husband's signature. The affidavit by the notary public in this case merely paraphrased the requirement of the statute—he stated it was his practice to "ask and confirm" the identity of the signer—without detailing any specific procedure that he routinely followed to fulfill that requirement. Even assuming a defect in a certificate of acknowledgment could be cured under Domestic Relations Law § 236B(3), defendant's submission was insufficient to raise a triable question of fact as to the propriety of the original acknowledgment procedure. Plaintiff was therefore entitled to summary judgment declaring that the prenuptial agreement was unenforceable.

Appellate Division, First Department

Neglect- Fact Finding Hearing - Evidence - Family Court Permitted Child to Testify Outside of Respondent's Presence Subject Contemporaneous Cross-examination by Respondent's Attorney

In *Matter of Moona C.*, --- N.Y.S.2d ----, 2013 WL 2476795 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order of the family court which found that respondent mother neglected the subject children. It held that Family Court properly permitted one of the children to testify at the fact-finding hearing in camera. The court properly balanced respondent's due process rights with the emotional well-being of the child by permitting the child to testify outside of respondent's presence but subject to contemporaneous cross-examination by respondent's attorney following consultation with respondent (see *Matter of Giannis F. [Vilma C.-Manny M.]*, 95 AD3d 618, 618 [1st Dept 2012]; *Matter of Hadja B.*, 302 A.D.2d 226 [1st Dept 2003]). The affidavit of the social worker submitted in support of the application sufficiently established the potential trauma to the child, which would likely interfere with her ability to testify accurately and without inhibition concerning the allegations of excessive corporal punishment.

Appellate Division, Second Department

Custody - Award - Fact Hearing - Evidence - Medical Records Subpoena - Custody Award Reversed Where Court Refused to Sign Subpoena for Medical Treatment Records Necessary to Rebut Allegations Against Mother.

In Matter of Murphy v. Lewis, --- N.Y.S.2d ----, 2013 WL 2321682 (N.Y.A.D. 2 Dept.) Family Court, after a hearing, granted the father's petition for physical custody of the subject child and denied her cross petition for physical custody of the subject child. The Appellate Division held that under the particular facts of this case, the Family Court improvidently exercised its discretion when it did not sign a subpoena proffered by the mother so as to permit her the opportunity to present certain medical treatment records to rebut the allegations asserted against her. The medical treatment records were relevant to the issue of whether an award of physical custody to the father was in the best interests of the child, and should have been considered by the Family Court (cf. Matter of Roldan v. Nieves, 51 AD3d 803, 805). Under the circumstances of this case, it remitted the matter to the Family Court for a new hearing and a new determination of the petition and the cross petition.

Child Custody - Award - Custody to Mother Reversed Where Family Court Failed to Give Sufficient Weight to the Forensic Mental Health Evaluation, Which Indicated That the Mother Was Not Suitable for Physical Custody of the Children and to its Own Finding That it Was in the Children's Best Interests for Them to Remain Away from Her Paramour.

In A.-S. v. A.-S.,--- N.Y.S.2d ----, 2013 WL 2420776 (N.Y.A.D. 2 Dept.) the parties were married in October 2005 and had two young daughters. After the parties separated, the mother left the parties' children in the father's care, and began residing with a man named Thomas Sherlock. The father subsequently petitioned for sole legal custody of the children and separately filed family offense petitions against the mother. The father contended that the mother was in a relationship with Sherlock and that he posed a threat to the safety and well-being of the subject children. He asserted that Sherlock, who was 19 years older than the mother, had engaged in an inappropriate relationship with the mother beginning after Sherlock first contacted her in an internet chatroom when the mother was only 12 years old. The father further asserted that Sherlock was the subject of a founded report in connection with allegations that he engaged in sexually abusive acts with his former stepdaughter when she was 14 years old. The father testified that, given the mother's relationship with Sherlock (they were engaged to be married at the time of the hearing), the children were

consistently exposed to him and routinely left alone in his care. The mother cross-petitioned for sole physical custody of the subject children.

At the hearing the mother acknowledged that she first came into contact with Sherlock in an internet chatroom when she was 12 years old in the 1990s, and that the two met in person at a doughnut shop when she was approximately 16 years old. The mother testified that she and Sherlock stayed in contact and continued to maintain a relationship until the present day. Sherlock also testified at the hearing, and although he acknowledged forming a relationship with the mother when she was 12 years old, he asserted that it did not become sexual until after she turned 18 years old. Sherlock denied sexually abusing his former stepdaughter. Sherlock additionally claimed that he was never left alone with the children and that he only occasionally would help to feed them. A forensic mental health evaluation prepared by a psychologist affiliated with Westchester Jewish Community Services substantiated the father's claim that a founded report had been filed against Sherlock, in which Sherlock was alleged to have engaged in inappropriate sexual acts with his then 14-year-old stepdaughter. The evaluation revealed that both the mother and Sherlock exhibited a "dismissive attitude" with regard to Sherlock's inappropriate relationship with the mother when she was 12 years old and to the founded report. The evaluation concluded that "the presence of Mr. Sherlock in [the mother's] home ... renders [the mother] not suitable for physical residence."

After the hearing, the Family Court granted the mother's cross petition for sole physical custody, but directed that the mother "shall not permit the Subject Children to be in the presence of Mr. Thomas Sherlock unless the subject children are supervised at all times by the Respondent or any other adult approved by the Respondent/Mother."

The Appellate Division held that under the circumstances of this case, the Family Court should have granted the father's petition for custody and denied the mother's cross petition. In awarding the mother custody, the Family Court gave undue weight to its finding that the mother would be more likely than the father to foster a meaningful relationship between the children and the noncustodial parent. Furthermore, the Family Court failed to give sufficient weight to the forensic mental health evaluation, which indicated that the mother was not suitable for physical custody of the children and to its own finding that it was in the children's best interests for them to remain away from Sherlock at all times. It held that under the totality of the circumstances, including the founded concerns with respect to Sherlock and the attendant risk his relationship with the mother posed to the safety and well-being of the subject children, the best interests of the children would be served by awarding the father sole physical custody.

Maintenance - Award - Denied - Supreme Court Properly Denied Wife Maintenance Where She Was Employed and Self-supporting Before Marriage, Continued to Work During and

after the Marriage, Marriage Short Duration, and Parties Generally Kept Finances Separate.

In Szewczuk v Szewczuk, --- N.Y.S.2d ----, 2013 WL 2421012 (N.Y.A.D. 2 Dept.) Supreme Court granted the defendant's application for a distributive award based on the appreciation in value of the marital residence, and denied the plaintiff's applications for maintenance and an award of an attorney's fee. The Appellate Division held that Supreme Court providently exercised its discretion in denying her request for maintenance. The plaintiff was employed and self-supporting before the marriage and continued to work during and after the marriage. Moreover, the marriage was of short duration, and the parties generally kept their finances separate. However, Supreme Court improvidently exercised its discretion in denying the plaintiff's application for an award of an attorney's fee. An award of an attorney's fee pursuant to Domestic Relations Law § 237(a), a matter within the sound discretion of the trial court, is controlled by the equities and circumstances of each particular case. Here, in light of, inter alia, the disparity in the parties' incomes, an award of an attorney's fee in the sum of \$15,818, one quarter of the attorney's fee incurred by the plaintiff, was appropriate.

While the marital residence was the plaintiff's separate property, the Supreme Court directed the plaintiff to pay the defendant the sum of \$102,500 as a distributive award based on the appreciation in value of the marital residence that was attributable to the efforts of both parties in physically improving the property during the marriage. Although the defendant's counsel noted at trial that the defendant's distributive award based on the appreciation of the marital residence should be reduced by the defendant's equitable share of the marital debt incurred in financing the improvements to the residence, the Supreme Court improperly failed to do so . It modified judgment by deleting the provision thereof directing the plaintiff to pay the defendant \$102,500 as a distributive award based on the appreciation in value of the marital residence, and substituted a provision directing the plaintiff to pay the defendant \$60,000 as a distributive award based on the appreciation in value of the marital residence.

Appellate Division, Third Department

Maintenance - Award - Denied - Supreme Court Abused its Discretion by Awarding the Wife Maintenance -

Equitable Distribution - American Express Reward Points Accumulated During Marriage Should Have Been Distributed

Equitable Distribution - Factors Considered - (12) the Wasteful Dissipation of Assets by Either Spouse

- Husband's Minor Legal Expenses, and Expenditures on Paramour and Their Child Incurred after the Date of Commencement, Did Not Constitute Wasteful Dissipation of Marital Assets.

In *Mc Caffrey v Mc Caffrey*, --- N.Y.S.2d ----, 2013 WL 2435296 (N.Y.A.D. 3 Dept.) the parties were married in 1999. In late 2010, plaintiff (husband) commenced the action and the parties subsequently consented to a no-fault divorce. The parties stipulated to the value of the marital home and the division of certain marital property and the action proceeded to a nonjury trial for resolution of the remaining maintenance and equitable distribution issues.

The Appellate Division agreed with the husband that Supreme Court abused its discretion by awarding the wife maintenance. It observed that the primary purpose of maintenance is to encourage self-sufficiency by the recipient and maintenance is appropriate where ... 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. Here, the parties' marriage was not of particularly long duration (12 years), and they had no children together. When the action was commenced, the husband was 52 years old and the wife was 42 years old. Both parties were in good health and were gainfully employed, with the husband earning an annual salary of approximately \$113,000 and the wife earning an annual salary of \$65,000. In addition, the wife had separate property consisting of \$66,000 in a trust account and \$27,000 in savings bonds, both of which she testified were in her name but had been set aside by her parents for their elder care. Supreme Court found that both parties were self-supporting, and they stipulated to an equal division of their retirement and deferred compensation plans and neither party lost health insurance as a result of the divorce. The wife correctly noted that "[t]he fact that [she] 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". However, the determination of an appropriate maintenance award requires a delicate balance of each party's needs and means or ability to pay. The record demonstrated that the parties' relatively high predivorce standard of living would not have been sustainable without the significant credit card debt. The parties refinanced the marital residence, relying on much of its equity to reduce their debt. Supreme Court gave inadequate consideration to the balancing of the wife's needs-for which her own salary should provide adequate support-with the husband's ability to pay.

Moreover, the husband's alleged wasteful dissipation of marital assets as a ground for awarding maintenance was not supported by the record. The husband's minor legal expenses (around \$1,100) associated with his defense of a criminal charge did not constitute wasteful dissipation of marital assets (see *Kohl v. Kohl*, 24 AD3d 219, 219 [2005]). The record also demonstrated that the husband's expenditures on his paramour and their child-who was conceived during the husband's marriage to the wife and born

while the action was pending-were incurred after the date of commencement. The record reflected that the husband gambled only a few times during the parties' marriage, spent no more than \$2,000 and broke even on all accounts, which did not rise to the level of wasteful dissipation. Although the wife accused the husband of incurring significant credit card debt without her knowledge, he testified that all of the charges-including those on his personal credit cards-were made for marital, household and work-related expenses. The wife did not rebut this testimony and, thus, the parties' credit card debt, including that charged on the husband's credit cards, was marital debt rather than wasteful dissipation of marital assets.

The Appellate Division held that under the circumstances of this case, where the marriage was not of particularly long duration, the parties had no children, the wife had stable employment that provided her a significant salary, the wife was not losing retirement or health benefits and the parties' predivorce standard of living was falsely inflated by overextended lines of credit, the statutory factors did not support an award of maintenance.

The Appellate Division agreed with the husband that Supreme Court erred by ordering him to pay the wife \$37,110, half of the money that the parties borrowed against their equity in their marital residence. In 2010, the parties refinanced the marital residence and borrowed approximately \$74,000 against that equity to pay their outstanding credit card balances.. Supreme Court found that the husband took the proceeds of this refinance and spent it entirely on personal expenses, gambling and his paramour and, as a result, it ordered him to pay the wife half of the refinance proceeds. However, the parties' credit card statements established that the refinancing proceeds were actually used by the husband to pay off the outstanding marital credit card balances.

During the marriage, the husband earned an Associate's degree in telecommunications and a Bachelor's degree in business administration with a minor in accounting. He received numerous promotions throughout the marriage, eventually holding the title of director of a department relevant to his degrees. The Appellate Division found no error in Supreme Court's distribution of the enhanced earning capacity created by the husband's two college degrees, and rejected the husband's arguments that the wife failed to prove that the degrees resulted in enhanced earnings or that she substantially contributed to their attainment. To be entitled to a share of the value of the husband's degrees, the wife must demonstrate that the degrees enhanced the husband's earning capacity and that she, in a meaningful and substantial way, contributed to his efforts in obtaining them. Richard Jones, a jointly retained consultant, opined that the value of the enhanced earnings attributable to the husband's degrees at the date of commencement was \$204,000. Supreme Court found that 25% (\$51,000) of that value constituted separate property and, further, that only 50% (\$76,500) of the husband's enhanced earning potential was traceable to his degrees. The court awarded the wife 15% of that amount, totaling \$11,475. In addition to Jones' expert opinion, evidence of the enhanced earnings included an evaluation in his personnel file that remarked on the

beneficial effect that his degrees had on his employment and the fact that he included his degrees on every promotion application. Although two witnesses from the husband's employment testified that his degrees were not required for his promotions and that his promotions were mostly attributable to his superior job performance, neither witness testified that his degrees were not a factor in his promotions. Accordingly, Supreme Court arrived at a determination that was supported by the credible evidence introduced at trial. The Appellate Division rejected the argument of the husband that the wife failed to prove that she contributed in a substantial way to his attainment of the degrees, which depends on whether she "altered ... her schedule and/or took on additional household duties that ... she would not have otherwise performed, in order to enable [the husband] to obtain the ... degree[s]" (Quarty v. Quarty, 96 AD3d at 1277). The wife testified that while the husband was in school, she rearranged her schedule, transported him to and from classes, and assumed a greater share of the household responsibilities, and she averred that part of the husband's tuition was paid for by marital funds. Accordingly, it could not not say that Supreme Court abused its discretion in finding that the wife contributed to the husband's degrees. The wife's assertion that Supreme Court erroneously distributed to her only a limited percentage of the husband's enhanced earning value is was without merit. Where only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree 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. The husband expended significant effort in obtaining his degrees; he attended night classes while working full time, and occasionally at a part-time second job. Moreover, much of his professional success was attributable to his superior job performance. Thus, Supreme Court's limited distribution to the wife of only 15% of the enhanced earnings was well within its discretion.

The Appellate Division held that it was error to order the wife to reimburse the husband for the full amount of the monthly mortgage payments through the pendency of this action. The wife moved out of the residence in late November 2010, prior to the commencement of this action; from that point on, the husband, his paramour and their child together had exclusive use and occupancy of the home. Accordingly, the husband should only have been reimbursed for one half of the amount by which the mortgage principal has been reduced..

Additionally, the parties' 180,000 American Express reward points that were accumulated during the marriage should have been distributed equally between them (Hale v. Hale, 16 AD3d 231, 235 [2005]).

Child Support - Enforcement - Family Court Has Continuing Jurisdiction to Determine Enforcement Applications by the Support Collection Unit on Behalf of Persons" Who

Receive Child Support Pursuant to a Court Order. The SCU Is Tasked with Collecting Those Funds from the Obligor and Ensuring That They Are Properly Accounted For.

In Chemung County Support Collection Unit ex rel. Perry v. Greenfield, --- N.Y.S.2d ----, 2013 WL 2338736 (N.Y.A.D. 3 Dept.) a 2006 order of Family Court required respondent to pay \$114 a week child support for her three children (born in 1985, 1987 and 1990). After respondent accrued over \$30,000 in arrearages on her support obligation, petitioner obtained over \$5,000 in income tax refunds due to her and disbursed them to the children's father (42 USC § 664; Social Services Law §§ 111-b [15]; 111-h; Tax Law § 171-i). Respondent's current husband then claimed that the refunds stemmed from joint tax returns and that some or all of the monies were his, obliging petitioner to repay them to the taxing authorities out of its own funds (42 USC § 664[a][3]; Tax Law §§ 171-c [3][e]; 651[b][6]). Petitioner commenced a proceeding on behalf of the father and, alleging that respondent had willfully violated the support order, sought the entry of a money judgment against her for the amount of the tax refunds. Family Court determined that it lacked jurisdiction to issue such a judgment.

The Appellate Division modified. It held that Family Court is empowered "to determine applications to modify or enforce judgments and orders of support" (N.Y. Const, art VI, § 13; Family Ct Act §§ 115 [a][ii]; 454[1]). In that regard, petitioner was authorized to commence violation proceedings "on behalf of persons" who receive child support pursuant to a court order (Family Ct Act § 453[a]). Family Court retained continuing jurisdiction to enforce the support order until it was completely satisfied. Petitioner's role in enforcing child support orders is not limited to disbursing monies to the support recipient; it is also tasked with collecting those funds from the obligor and ensuring that they are properly accounted for. Historically, a support collection unit was authorized to file a violation petition without reference to the support recipient. The "on behalf of" language was only added to Family Ct Act § 453 in order to clarify that the unit could prosecute as well as originate a violation proceeding on behalf of non-public assistance individuals in receipt of child support services. Petitioner thus acted well within its statutory authority in commencing the proceeding to enforce a child support order that respondent had "fail[ed] to obey," and Family Court likewise had subject matter jurisdiction to consider it.

Supreme Court

Sanctions - 22 NYCRR 130-1.1 - Husband Sanctioned Where He Misrepresented His Knowledge of and past Interactions and Presented Half-truths to Obtain an ex Parte Stay Enjoining the Wife from Leaving the Children with Unrelated Persons in Order Specifically to Interfere with Her Planned Vacation.

In Karen E. v Yoram E., 2013 WL 2402686 (N.Y.Sup.), the husband made an ex parte application after the Court had already awarded the wife temporary pendente lite sole custody of the children after conducting a full hearing. He obtained an ex parte stay enjoining the wife from leaving the children with any unrelated persons over the Veterans Day holiday weekend based on misrepresentations about his prior contact with the individuals-D.R. and S.H.-whom the wife selected to provide child care for the children. The husband represented to the Court that D.R. and S.H. were "complete strangers" to him in a sworn Affidavit. Despite detailed inquiry by the Court on the record at the ex parte hearing on November 10, 2011 the husband, who was present in court, never informed the Court through his attorney that he had met D.R. and S.H. on several occasions, participated in conducting criminal and financial background checks on them and finally approved them to move into the apartment in the marital residence after discussing their personal references with the plaintiff-wife.

The Court found that, under the facts and circumstances here, the husband's counsel did not provide sufficient 22 NYCRR 202.7 notice to the wife's counsel by e-mailing her at 1:40 p.m. of his intent to file an ex parte application that very afternoon. The explanation provided by the husband for seeking the ex parte stay in the afternoon the day before a Court holiday without even attempting to contact the wife directly to discuss his alleged concerns was not reasonable. Furthermore, the husband repeatedly provided less than forthright representations in his filings and on the record through counsel which placed the Court in the untenable position of having to act to protect the children without the wife or the children being afforded due process. The Court found that the husband abused the ex parte application process when he used it as a litigation tactic to purposefully interfere with the wife's vacation plans.

The Court found that an award of counsel fees to the wife of the cost and disbursements associated with the husband's ex parte application dated November 10, 2011 was appropriate based on the husband's abuse of the ex parte application process and his blatant misrepresentations and half-truths to the Court which resulted in an ex parte stay that unnecessarily prolonged the litigation and forced the wife to incur over \$13,000.00 of unnecessary legal fees and disbursements. As such, the wife was awarded the sum of \$7,500.00 in counsel fees relating to the husband's ex parte application dated November 10, 2011, plus costs. The Court found that sanctions against the husband were appropriate based on frivolous conduct related to the ex parte application as defined under 22 NYCRR 130. The husband repeatedly represented to the Court in a sworn Affidavit and through counsel on the record on November 10, 2011, when the husband was present in Court, that the persons the wife selected to provide child care-D.R. and S.H.-were "complete strangers" to him. The husband steadfastly maintained his representation even after the Court made inquiry on the record as to whether the husband had honest and sincere concerns regarding the safety of the children if left with D .R. and S.H.. Based on the record before the Court, including the papers and the testimony on the record, it was

evident to the Court that the husband misrepresented his knowledge of and past interactions with D.R. and S.H. and presented, at best, only half-truths in order to obtain an ex parte stay enjoining the wife from leaving the children with unrelated persons in order specifically to interfere with her planned vacation departure the next day. The Court found that the husband's testimony at the hearing on January 11, 2013 attempting to amend his prior sworn statement by offering his own unique definition of "complete strangers" disingenuous since the husband never clarified to the Court that his definition included people whom he had interviewed, met on multiple occasions and on whom he had conducted background and reference checks. For the husband to misrepresent that the children were being left with "complete strangers" raising the specter that the wife was placing the children in danger falsely was inappropriate. The record was clear that the persons selected by the wife to provide child care for the holiday weekend, after her parents could not assist her with child care, which was the subject to the husband's November 10, 2011 ex parte application, were not "complete strangers" to the husband.

The Court found that the husband's ex parte application was frivolous, as defined under by 22 NYCRR 130-1.1(c), because the husband's sworn Affidavit in Support of the ex parte application asserted material factual statements that were false and the application was designed primarily to prolong the resolution of the litigation and to attempt to "get even" with the wife by interfering with her planned vacation weekend. The Court noted that the husband's testimony at the November 10, 2011 hearing and during the January 11, 2013 sanctions hearing and his sworn representations in his Affidavits relating to his ex parte application were replete with reference to how he believed the wife had wronged him. The Court found that sanctions fixed in the sum of \$1,000.00 was appropriate here because the husband's frivolous ex parte application forced the wife to incur unnecessary costs and it unnecessarily prolonged the litigation. The plaintiff's application for sanctions against the defendant was granted to the extent that the defendant was sanctioned \$750.00.

Family Court

Neglect - Fact Finding Hearing - Family Court Holds Mother Did Not Neglect Child by Using Marijuana While She Was Pregnant Where No Evidence That Child Harmed or Placed in Imminent Danger of Harm by That Conduct. Misuse of an Unlawful Substance, Standing Alone, Is Insufficient to Establish Neglect. Mother's Consent to a Finding of Neglect Prior Neglect Proceeding Inadmissible as Evidence of Derivative Neglect.

In Matter of William N., Jr., --- N.Y.S.2d ----, 2013 WL 2443190 (N.Y.Sup.) Family held that the mother did not neglect the child by using marijuana while she was pregnant with

him; that the father did not neglect the child by misusing marijuana or by failing to stop the mother from smoking marijuana; that the mother did not neglect child by failing to comply with a dispositional order entered in prior neglect proceeding involving the child's sibling; and that as a matter of first impression, the mother's consent to a finding of neglect in the prior neglect proceeding was inadmissible as evidence of derivative neglect.

The Commissioner of the Administration for Children's Services ("ACS") commenced this proceeding alleging that subject child, William N., Jr., was neglected by his mother, Kimberly H. and his father, William N., Sr. ACS alleged that the Child's "physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired" as a result of the Mother's and Father's use of marijuana while the Mother was pregnant; the Father's "failure to take any action" to stop the Mother from smoking marijuana; and the Mother's failure to comply with a dispositional order entered, less than three months before William was born, in a case involving William's then 4 1/2 year-old sibling Akasha. William was removed from the Respondents' care two days after his birth, remanded to the custody of the Commissioner, and temporarily placed with his maternal aunt pending further proceedings.

Petitioner's evidence consisted of records from Beth Israel Hospital ("the Hospital") where William was born and the testimony of Child Protective Specialist Leah Brown. In addition, the Court took judicial notice of the fact-finding and dispositional orders in Akasha's case. The Hospital records established that the Mother tested positive for marijuana when William was born, but William tested negative. Ms. Brown testified that the Mother admitted smoking marijuana during her pregnancy. The Mother admitted in the hearing that she smoked marijuana when she was seven months pregnant with William-around the same time that she consented to entry of a finding that she neglected Akasha by misusing marijuana. Ms. Hernandez explained that she smoked marijuana while she was pregnant with William because it was a difficult pregnancy, she was unable to eat, and the marijuana helped increase her appetite and her tolerance of food. Regardless, she did smoke marijuana while she was pregnant with William. The Hospital records also established that, although the Mother tested positive for marijuana when William was born, William tested negative for alcohol, marijuana, or any other controlled substance. Except for a slightly elevated bilirubin count, which had no connection to the Mother's marijuana use, William was a healthy, normal newborn in all respects.

The Court observed that Family Court Act § 1012(f) defines a "neglected child" in pertinent part as a child under the age of 18 "(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent ... to exercise a minimum degree of care ... (B) in providing the child with proper supervision or guardianship by ... misusing a drug or drugs...." To establish that William was a neglected child, Petitioner had to prove, by a preponderance of the evidence (*Nicholson v. Scopetta*, 3 N.Y.3d 357, 368 [2004]), not only that the Mother

misused a drug or drugs, which was not in dispute, but also that William's physical, mental or emotional condition was impaired or placed in imminent danger of becoming impaired as a result of the Mother's drug use. The Court of Appeals instructed in Nicholson that, in determining whether a child should be removed from her home, a court must "focus on serious or potential harm to a child, not just what might be deemed undesirable parental behavior" . Moreover, the Court emphasized that "imminent danger" means "near or impending, not merely possible". The Court of Appeals reiterated Nicholson's teaching in Matter of Afton C., 17 N.Y.3d 1, 9 [2011]). In that case, the Court held that the Respondent-Father's conviction of second degree rape and having sex with a minor was insufficient to establish that he posed an imminent risk to his teenage daughters and should thus

be removed from the home. The Court admonished that the test is whether the respondent failed to exercise a "minimum degree of care-not maximum, not best, not ideal-and the failure must be actual, not threatened" . Quoting its earlier decision in Matter of Marie B., 62 N.Y.2d 352, 358, the Afton Court noted that "these statutory requirements have constitutional underpinnings: Fundamental constitutional principles of due process and protected privacy prohibit governmental interference with the liberty of a parent to supervise and rear a child except upon a showing of overriding necessity.... [Thus,] the State may not deprive a natural parent of the right to the care and custody of a child absent a demonstration of ... behavior evincing utter indifference and irresponsibility to the child's well-being" Matter of Marie B., 62 N.Y.2d 352, 358 [1984]." ' Afton, 17 N.Y.3d at 9, 926 N.Y.S.2d 365, 950 N.E.2d 101. The Court of Appeals held in In the Matter of Dante M. (87 N.Y.2d 73 [1995]), that a newborn's positive toxicology for cocaine "without proof that the child has been physically, mentally or emotionally impaired, or is in imminent danger of being impaired" is insufficient to establish neglect under FCA § 1012(f)(i)(B). Unlike the baby in Dante M, who had a positive toxicology for cocaine, William tested negative for all unlawful substances and alcohol. And there was no evidence that the Mother's positive toxicology for marijuana-or her use of marijuana while she was pregnant with William-caused any physical, mental, or emotional harm to William or put him at risk of such harm. There was no evidence presented that marijuana itself causes any harm to a developing fetus (see, e.g., Matter of Smith-Jones Children, 34 Misc. 1226(A) [Fam. Ct., Kings Co.2012]. Nor was there any evidence that other conduct of the mother in addition to or in combination with her use of marijuana placed William at risk of harm. In the absence of any evidence that William was actually or potentially injured as a result of the Mother's drug abuse, the allegations that she neglected William as a result of misuse of marijuana failed.

There was no evidence that the father ever used marijuana in the presence of William. Furthermore, since Petitioner failed to prove that the Mother's use of marijuana impaired William or placed him in imminent risk of impairment, its allegations that the Father neglected William by misusing marijuana or by failing to stop the Mother from smoking marijuana had to fail.

The petition in Akasha's case alleged that the Mother neglected Akasha as a result of her misuse of marijuana; her failure to comply with an order of protection issued against her former paramour; and her failure to provide Akasha with adequate supervision and guardianship. The Court notations on the F-99 indicate that the Mother consented under FCA §1051(a) only to entry of a finding that she had neglected Akasha as a result of her misuse of marijuana, and the other allegations were, therefore, implicitly dismissed. In the present case, while the evidence demonstrated that the Mother's misuse of marijuana, which was the basis of the finding that the Mother neglected Akasha, involved a course of conduct that continued up to approximately three months before William was born, there was no evidence that either Akasha or William was harmed or placed in imminent danger of harm by that conduct. Moreover misuse of an unlawful substance, standing alone, is insufficient to establish neglect. Nor does misuse of marijuana constitute the type of neglectful or abusive conduct that has generally served as the basis for a finding of derivative neglect.

The Family Court held that question whether a finding of neglect entered on consent under FCA § 1051(a) in one case did not constitute the "proof" of abuse or neglect necessary under FCA § 1046(a)(i) to be used as evidence to support a finding of neglect of a different child in a subsequent case appeared to be one of first impression. The Court observed that section 1051 permits entry of a finding of abuse or neglect without a hearing in two different circumstances: Section 1051(a) explicitly permits entry of a finding on the consent of all parties-including the respondent-and the attorney for the child. Section 1051(f) implicitly permits entry of a finding on respondent's admission and distinguishes between an admission and a consent by providing that, "[p]rior to accepting an admission to an allegation or permitting a respondent to consent to a finding of neglect or abuse," the court must advise the respondent of the consequences of such admission or consent. In the first circumstance, the court accepts "an admission to an allegation"; in the second, the court permits the "respondent to consent to a finding. "The form order used by Family Court specifically states that the respondent consents to a finding "without admission." There is a clear distinction between a "consent" to a finding of abuse or neglect and an "admission" of conduct constituting abuse or neglect under Article 10 of the Family Court Act. In contrast to an admission, a respondent who consents to entry of a finding of abuse or neglect under FCA s 1051(a) neither admits nor denies the allegations in the petition, but merely consents to entry of a finding and to an order of disposition based on that finding. A consent to a finding under FCA s 1051(a) is analogous to a plea of nolo contendere in the criminal context. For the foregoing reasons, Family Court found that Petitioner failed to prove, by a preponderance of the evidence, that neither the Mother nor the Father neglected William, and the petition was dismissed.

June 3, 2013

Appellate Division, First Department

Pendente Lite Determination - Marital Residence - Sale - Court May Not Direct Sale of Marital Property Held by Spouses as Tenants by the Entirety

In *Schorr v Schorr*, --- N.Y.S.2d ----, 2013 WL 2096417 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which denied defendant's motion to compel plaintiff to sell her interest in the marital residence to his parents. It observed that prior to entry of a judgment altering the legal relationship between spouses by granting divorce, separation or annulment, courts may not direct the sale of marital property held by spouses as tenants by the entirety, unless the parties have consented to sell. Plaintiff's statement in her affidavit, filed in connection with a prior motion in this action, did not constitute a stipulation or agreement between the parties to immediately sell the marital residence, as it did not reflect a meeting of the minds and did not contain specific terms.

Attorneys - Legal Fees - Effect of Disciplinary Rules - Law Office Denied Legal Fees Arising from Representation of Client after Trial Commenced Where Retainer Stated That the Law Office's Representation of Blisko Included Work Leading "Up To" a Trial.

In *Law Office of Sheldon Eisenberger v. Blisko*--- N.Y.S.2d ----, 2013 WL 2301816 (N.Y.A.D. 1 Dept.) Blisko and Eisenberger signed a retainer agreement and a statement of client's rights and responsibilities. The retainer stated that the law office will represent Blisko "in a matrimonial action, including motions and Court appearances up to but not including an actual trial on the matter." Although the retainer lists the law office's hourly fee, it did not indicate the hourly fees of any other attorney who would be working on the case, as required. The law office filed an action against Blisko's husband in January 2009 which was discontinued and a second action in March 2009 which went to trial but was adjourned during the trial. In October 2009, Blisko retained new counsel to represent her in the divorce proceedings. Following arbitration, the law office commenced this action seeking unpaid legal fees of \$83,775.69 and a trial was held on the claim. Blisko asserted that the retainer did not comply with 22 NYCRR 1400.3 because it did not state the "hourly rate of each person whose time" was charged to her, but rather only stated the hourly rate of Eisenberger and made no mention of any other attorney working on the case. Blisko also contended that the retainer expressly stated that the law office's representation did not include being trial counsel. The trial court rejected Blisko's arguments and ordered her

to pay \$83,775.69 to the law office, in addition to the substantial amount she already had paid.

The Appellate Division held that the law office should be denied any legal fees arising from representation of Blisko after the grounds trial commenced. The plain language of the retainer stated that the law office's representation of Blisko included work leading "up to" a trial, "but not including an actual trial." Following the commencement of the trial on August 18, 2009, the retainer between the law office and Blisko terminated and plaintiff was representing Blisko without a written retainer. It rejected the argument of the law office that even if the retainer terminated when the trial began, it could still collect unpaid fees from Blisko because it substantially complied with the requirements of 22 NYCRR 1400.3, holding that the substantial compliance argument has no relevance to this issue because there was no trial retainer at all. If the law office wanted to be paid for representing Blisko at trial, it needed to have the client sign a new retainer. Although the law office could not receive legal fees for any services completed after trial commenced, it could receive any outstanding unpaid fees for work completed prior to commencement of the actual trial. The law office substantially complied with the requirements of 22 NYCRR 1400.3 by giving the client the required statement of client rights and responsibilities and by listing the fee of the primary attorney. It observed that as a general principle, the law office "need not return fees [it] properly earned" (*Markard v. Markard*, 263 A.D.2d 470, 471 [2d Dept 1999]). Although the retainer did not fully comply with 22 NYCRR 1400.3, the law office did complete work that was within the scope of the pretrial retainer, and therefore it was not required to return fees already paid to it for work completed before the trial. When a client is seeking the return of funds already paid to the attorney, the attorney does not need to show substantial compliance with 22 NYCRR 1400.3, but only that the fees paid were properly earned (*Markard*, 263 A.D.2d at 471; *Mulcahy*, 285 A.D.2d at 588).

Appellate Division, Second Department

Contempt - Civil - Where the Plaintiff Failed to Prove Actual Loss, Any Penalty That Punished Defendant for past Acts of Disobedience Would Have Been Within Rubric of a Criminal Contempt and Improper - Supreme Court Did Not Err in Suspending Maintenance Payments and Imposing a Fine Only Prospectively.

In *Ruesch v Ruesch*, --- N.Y.S.2d ----, 2013 WL 2233961 (N.Y.A.D. 2 Dept.) during the pendency of this action for a divorce the defendant was awarded exclusive possession of the marital home, temporary custody of the parties' children, and pendente lite maintenance and child support. At some point, the defendant permitted her alleged paramour to move into the marital home. In a so-ordered stipulation dated February 15,

2012, the defendant agreed that her paramour was barred from entering the marital home absent further order of the court. In March 2012, the plaintiff moved to hold the defendant in contempt of the so-ordered stipulation because the paramour continued to reside in the marital residence. Upon the defendant's admission that she permitted her paramour to continue to reside in the marital residence in violation of the so-ordered stipulation, the Supreme Court granted that branch of the plaintiff's motion which was to hold her in contempt, pursuant to Judiciary Law § 753. The Supreme Court temporarily suspended maintenance payments and imposed a fine of \$250 for each day the defendant remained in continuing violation of the so-ordered stipulation, prospectively, commencing June 26, 2012, until she purged her contempt by demonstrating compliance with the so-ordered stipulation. See *Reusch v Reusch*, 2012 WL 8144812 (N.Y.Sup.), 2012 N.Y. Slip Op. 52485(U).

The Appellate Division affirmed. It rejected the plaintiff's argument that the court should have suspended maintenance payments and imposed a fine retrospectively from the first day the defendant violated the so-ordered stipulation and thereafter prospectively until she demonstrated compliance.

The Appellate Division observed that unlike fines for criminal contempt where deterrence is the aim and the State is the aggrieved party entitled to the award, civil contempt fines must be remedial in nature and effect. The award should be formulated not to punish an offender, but solely to compensate or indemnify private complainants. The Supreme Court held the defendant in civil contempt. Coercive penalties designed to modify the contemnor's behavior, generally speaking, are civil in nature, while penalties meant to punish the contemnor for past acts of disobedience are criminal. Thus, a fine is considered civil and remedial if it either coerces the recalcitrant party into compliance with a court order, or compensates the claimant for some loss. If a fine is not compensatory, it is civil only if the contemnor is given an opportunity to purge. Here, where the plaintiff failed to prove an actual loss, any penalty that punished the defendant for her past acts of disobedience would have been within the rubric of a criminal contempt and thus improper within this civil contempt adjudication. Accordingly, the Supreme Court did not err in suspending maintenance payments and imposing a fine only prospectively.

**Retirement Benefits- Pensions - Waiver - Lack of Definitive Guidance on Whether VSF Benefits Subject to Equitable Distribution Not a Sufficient Basis to Avoid Waiver.
Child Support - Modification - Termination - Child Support Ordered for More than One Child Not Automatically Reduced by Emancipation of Oldest Child - Party Seeking Downward Modification of Unallocated Order Based on Emancipation of One Child Has Burden of Proving Amount of Unallocated Child Support Is Excessive Based on the Needs of the Remaining Children -**

In *Lamassa v Lamassa*, --- N.Y.S.2d ----, 2013 WL 2230540 (N.Y.A.D. 2 Dept.), the parties entered into a stipulation of settlement, read into a court record, whereby the defendant specifically waived any interest in a variable supplement fund (VSF). During those proceedings, the defendant's counsel stated that, under the law in effect at the time, VSF benefits were not marital property subject to equitable distribution. The defendant was asked and confirmed that she understood the effect of the stipulation and voluntarily agreed to waive any interest in the VSF.

In February 2010 the defendant cross-moved, inter alia, to modify the parties' qualified domestic relations order by adding a provision thereto equitably distributing the marital portion of the VSF on the basis that the law concerning equitable distribution of VSFs had changed. The defendant also claimed that the plaintiff unilaterally, and without a court order, modified the child support payments when the parties' eldest child reached 18 years of age and then reduced the amount of the support payments each time one of the parties' remaining three children reached the age of 21 years. The plaintiff then moved, in effect, to modify the stipulation of settlement by reducing the amount of child support payments and cancelling child support arrears on the basis that all of the children were emancipated and the parties had agreed to modify the support obligation when the children became emancipated.

At the hearing the plaintiff testified that, when each of the children reached 21 years of age, he reduced the amount of support payments and gave checks to the defendant, who accepted the checks and did not object orally or in writing. The defendant testified and denied that she agreed to a reduction of the support payments, claimed that she did not receive any checks directly from the plaintiff, and stated that, upon receiving the reduced support checks from the children, she asked the children to tell the plaintiff that the amount was wrong. The defendant also testified about her attempt to enforce the child support obligation. In addition, three of the parties' children also testified and stated that the support checks were given to them to pass on to the defendant and that they never saw the plaintiff give checks directly to the defendant.

The Appellate Division held that the Referee was correct in noting that, at the time of the parties' stipulation of settlement, the law on the issue of whether VSF benefits were subject to equitable distribution was unclear. The law was later clarified when the Court of Appeals held that VSF benefits were marital property subject to equitable distribution. However, the fact that the plaintiff did not have definitive guidance on the issue of whether VSF benefits were subject to equitable distribution is not a sufficient basis upon which she may avoid the effects of her otherwise knowing and voluntary waiver. Thus, it was error to permit the defendant to avoid the consequences of her waiver of any interest in the VSF.

As to the application to reduce the amount of child support payments and cancel child support arrears, the plaintiff provided no evidence, other than his own testimony, that he and the plaintiff had agreed to reduce the amount of the support payments. The plaintiff

failed to seek appropriate relief by application to the court for a modification of child support payments, and instead reduced the amount of support payments unilaterally. "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" (Matter of Wrighton v. Wrighton, 61 AD3d 988, 989). In addition, a party seeking a downward modification of an unallocated order of child support based on the emancipation of one of the children has the burden of proving that the amount of unallocated child support is excessive based on the needs of the remaining children (Matter of Rosenthal v. Buck, 281 A.D.2d 909). The plaintiff did not provide evidence showing that the emancipation of the parties' children made the support obligation excessive. Thus, the plaintiff was not entitled to a reduction of the amount of child support payments or a cancellation of child support arrears.

Child Support - Modification - Upward - Substantial Change in Circumstances - Party Seeking Upward Modification must Establish Specific Increases in Costs Relating to Children's Needs

In Radday v McLoughlin, --- N.Y.S.2d ----, 2013 WL 2233214 (N.Y.A.D. 2 Dept.) the Appellate Division observed that a party may seek modification of a child support order by demonstrating a substantial change in circumstances, as determined by the best interests of the children. The party seeking upward modification must establish specific increases in the costs relating to the children's needs, and may not rely on generalized claims of increases due to their maturity or due to inflation.

Supreme Court

Pendente Lite Determination - Marital Residence - Sale - Court May Direct Sale of Marital Residence by Spouses as Tenants by the Entirety Where it Is in Actual Danger of Being Dissipated.

In Stratton v Stratton, 2013 WL 2249155 (N.Y.Sup.), 2013 N.Y. Slip Op. 50808(U) Plaintiff and Defendant were married on April 1, 2004, following a domestic partnership that began in 1982. There were no children of the marriage. Plaintiff commenced the action for divorce on December 8, 2009. Defendant was timely and properly served with the Summons and Complaint on December 23, 2009. On May 18, 2010, the Court awarded plaintiff pendente lite exclusive possession of the marital home in Livingston Manor, New

York so long as she continued to reside there; directed Defendant to pay the household expenses of the marital home in a timely manner as they became due including: the monthly mortgage/and property tax payment of \$2,796.00, all fuel oil and electric service invoices, all cable TV invoices, all homeowner's and vehicle insurance premiums, all medical dental and optical insurance premiums. In addition, the Court ordered Defendant to pay to Plaintiff spousal maintenance of \$1,000.00 per month and awarded \$5,000.00 as interim counsel fees to the Plaintiff.

Defendant failed in almost all respects to comply with the Court's pendente lite and other orders. Plaintiff filed a contempt motion pursuant to Judiciary Law § 753 on August 12, 2010, for Defendant's failure to pay all of the pendente lite support set forth in the May 18, 2010, order. In a March 5, 2012, order, the Court held the defendant in contempt and determined that Plaintiff accrued further damage to her credit, because the mortgage on the marital residence/farm repeatedly went into foreclosure. In addition Defendant interfered with the sale of the marital residence in 2011. A prospective purchaser submitted an offer of \$275,000.00, but the sale could not move forward due to Defendant's refusal to sign the Contract of Sale). The Court found Defendant in civil contempt for failing to comply with the pendente lite order and for failure to pay the mortgage, insurance, taxes, maintenance, maintenance arrears, legal fees, and utilities as directed. The parties appeared, again, in court on August 20, 2012 at which time the Court gave Defendant one last opportunity to comply with the outstanding orders and to sign a quitclaim deed transferring ownership of the marital residence to the Plaintiff so she could effectuate the sale of the farm and place the proceeds in her attorney's trust account. The Defendant remained defiant, refusing to comply with all of the Court's orders. The Court remanded Defendant to the Sullivan County Jail for 30 days. At no time since serving the 30 days in jail had Defendant complied with the Court's orders. The marital residence, which Plaintiff continued to operate as a small farm on which she housed many animals, was once again in danger of foreclosure due to Defendant's ongoing, willful contemptuous conduct. The animals, including many horses, were in danger of going without food, once again due to Defendant's ongoing, willful contemptuous conduct.

The Supreme Court observed that New York law generally limits a court's power to alter title or direct the disposition of the marital residence held as tenants by the entirety during the pendency of a divorce proceeding until the legal relationship between the parties is altered. *Kahn v. Kahn*, 43 N.Y.2d 203 [1977]. Since the Kahn decision in 1977, however, the New York legislature has enacted the equitable distribution law, found in DRL § 236B, and courts have recognized the judicial flexibility and discretion needed to issue orders necessary to preserve marital assets in danger of being dissipated during the pendency of the divorce proceeding. The law favors preservation of marital assets. When a party's refusal to act causes the dissipation of assets or places those assets in danger of imminent dissipation, it is no less necessary to the enforcement of the equitable distribution statute that the court have the power to direct an affirmative act as it is that the

court have the power to restrain. It is unquestioned that courts have the power to direct one party to deliver possession to the other; that power, however, "necessarily includes the power to prevent a party from frustrating such delivery by improper disposition or wasteful dissipation of assets ... [and] is vital to meaningful enforcement and implementation of the equitable distribution statute." " St. Angelo v. St. Angelo, 130 Misc.2d 583 [Sup.Ct. Suffolk Co.1985]. A temporary receiver may be appointed on motion, when property subject to the action is in danger of being lost, damaged or destroyed. CPLR 6401(a).

The Court found that Defendant's ongoing, willful contempt, disregard, and disrespect for the Court's orders, resulted in placing the most significant marital asset in imminent danger of dissipation through foreclosure and had placed farm animals in danger of starvation and neglect; he had done this not only by failing to make any payments as previously directed by this Court in the pendente lite order, but also by willfully and intentionally refusing to sign a contract of sale when Plaintiff presented a ready, willing and able buyer for the property. St. Angelo v. St. Angelo, 130 Misc.2d at 585 .As was the case in St. Angelo, Defendant, who had a significant income, "has offered no justification for not contributing to the payments on the mortgage" and for refusing to sign the contract of sale previously offered. After hearing from both parties in open court and conducting numerous settlement conference in Chambers, the Court determined that Defendant's ongoing behavior was willful and spiteful, and would continue without court intervention. Under the circumstances, this Court, like the court in St. Angelo, appointed a receiver to sell the marital residence on the open market, and to retain the proceeds from such sale in an attorney escrow account pending ultimate resolution of the equitable distribution of the marital assets. It granted the Plaintiff's motion for a receiver to sell the marital residence, and directed that out of the net proceeds from the sale of the marital residence, the receiver shall pay to Plaintiff all of the monies due and owing to her pursuant to the outstanding pendente lite order, and hold the balance in escrow pending final disposition of the case.

Child Support - Agreement - Retroactive Support Not Waived Where pendente lite stipulation silent as to retroactive support. "

In Freilich v Freilich, 2013 WL 2090191 (N.Y.Sup.) the wife moved for an order directing he husband to pay the wife \$9,039.00 in pendente lite maintenance and child support arrears for the period of May 11, 2012 to June 27, 2012. On May 11, 2012, the wife moved for pendente lite child support and pendente lite maintenance. On June 19, 2012, the parties' entered into an agreement resolving the pendente lite application. Counsel, on the record in open court in the presence of the parties, spread their agreement on the record and thereafter, settled an order on notice which was signed on October 23, 2012. The wife's counsel stated on the record on June 19, 2012 that" [t]he parties agree that

during the pendency of the above action or until further order of the Court, plaintiff shall pay to the defendant Mrs. Freilich, \$8,500 per month as taxable maintenance to defendant [wife] and deductible to plaintiff [husband] and \$4,100 per month beginning June 27, 2012 in pendente lite child support. The order which was settled on notice stated, in part, that it is ORDERED that Plaintiff is directed to pay the Defendant pendente lite child support for the two children, David and Isaac, FOUR THOUSAND ONE HUNDRED DOLLARS (\$4,100) per month beginning June 27, 2012; and it is further ...

Supreme Court held that where a pendente lite stipulation resolving the issues of child support and maintenance is silent as to the retroactive support, retroactive support is not waived. It held that "during the pendency of this action", does not mean commencing with this order. Rather, the application for support commences upon service of the first application and is pending from that day forward.

Supreme Court observed that for that to be a waiver, the party claiming a waiver must come forward with proof that there was a voluntary and intentional relinquishment of a known and otherwise enforceable right. "Child support payments may be waived prospectively, before the obligation to make such payments has accrued (see Matter of O'Connor v. Curcio, 281 A.D.2d 100 [2001]). Both the oral agreement and the written order based upon that agreement were silent to the issue of retroactive child support and maintenance. Supreme Court held that the wife did not waive her right to readdress these issues at a later date because she did not intentionally relinquish this known right by not addressing it on the record.

Family Court

Actions - Stay of Proceedings - Federal Service Members Civil Relief Act and New York's Military Law - Affidavit Which Failed to Demonstrate Defendant in Active Military Service Insufficient to Vacate Default

In Matter of Lavern B. v Byron W. 2013 WL 2233924 (N.Y.Fam.Ct.) Family Court denied respondents motion for an order pursuant to CPLR 5015 vacating an order of protection issued by the Court on his default on June 19, 2012. Respondent subsequently appeared voluntarily before the Court on December 19, 2012 and the Court assigned counsel to represent him in post-dispositional proceedings, including the filing of this motion.

In his affidavit in support of the motion Respondent stated that he served in the United States Army for 15 years, most recently as a Sergeant with the 299th Quartermaster Unit, where he was assigned to Iraq. Respondent conceded that he and the petitioner "began dating" in 2011 and that "on March 7, 2012, the petitioner came to visit me in

Philadelphia, PA, and that we spent the night at my mother's house."Moreover, respondent stated that "some time later I became aware from my mother in Philadelphia, PA, that the petitioner had obtained a restraining order against me alleging that during the visit on March 7, 2012, I had sexually assaulted her" and respondent denies the allegations made by the petitioner. Respondent further stated that "I wrote a letter to the court stating that as a result of being on active duty I was unable to come to the court appearance" , and "[t]hat I have a reasonable excuse" for not appearing "in that I was on active duty during a time of war and was unable to come to court and that the allegations made by the petitioner are false."

Family Court held that in order to obtain relief from the final order entered upon default, respondent must demonstrate both a reasonable excuse for his failure to appear in court as well as a meritorious defense to the allegations in the family offense petition. While respondent alleged in the motion that he "was on active duty" with the United States Army "during a time of war and was unable to come to court" to defend against the petition, there was nothing to substantiate that respondent was on active military duty on June 19, 2012. Respondent did not present the Court with a copy of his orders issued by the Army or any document which would confirm what he suggested was his deployment to Iraq as a Sergeant with the 299th Quartermaster Unit or his confinement to a military installation on June 19, 2012. The letter which he sent to the Court, made no mention of any military duty or any inability to appear due to military service. The Court noted that the New York State Soldiers' and Sailors' Civil Relief Act expressly provides for a person on active duty with the armed forces to request a stay of judicial proceedings "during the period of such service or within sixty days thereafter" (Military Law § 304)).

May 16, 2013

Court of Appeals

Child Custody - Visitation - Court of Appeals Holds That There Is a Rebuttable Presumption in New York That Visitation with Non-custodial Parent Is in Child's Best Interest. Parent's Incarceration Not an Automatic Reason for Blocking Visitation

In Matter of Granger v Miscercola, --- N.E.2d ----, 2013 WL 1798581 (N.Y.)
Petitioner, an inmate in New York's correctional system, who had acknowledged paternity of a child prior to his imprisonment, commenced a Family Court proceeding

seeking visitation with the child after respondent mother refused to bring the child to the prison. Family Court granted the petition, awarding petitioner periodic four-hour visits at the prison with the child, who was then three years old. It noted that "the law in New York presumes visitation with a non-custodial parent to be in the child's best interest and the fact that such parent is incarcerated is not an automatic reason for blocking visitation." The court found that petitioner had "demonstrated that he was involved in a meaningful way in the child's life prior to his incarceration and seeks to maintain a relationship." It further found that the child was old enough to travel to and from the prison by car without harm, and would "benefit from the visitation with his father." The court considered the length of petitioner's sentence and reasoned that "[l]osing contact for such a long period is felt to be detrimental to an established relationship." The court concluded that visitation with petitioner would be in the child's best interests.

The Appellate Division affirmed Family Court's order, finding "a sound and substantial basis in the record to support the court's determination to grant the father visitation with the child in accordance with the schedule set forth in the order" (96 AD3d 1694, 1695 [4th Dept 2012]). While his appeal was pending, petitioner had been moved to a different correctional facility, further from respondent's home. The Appellate Division made no finding of fact in this regard, ruling that any such change in circumstance was more appropriately the subject of a modification petition. The Court of Appeals affirmed rejecting Respondent's primary contention that the lower courts employed an incorrect legal standard in reviewing the petition for visitation.

The Court of Appeals, in an opinion by Judge Pigott, rejected Respondents contention that this presumption was contrary to this Court's holding in *Tropea v. Tropea* (87 N.Y.2d 727 [1996]) pointing out that its holding was not that presumptions can never be relied upon, but that "each relocation request must be considered on its own merits ... and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child". It observed that in *Weiss v. Weiss* (52 N.Y.2d 170 [1981]), it held that "in initially prescribing or approving custodial arrangements, absent exceptional circumstances, such as those in which it would be inimical to the welfare of the child or where a parent in some manner has forfeited his or her right to such access, appropriate provision for visitation or other access by the noncustodial parent follows almost as a matter of course". Subsequent Appellate Division decisions have frequently referred to a rebuttable presumption that, in initial custodial arrangements, a noncustodial parent will be granted visitation. "[I]t is presumed that parental visitation is in the best interest of the child in the absence of proof that it will be harmful" or proof that the noncustodial parent has forfeited the right to visitation. Family Court noted that New York law "presumes visitation with a non-custodial parent to be in the child's best interest."

The Court reiterated its holding in *Weiss*, that a rebuttable presumption that a noncustodial parent will be granted visitation is an appropriate starting point in any initial determination regarding custody and/or visitation. Moreover, the rebuttable presumption

in favor of visitation applies when the parent seeking visitation is incarcerated. A parent who is in prison does not forfeit his or her visitation rights by being incarcerated. Petitioner's incarceration, standing alone, does not make a visitation order inappropriate," but a demonstration "that such visitation would be harmful to the child will justify denying such a request". In deciding whether the presumption is rebutted, the possibility that a visit to an incarcerated parent would be harmful to the child must be considered, together with other relevant facts. Visitation should be denied where it is demonstrated that under all the circumstances visitation would be harmful to the child's welfare, or that the right to visitation has been forfeited.

The Court noted that In speaking of the manner in which the presumption of visitation may be rebutted, the Appellate Division has frequently used the terms "substantial proof" and "substantial evidence." "[T]he sweeping denial of the right of the father to visit or see the child is a drastic decision that should be based upon substantial evidence". This language is intended to convey to lower courts and practitioners that visitation will be denied only upon a demonstration-that visitation would be harmful to the child-that proceeds by means of sworn testimony or documentary evidence. It held that the "substantial proof" language should not be interpreted in such a way as to heighten the burden, of the party who opposes visitation, to rebut the presumption of visitation. The presumption in favor of visitation may be rebutted through demonstration by a preponderance of the evidence.

The Court of Appeals concluded that the lower courts used the appropriate legal standard, applying the presumption in favor of visitation and considering whether respondent rebutted the presumption through showing, by a preponderance of the evidence, that visitation would be harmful to the child.

Termination of Parental Rights - Social Services Law § 384-b - Court of Appeals Holds that phrase "circumstances evincing a depraved indifference to human life" does not mean the same thing for purposes of Social Services Law § 384-b (8) (a) (I) as it does under the Penal Law.

In re Dashawn W., --- N.E.2d ----, 2013 WL 1759867 (N.Y.) the Court of Appeals in an opinion by Judge Read, held that the phrase "circumstances evincing a depraved indifference to human life" does not mean the same thing for purposes of Social Services Law § 384-b (8) (a) (I) as it does under the Penal Law. The Court also held that a showing of diligent efforts to encourage and strengthen the parental relationship is not prerequisite to a finding of severe abuse under Family Court Act § 1051 (e) where the fact-finder determines that such efforts would be detrimental to the best interests of the child.

The Court of Appeals observed that at the conclusion of the fact-finding phase in an article 10 proceeding, Family Court may, "[i]n addition to a finding of abuse, . . . enter a

finding of severe abuse as defined in [Social Services Law § 384-b (8) (a)], which shall be admissible in a proceeding to terminate parental rights pursuant to [Social Services Law § 384-b]. If the court makes such additional finding of severe abuse . . . , the court shall state the grounds for its determination, which shall be based upon clear and convincing evidence" (Family Court Act § 1051 [e]. Section 384-b (8) (a) of the Social Services Law, in turn, specifies that "[f]or purposes of this section [384-b]," which governs termination of parental rights, a child is "severely abused" if "(i) the child has been found to be an abused child as a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life, which result in serious physical injury to the child as defined in [Penal Law § 10.00 (10)]¹³; or "(ii) the child has been found to be [a sexually abused child]; provided, however, the [parent] must have committed or knowingly allowed to be committed [one of 11 enumerated felony sex offenses] . . . ; or "(iii) [the child's parent has been convicted of certain felony offenses under the Penal Law,¹⁴ and] the victim or intended victim¹⁴ was the child or another child of the parent or another child for whose care such parent is or has been legally responsible; or . . . the parent of such child has been convicted under the law in any other jurisdiction of an offense which includes all of the essential elements [of these crimes]; and "(iv) the agency has made diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate the respondent, when such efforts will not be detrimental to the best interests of the child, and such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future. Where a court has previously determined in accordance with this chapter or the family court act that reasonable efforts to make it possible for the child to return safely to his or her home are not required, the agency shall not be required to demonstrate diligent efforts as set forth in this section" (Social Services Law § 384-b [8] [a] [i]-[iv] [emphases added]).

In this appeal, the parties differed as to what is required to establish "circumstances evincing a depraved indifference to human life" within the meaning of Social Services Law 384-b (8) (a) (i); and whether the diligent efforts specified by subparagraph (iv) of this provision are prerequisite to a finding of severe abuse under Family Court Act § 1051 (e), or may be excused under Family Court Act §§ 1039-b and 1012 (j) or, alternatively, Social Services Law § 384-b (8) (a) (iv) itself.

ACS, joined by the attorney for the children, argued that the cases discussing "circumstances evincing a depraved indifference to human life" within the meaning of the Penal Law do not control the interpretation of the same phrase in Social Services Law § 384-b (8) (a) (i). Judge Read pointed out that under the Penal Law, a person acts

¹³ 10.00 (10) of the Penal Law defines "serious physical injury" as "physical injury which creates a substantial risk of death or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."

¹⁴ The felony offenses include first- or second-degree murder, first- or second-degree manslaughter, or an attempt to commit murder or manslaughter; criminal solicitation, conspiracy or criminal facilitation for conspiring, soliciting or facilitating these crimes; or first- or second-degree assault or aggravated assault upon a person less than 11 years old or any attempt to commit these crimes.

"intentionally" when "his conscious objective" is to cause a proscribed result (for example, death) or engage in conduct described by a statute (Penal Law § 15.05 [1]); and a person acts "recklessly" with respect to a proscribed result or a circumstance described by a statute "when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists" (Penal Law § 15.05 [3]). And "depraved indifference" bespeaks a state of mind reflecting "a depraved kind of wantonness: for example, shooting into a crowd, placing a time bomb in a public place, or opening the door of the lions' cage in the zoo" (Feingold, 7 NY3d at 293). It is "best understood as an utter disregard for the value of human life — a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not[, and which reflects] wickedness, evil or inhumanity, as manifested by brutal, heinous and despicable acts" (Suarez, 6 NY3d at 214). The Penal Law establishes crimes that are mutually exclusive, depending on these distinctions of culpable state of mind; specifically, second-degree intentional murder (Penal Law § 125.25 [1] [mens rea of intent to kill]), as contrasted with second-degree depraved indifference murder (Penal Law § 125.25 [2] [mens rea of recklessness plus mens rea of depraved indifference]), as contrasted with second-degree manslaughter (Penal Law § 125.15 [mens rea of recklessness]).

Judge Read indicated that the same cannot be said of the child protective statutes. Social Services Law § 384-b (8) (a) (i) provides that a child can be found to be severely abused "as a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life" (emphases added). Under the Penal Law, however, a crime requiring proof of an intent to kill can never be committed with depraved indifference (see Policano, 7 NY3d at 600 ["[I]t has never been permissible in New York for a jury to convict a defendant of depraved indifference murder where the evidence produced at trial indicated that if the defendant committed homicide at all, he committed it with the conscious objective of killing the victim" [internal quotation marks omitted]). Additionally, "[a] defendant may be convicted of depraved indifference murder when but a single person is endangered in only a few rare circumstances" (Suarez, 6 NY3d at 212), whereas acts of child abuse necessarily involve one-on-one violence. In short, our depraved indifference jurisprudence under the Penal Law has no bearing on whether a child is severely abused within the meaning of Social Services Law § 384-b (8) (a) (i). For purposes of that statute "circumstances evincing a depraved indifference to human life" refers to the risk intentionally or recklessly posed to the child by the parent's abusive conduct.

Here, Antoine beat or struck a baby — an especially vulnerable victim because so tiny, defenseless and unformed. And the medical experts testimony about the age of Jayquan's injuries established that Antoine must have attacked him on at least two different occasions, separated by at least two weeks. Further, Antoine had to have been aware of the life-threatening risks he created when he applied brute force to Jayquan's chest and shoulder. After all, he knew that devastating injuries ensued when he brutalized his then four-month old namesake, Antoine, Jr. While this prior instance of abuse was too

remote in time to support a finding of repeated abuse, it reflects Antoine's utter disregard for Jayquan's life, health and well-being. Additionally, Antoine neglected to summon medical aid for Jayquan's fractured ribs, even though the baby would have to have experienced and displayed continuous pain and distress; and he delayed seeking medical care for Jayquan on February 21, 2007 from 11:00 a.m., when he claimed to have first noticed the baby's suffering, until the early evening hours . Finally, Antoine offered unbelievable explanations for Jayquan's injuries to medical personnel and social workers, and he did not testify at the fact-finding hearing (see Matter of Nassau County Dept. of Social Servs. v Denise J., 87 NY2d 73, 79 [1995] [where the mother did not testify in a child protective proceeding, we noted that "[a] trier of fact may draw the strongest inference that the opposing evidence permits"]). Thus, there was record support for the Appellate Division's finding, based on clear and convincing evidence, that Antoine, acting under circumstances evincing a depraved indifference to human life, severely abused Jayquan.

It was undisputed that at no time did ACS make "diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate" Antoine (see Social Services Law § 384-b [8] [a] [iv]). The parties contested whether this omission was permissible in light of Family Court Act §§ 1051 (e), 1039-b and 1012 (j). The attorney for the children, joined by ACS, urged that a showing of diligent efforts is not required for a finding of severe abuse under Family Court Act § 1051 (e). Section 1039-b (a) of the Family Court Act states that "[i]n conjunction with, or at any time subsequent to, the filing of a [n abuse or neglect] petition . . . , the [presentment agency] may file a motion upon notice requesting a finding that reasonable efforts to return the child to his or her home are no longer required." The statute further provides that reasonable efforts "shall not be required" when "the parent of such child has subjected the child to aggravated circumstances, as defined in" Family Court Act § 1012 (j) (Family Court Act § 1039-b [b] [1]).¹⁵ Family Court Act § 1012 (j) defines "aggravated circumstances" to include "where a child has been either severely or repeatedly abused, as defined in" Social Services Law § 384-b (8).¹⁶

¹⁵ Judge Read noted in footnote 10 that additionally, reasonable efforts are not required where the parent has been convicted of the murder or manslaughter of another child of that parent (Family Court Act § 1039-b [b] [2]); the parent has been convicted of an attempt to commit murder or manslaughter, or of criminal solicitation, conspiracy or criminal facilitation for conspiring, soliciting or facilitating those crimes, and the victim or intended victim was the child or another child of that parent (id. § 1039-b [b] [3]); the parent has been convicted of first- or second-degree assault or aggravated assault upon a person less than 11 years old, and this criminal conduct caused serious physical injury to the child or another child of the parent (id. § 1039-b [b] [4]); the parent has been convicted "in any other jurisdiction of an offense which includes all of the essential elements of" any of the foregoing crimes, and the victim was the child or another child of the parent (id. § 1039-b [b] [5]); or "the parental rights of the parent to a sibling of [the] child have been involuntarily terminated" (id. § 1039-b [b] [6]).

¹⁶ Judge Read pointed out in footnote 11 that "aggravated circumstances" also include instances where the child has been found to be repeatedly abused within the meaning of Social Services Law § 384-b (8)(b); the child "has subsequently been found to be an abused child [within the meaning of Family Court Act § 1012 (e) (i) or (iii)] within five years after [the] return home following placement in foster care as a result of being found to be a neglected child"; the parent "has refused and . . . failed completely, over a period of at least six months from the date of removal" to engage in or secure reunification services; or "a court has determined a child five days old or younger was abandoned by a parent with an intent to wholly abandon such child and with the intent that the child be safe from physical injury and cared for in an appropriate manner" (see Family Court Act § 1012 [j]).

The Court of Appeals concluded that Family Court Act §§ 1051 (e) and 1012 (j) necessarily import Social Services Law § 384-b (8) (a) in its entirety. It could not read subparagraph (iv) out of the definition of severe abuse incorporated in these provisions when the Legislature did not choose to create such an exclusion, as it easily might have. The Court also concluded that Social Services Law § 384-b (8) (a) (iv) clearly states that Family Court may excuse diligent efforts when they are found to be detrimental to the best interests of the child. Judge Read recapitulated that Social Services Law § 384-b (8) (a) defines a child as "severely abused" if the victim of depraved indifference abuse (id. § 384-b [8] [a] [i]), or felony sex offense abuse (id. § 384-b [8] [a] [ii]), or other felony offense abuse (id. § 384-b [8] [a] [iii]), and "the agency has made diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate the respondent, when such efforts will not be detrimental to the best interests of the child, and such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future. Where a court has previously determined in accordance with this chapter or the family court act that reasonable efforts to make it possible for the child to return safely to his or her home are not required, the agency shall not be required to demonstrate diligent efforts as set forth in this section" (id. § 384-b [8] [a] [iv] [emphases added]). Thus, for a court to find severe abuse under Family Court Act § 1051 (e), the presentment agency must demonstrate by clear and convincing evidence that the parent committed an abusive act specified in subparagraphs (i), (ii) or (iii) of section 384-b (8) (a); and diligent efforts to reunite the family were not made because detrimental to the child's best interests; or such efforts were made but were unsuccessful and unlikely to succeed in the near term; or such efforts were not required because a court had previously determined that reasonable efforts to reunite the family were unnecessary.

Judge Read concluded that Family Court in this case properly found that diligent efforts to encourage and strengthen the parental relationship would be detrimental to Jayquan's best interests, in accordance with Social Services Law § 384-b (8) (a) (iv). The judge determined that, in light of Antoine's abuse of Antoine, Jr., followed by his severe abuse of Jayquan some 14 years later, there was little prospect that Antoine's "chronic, long-standing" violent behavior would improve anytime soon, if ever, and it was not in Jayquan's best interests to languish in foster care in the meantime.

Appellate Division, First Department

Agreements - Prenuptial - Construction - Provision For Waiver of Right to Share in Estate or Property Now Owned or Hereafter Acquired Bars Equitable Distribution - Express Waiver Not Required

In *Weiss v Weiss*, --- N.Y.S.2d ----, 2013 WL 1954155 (N.Y.A.D. 1 Dept.) the Appellate Division held that Plaintiff's claim for equitable distribution of the marital assets was barred by the parties' prenuptial agreement, which was made before the effective date of the equitable distribution statute and was valid and enforceable. The October 1972 agreement provided that each party "waives, releases, renounces and surrenders" any "rights, claims and elections" he or she may ever have "to take any interest or share of the other's estate or property, whether now owned or hereafter acquired ... under any circumstances whatsoever, with the same force or effect as though there had never been a marriage between the parties hereto." It held that contrary to plaintiff's contention, it was of no moment that the parties' prenuptial agreement did not contain an express waiver of equitable distribution (*Van Kipnis v. Van Kipnis*, 11 NY3d 573, 579 [2008]).

Appellate Division, Second Department

Equitable Distribution - Property Distribution - Marital Residence - Court Has No Authority to Award Defendants Interest in Marital Residence to the Children - Premature to Direct Payment of College Expenses for Children Ages 14, 10 and 6 - Judgment Must Include Notice Required By Domestic Relations Law § 236(B)(7)(d).

In *Mejia v Mejia*, --- N.Y.S.2d ----, 2013 WL 1896282 (N.Y.A.D. 2 Dept.) plaintiff husband and the defendant wife were married in 1998, and had three children, now ages 14, 10, and 6. By order of the Family Court entered upon consent, they were awarded joint legal custody, and the plaintiff was awarded primary physical custody. After a nonjury trial Supreme Court considered the first \$200,000 of combined parental income in determining child support, based upon, inter alia, "the economic reality of life in Rockland County, the financial resources of the custodial and noncustodial parent, and those of the children, [and] a determination that the gross income of one parent is substantially less than the other parents's gross income," and set the defendant's child support obligation at \$1,789 per month. The marital residence, titled in the parties' joint names, was awarded to the plaintiff and the children, based upon the plaintiff's claim that there was no equity in the house. The court held that the plaintiff should maintain health insurance for the children, and the defendant should pay 37% of the college expenses of the children.

The Appellate Division modified the child support award considering the substantial difference between the parties' income, the fact that the defendant had less income than the plaintiff, and the amount of parenting time awarded to the defendant. It found it was just and appropriate to apply the statutory percentage of 29% for the three minor children to the first \$150,000 of combined parental income (Domestic Relations Law s 240[1-b][f]). Calculated on that basis, the defendant's pro rata share of the child support obligation was

\$1,341 per month, subject to reduction as each child reaches the age of 21 years or is otherwise emancipated.

The parties both acknowledged that the Court had no authority to direct the conveyance of the defendant's interest in the marital residence to the children. It noted that the plaintiff, who was seeking the defendant's interest in that property, had the burden of establishing its value, which he failed to do. Under these circumstances, the plaintiff was not entitled to an award of the defendant's interest in the marital residence. It held that since the plaintiff had physical custody of the children, he should be awarded exclusive possession of the marital residence until the youngest child reaches the age of 18 or graduates from high school, whichever occurs first, whereupon the marital residence should be sold and any proceeds, after application of any appropriate credits, should be divided equally between the parties.

The court held that considering the ages of the children, it was premature for the Supreme Court to direct the defendant to contribute toward the college expenses of the children. In its decision, the Supreme Court ruled that the plaintiff shall maintain medical, dental, prescription, and optical insurance for the benefit of the parties' unemancipated children. However, the judgment failed to include a provision effectuating that determination. When there is an inconsistency between a judgment and the decision or order upon which it is based, the decision or order controls. It directed that the judgment be modified to include such a provision. Similarly, Domestic Relations Law § 236(B)(7)(d) requires that any order of support include a notice informing the parties of their right to seek a modification of the child support order upon a showing of "(i) a substantial change in circumstances; or (ii) that three years have passed since the order was entered, last modified or adjusted; or (iii) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted." Because the judgment failed to include such a notice, it modified the judgment to include that notice.

Child Support - Award - Family Ct Act § 413[1][K] - Appellate Division Holds That Sm Improperly Awarded Child Support Based on the Needs of Child Rather than Mother's Income, upon Concluding That Mother Failed to Substantiate Her Income Where Sm Failed to Advise Mother That Failure to Fill out the Financial Disclosure Affidavit Would Result in an Award of Support Based on Child's Needs.

In Matter of Anderson v Pappalardo, --- N.Y.S.2d ----, 2013 WL 1749076 (N.Y.A.D. 2 Dept.) the mother appealed from an order of the Family Court awarding child support to the guardian of the child of \$500 per month, based on the needs of the subject child, pursuant to Family Court Act § 413(1)(k). The Appellate Division reversed. It held that the Support Magistrate improperly awarded child support based on the needs of the child rather than the mother's income, upon concluding that the mother failed to substantiate her income (see Family Ct Act § 413[1][k]). Prior to the hearing at which the Support

Magistrate issued the order, the mother had appeared before the Support Magistrate only twice and, on both occasions, the appearances were very brief. The record did not reflect what directives the mother, who was appearing pro se, received regarding the financial disclosure affidavit which she had failed to complete, or what additional documents she was specifically directed to submit to prove her inability to work full-time. The Support Magistrate failed to advise the mother that her failure to fill out the financial disclosure affidavit would result in an award of support based on the child's needs, instead of the mother's income. The matter was remitted to the Family Court for a new hearing on the petition and a new determination thereafter as to the mother's support obligation.

Family Court - Support - Family Ct Act § 439(e) - Objections to Order - Despite Failure to File Proof of Service Objections Properly Considered Where Receipt Admitted and No Prejudice Resulted

In Matter of Nash v Nash, --- N.Y.S.2d ----, 2013 WL 1811275 (N.Y.A.D. 2 Dept.) the Appellate Division observed that Family Court Act § 439(e) provides that a party filing objections must serve those objections upon the opposing party, and that proof of service must be filed with the court at the time that the party's objection is filed. Here, the record did not contain any proof of service. However, the mother admitted to receiving the objections 13 days after the father filed them with the Family Court; the mother was able to file her own rebuttal to the father's objections, and no prejudice resulted. The Appellate Division held that despite the irregularity, the Family Court properly addressed the merits of the father's objections.

Appellate Division, Third Department

Marriage - Validity - Action for Declaration of Nullity of Void Marriage - Third Department Declines to Follow Second Department Decision in Ranieri v. Ranieri and Holds Marriage Performed by a Minister of the Universal Life Church Not (ULC) Not Void as a Matter of Law.

In Oswald v Oswald, --- N.Y.S.2d ----, 2013 WL 1759902 (N.Y.A.D. 3 Dept.) plaintiff and defendant were married in a ceremony performed by a minister of the Universal Life Church (ULC) in Washington County. Three days earlier, the parties had executed an

antenuptial agreement which, by its terms, was to take effect "only upon the solemnization of [the] marriage." Five years after the marriage, plaintiff commenced this action seeking a declaration that the marriage was void from its inception, and that the antenuptial agreement was thus unenforceable, because the officiant lacked authority under the Domestic Relations Law to solemnize the marriage. Alternatively, plaintiff sought a divorce as well as enforcement of the antenuptial agreement and equitable distribution of the parties' assets. Defendant answered, denying that the marriage was invalid and asserting a counterclaim for divorce. Plaintiff then moved for summary judgment on his declaratory judgment claim and defendant cross-moved for summary judgment, arguing that plaintiff had not carried his burden of proving the invalidity of the marriage and seeking a declaration that the antenuptial agreement was void on different grounds. Supreme Court granted plaintiff's motion, and denied defendant's motion, concluding that it was constrained by the holdings in *Ranieri v. Ranieri* (146 A.D.2d 34 [1989], lv dismissed 74 N.Y.2d 792 [1989]) and *Ravenal v. Ravenal* (72 Misc.2d 100 [1972]) to find the marriage void as a matter of law.

The Appellate Division reversed, finding that the plaintiff did not meet his burden of proof on the motion for summary judgment. It observed that a party to litigation may be estopped from asserting a position contrary to that taken on his or her tax returns (see *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422 [2009]; *Naghavi v. New York Life Ins. Co.*, 260 A.D.2d 252, 252 [1999]). However, a marriage that is void "cannot be retroactively validated by estoppel, by mutual agreement, or by the parties' conduct in holding themselves out as husband and wife" (*Lipschutz v. Kiderman*, 76 A.D.3d 178, 183 [2010]; see *Landsman v. Landsman*, 302 N.Y. 45, 48 [1950]; see also *People v. Kay*, 141 Misc. 574, 578 [1931]). Thus, Supreme Court correctly found that plaintiff was not estopped from challenging the validity of the marriage.

The Court noted that because *Ranieri v. Ranieri* was the only appellate decision in this state addressing the question of whether a minister of the ULC has authority under New York law to solemnize a marriage, Supreme Court was bound to follow it (*Mountain View Coach Lines v. Storms*, 102 A.D.2d 663, 664 [1984]). However, it was not so constrained and it declined to follow the Second Department's determination.

The Appellate Division pointed out that *Ranieri* was decided a quarter century ago, and it could not presume that the belief system, structure and inner workings of the ULC had remained static since that time. It pointed out that Domestic Relations Law § 11 provides that "[n]o marriage shall be valid" unless it is solemnized by, among others, "a clergy[] [member] or minister of any religion" Pursuant to the Religious Corporations Law, the terms clergy member and minister include "a person having authority ... from the church or synagogue to preside over and direct the spiritual affairs of the church or synagogue" (Religious Corporations Law § 2). The statute defines an "unincorporated church" as a "congregation, society, or other assemblage of

persons who are accustomed to statedly meet for divine worship or other religious observances, without having been incorporated for that purpose". Thus, the inquiry here distilled to (1) whether the officiant of the parties' marriage was authorized by the ULC to preside over and direct its spiritual affairs, and (2) whether the ULC is a "church" within the meaning of the statute.

With respect to whether the officiant of the parties' marriage was authorized by the ULC to preside over and direct its spiritual affairs, plaintiff's own submissions, which included the officiant's "Credentials of Ministry," established that the officiant was ordained a minister of the ULC in August 2000 and remains in good standing. Furthermore, documents submitted from the ULC's website state that those ordained as a minister by the ULC are authorized to perform weddings, baptisms and funerals and to otherwise conduct religious services through the ULC. Plaintiff stressed the unconventional nature of the method employed by the ULC in selecting its ministers in an ostensible attempt to undermine the legitimacy of authority bestowed upon its ministers. However, the Court observed that judicial involvement is permitted only when the issue can be resolved by application of neutral principles of law and, other than determining whether the ULC adhered to its own rules and regulations in selecting and ordaining the officiant as a minister, it is not the role of the courts to question the ULC's membership requirements or the method by which it selects its ministers.

With respect to the question of whether the ULC constitutes a "church" within the meaning of the Religious Corporations Law, the affidavits from plaintiff and his attorney merely aver, "upon information and belief," that the ULC does not have an actual church or stated place of worship. The Court held that such allegations were without probative value. The statement from the ULC's website that "the communication and fellowship of our ministers is equal to the once a week sacramonious [sic] fellowship in some of our most segregated and elitist churches" was, at best, ambiguous as to whether members of the ULC were accustomed to meet for divine worship or other religious observances (Religious Corporations Law § 2). The Court stated that in any event, even had plaintiff sustained his initial burden on this point, it would find that defendant's submissions in opposition to the motion, which included an affidavit from the president of the ULC attesting that the ULC had numerous places of worship throughout New York State as well as a list of such congregations, raised genuine factual issues precluding an award of summary judgment.

Plaintiff's assertion that the ULC professes no belief to distinguish its church as a religion provided the Court with no basis to conclude, as a matter of law, that the ULC was not a church within the meaning of the Religious Corporations Law. The courts may not inquire into or classify the content of the doctrine, dogmas, and teachings held by a body to be integral to its religion but must accept that body's characterization of its own beliefs and activities and those of its adherents, so long as that characterization is made in good faith and is not sham". It noted that in some respects, the ULC conducts itself like more conventional churches and encompasses many of the same ideas and values that

are present in traditional religions. The ULC ordains ministers and, although ministers are not required to preside over a specific congregation or work within a physical church, the ULC encourages that practice. Additionally, since the ULC's formation in 1959, it has consistently advanced and advocated for its beliefs.

The Appellate Division found that plaintiff failed to establish as a matter of law that the officiant did not have authority to solemnize the parties' marriage, thus warranting denial of his motion.

Grandparent Visitation - DRL §72 - Standing - Third Department Holds "Essential" Components of the Standing Inquiry Are "The Nature and Extent of the Grandparent-Grandchild Relationship" and "The Nature and Basis of the Parents Objection to Visitation".

In *Matter of Hill v. Juhase*, --- N.Y.S.2d ----, 2013 WL 1760201 (N.Y.A.D. 3 Dept.), Petitioner was the paternal grandmother of two minor children, Aiyanna (born in 2006) and Sierra (born in 2008). Petitioner's son, respondent Kasheem C. Hill (father), was the biological father of Sierra but not of Aiyanna, although he acknowledged paternity of Aiyanna and consented to be her father. Respondent Nicole M. Juhase (mother) and the father never married, but cohabitated for a period of time and eventually separated. In March 2010, Family Court issued an order granting custody of the children to the mother and parenting time to the father as agreed to by the parties. Believing that she was not getting sufficient visitation with the children when she traveled from her home in Maryland to New York every other month, petitioner filed a Family Court petition in May 2011 seeking visitation. At the hearing, the parties appeared pro se and the children were represented by an attorney. Prior to the hearing, the mother agreed to allow petitioner to visit the children for the day (four to six hours) every other month in Broome County where they lived, initially with the father present as a transition, but opposed her request to allow her to take them to the City of Oneonta, Otsego County where petitioner has relatives, approximately one hour away. Following the hearing, at which only petitioner and the mother testified, Family Court granted the petition and directed that petitioner would have visitation the first Saturday of every month for four consecutive months beginning January 7, 2012 from 10:00 a.m. to 4:00 p.m., with the visits restricted to Broome County and the first two visits to be conducted in the presence of the father. Upon satisfactory compliance with such provisions, the court directed that subsequent visits would be the first Saturday of every other month commencing June 2, 2012 from 10:00 a.m. to 6:00 p.m. with no restriction to Broome County nor any requirement that the father be present. The court further directed that no one was to consume alcoholic beverages in the presence of the children.

The Appellate Division reversed, finding that Family Court erred in finding that petitioner had standing and awarding her visitation. Where, as here, the parents of children are alive, Domestic Relations Law § 72 gives grandparents the right to seek visitation with

their grandchildren where, as a threshold matter, they can establish circumstances in which "equity would see fit to intervene," i.e., that equitable circumstances exist. Grandparents "must establish a sufficient existing relationship with their grandchild, or in cases where that has been frustrated by the parents, a sufficient effort to establish one, so that the court perceives it as one deserving the court's intervention" (Matter of Emanuel S. v. Joseph E., 78 N.Y.2d at 182). Grandparents must allege and establish more than "love and affection" for their grandchildren. Only when a showing of equitable circumstances has been made will the court then determine whether visitation would be in the grandchildren's best interests. "Essential" components of the standing inquiry are "the nature and extent of the grandparent-grandchild relationship" and "the nature and basis of the parent[']s objection to visitation".

The Appellate Division found that Family Court made no such findings here, simply stating in its oral ruling that petitioner "does appear to have a relationship with the children," without describing its "nature" or "extent" and did not address the basis of the mother's objections. Upon its review of the testimony, it concluded that petitioner did not establish equitable circumstances that justified according her standing to force the mother to accept visitation outside parameters within which she was comfortable as a fit and responsible parent . In so holding, it reminded that "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" (Matter of E.S. v. P.D., 8 N.Y.3d 150, 157 [2007]; Troxel v. Granville, 530 U.S. 57 [2000]).

The record reflected that the parents were fit and employed and continued to cooperatively share responsibilities for caring for the children in the mother's home, assisted by the maternal grandmother. Petitioner, a day-care provider, testified that she lives in Maryland, has relatives including a sister in Oneonta, and travels to New York approximately every other month. Although her testimony was vague, it appears that she sporadically saw the children, born in 2008 and 2006, a few times per year for short visits in 2009, 2010 and 2011 on trips to New York, and one or two times when the mother or father drove to Maryland with the children and stayed overnight at petitioner's house on their way to Virginia. She has never baby-sat for them or visited alone with them, but sent or brought cards and gifts. She claimed that on her New York trips, she often did not see them or saw them for only an hour or so because they usually already had other plans, which the mother was unwilling or unable to alter at the last minute, or the mother picked them up after a short visit with petitioner and the father. Petitioner did not get along with or communicate with the mother, and the reasons for this were not clear. Although requested by the mother, it appeared that petitioner often gave little notice of visits, a few days or hours, and the record suggested that petitioner's visits to New York were focused on visits to Oneonta and were not primarily to see the children, although she did request to see them when here. Her testimony did not clarify why she did not pursue visitation with the children at her son's residence or during his parenting time.

Petitioner also claimed that she had nowhere to visit with the children in Broome County since her niece-at whose home she had occasionally visited with the children-had moved away, but conceded she had always stayed in hotels on her visits and could visit with them there; she did not testify that the cost of hotels was a hardship for her. Petitioner wished to take the children-without either parent-to Oneonta for day-long visits with her extended family, although it was not established that the children knew those relatives or that those relatives had made more than isolated efforts to come to Broome County to visit with and get to know the children.

The mother testified, confirming that petitioner had only periodic visits with the children each year and was often not able to see them because she failed to provide adequate advance notice. The mother opposed out-of-town visitation because the children were young, ages three and five at the hearing, did not know petitioner well and were not bonded to her, and petitioner did not know their routines or needs. She also was concerned that the Oneonta family gatherings involved adult parties with alcohol consumption and the children would not be cared for and supervised by people whom they know. As petitioner admitted, her primary reason for seeking judicial intervention was to take the children to Oneonta. The Appellate Division found valid "the nature and basis" of the mother's objections to compelled overnight or out-of-town visitation. Family Court made no finding regarding petitioner's nurturing skills, the children's attorney advocated against out-of-county visits and there was no evidence suggestive of the children's wishes. The Court found that the nature and extent of the existing grandparent-grandchild relationship did not support the conferral of standing here. The court did not find, nor did the record establish, that the mother frustrated that relationship, and petitioner did not demonstrate sufficient efforts to establish one by doing everything she could have reasonably done to cultivate a close relationship with the children.

Appellate Division, Fourth Department

Equitable Distribution - Property Distribution - Jointly Owned Property - Presumptions - Fourth Department Holds Where Property at Issue Is Held Jointly, an Equal Disposition of That Property Should Be Presumptively in Order, with the Burden on the Party Seeking a Greater Share to Establish Entitlement.

In *Lauzonis v. Lauzonis*, --- N.Y.S.2d ---, 2013 WL 1777454 (N.Y.A.D. 4 Dept.) Defendant wife appealed from a judgment that, inter alia, dissolved the parties' marriage on the ground of cruel and inhuman treatment, awarded the wife maintenance and child support, and distributed the marital property. The Appellate Division held that Supreme Court did not err in imputing annual income in the amount of \$20,000 to the wife for purposes of calculating child support and maintenance based upon her education, qualifications, employment history, past income, and demonstrated earning potential. It

agreed with the wife, however, that the court erred in failing to distribute certain marital assets, i.e., an investment account, a 403-b deferred compensation account, and plaintiff husband's preretirement death benefits.

With respect to the investment account, which the parties referred to as the "Investacorp account," there was no question that those funds constituted marital property. The husband acknowledged at trial that the Investacorp account should be divided equally between the parties after he is reimbursed from that account for the amount he paid for the parties' custodial evaluator. The court, however, awarded the entire account balance to the husband on the ground that "the testimony and evidence is not enough to award the balance of said account to the [wife]." The Appellate Division held that where, as here, the property at issue is held jointly, an equal disposition of that property should be presumptively in order, with the burden on the party seeking a greater share to establish entitlement. Here, the husband did not overcome the presumption that the jointly titled property, i.e., the Investacorp account, should be divided equally between the parties. Thus, it agreed with the wife that the court should have equitably distributed that marital asset and modified the judgment accordingly.

It also agreed that at least a portion of the husband's 403-b account was marital property subject to equitable distribution and that the court therefore erred in failing to distribute that asset. The husband made contributions to that account from his wages during the course of the marriage and thus, as the husband acknowledged at trial, the account should be divided equitably "pursuant to the formulas outlined by the courts" It remitted this matter to Supreme Court for equitable distribution of the husband's 403-b account.

It further agreed with the wife that the court erred in failing to equitably distribute the husband's in-service death benefit, which was provided through the teacher retirement system and remitted this matter to Supreme Court for a determination of the value of the death benefit at the time of the commencement of this action and for the equitable distribution thereof.

The wife contended that the court abused its discretion in failing to award her any portion of the husband's enhanced earnings from his master's degree, which he earned in part during the marriage. It agreed, and remitted this matter to Supreme Court for a determination of the appropriate percentage of those enhanced earnings that should be awarded to the wife. The record established that, at the very least, the wife made a "modest" contribution toward the husband's attainment of a master's degree and thus that she is entitled to some portion of his enhanced earnings.

The Appellate Division was unable to ascertain from the record how the court calculated the child support award in the amount of \$275 per week and whether, as the wife contended, the court deducted maintenance from the husband's income before calculating his child support obligation. It modified the judgment by remitting this matter

to Supreme Court to determine the amount of the husband's child support obligation in compliance with the Child Support Standards Act.

Finally, it concluded that the court failed to determine what amounts, if any, the husband owed to the wife for arrears with respect to an interim order (grocery arrears), and remitted this matter to Supreme Court to determine the amount of the grocery arrears, if any, owed to the wife and to award an appropriate money judgment for any such arrears. It noted that upon remittal, the court should hold a hearing with respect to the various issues to be decided, if necessary.

Action for Divorce - Process - CPLR 308(5) - Appellate Division Holds Where Plaintiff Made Sufficient Showing That Service Pursuant to CPLR 308(1), (2), or (4) Was Impracticable Court Providently Exercised its Discretion in Directing Service by Email.

In *Safadjou v. Mohammadi*, --- N.Y.S.2d ----, 2013 WL 1777765 (N.Y.A.D. 4 Dept.) consolidated appeals arising from a matrimonial action, in which a divorce was granted and custody awarded to the plaintiff, the defendant contended on appeal that Supreme Court erred in ordering service of the summons with notice by email. The Appellate Division affirmed. It concluded that plaintiff made a sufficient showing that service upon defendant pursuant to CPLR 308(1), (2), or (4) was impracticable, and thus that the court providently exercised its discretion in directing an alternative method of service.

The Appellate Division observed that CPLR 308(5) vests a court with the discretion to direct an alternative method for service of process when it has determined that the methods set forth in CPLR 308(1), (2), and (4) are "impracticable." Although the impracticability standard is not capable of easy definition a showing of impracticability under CPLR 308(5) does not require proof of actual prior attempts to serve a party under the methods outlined pursuant to subdivisions (1), (2) or (4) of CPLR 308. The meaning of 'impracticable' will depend upon the facts and circumstances of the particular case. Plaintiff submitted evidence that defendant left the United States with the parties' child and declared her intention to remain in Iran with her family (*Astrologo*, 240 A.D.2d at 606-607). Plaintiff established that Iran and the United States do not have diplomatic relations and that Iran is not a signatory to the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (20 UST 361, TIAS No. 6638). Plaintiff thus requested alternative service upon defendant's parents in Iran, with whom defendant was residing. In light of those unique circumstances, the court properly determined that service upon defendant was "impracticable by any method of service specified in CPLR 308(1), (2), and (4)."

The Court pointed out that once the impracticability standard is satisfied, due process requires that the method of service be reasonably calculated, under all the circumstances, to apprise' the defendant of the action. In order to be constitutionally adequate, the method of service need not guarantee that the defendant will receive actual notice. Here, the court initially ordered service of the summons by (1) personal service upon defendant's parents; (2) mail service upon defendant at her parents' address in Iran; and (3) service upon defendant by plaintiff's Iranian attorneys in accordance with Iranian law. Pursuant to that order, plaintiff mailed the summons and notice to defendant at her parents' last known address in Tehran and submitted a declaration by his Iranian attorney that at least two attempts were made to effect personal service upon defendant at that address. Although defendant contended that the address used for service was "bogus," the record reflected that the address was in fact used by defendant and/or her parents in some capacity. Defendant supplied that address to the child's pediatrician in requesting the child's medical records, and she averred that her father ultimately received the documents from a "tenant" who lived at that address. When plaintiff was unable to effect personal service upon defendant's parents pursuant to the court's order, the court relieved him of that obligation and instead permitted service "via email at each email address that [p]laintiff knows [d]efendant to have."

The Appellate Division held that although service of process by email "is not directly authorized by either the CPLR or the Hague Convention, it is not prohibited under either state or federal law, or the Hague Convention" (*Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L.*, 78 AD3d 137, 141) and, both New York courts and federal courts have, upon application by plaintiffs, authorized email service of process as an appropriate alternative method when the statutory methods have proven ineffective. Contrary to the contention of defendant, it concluded that plaintiff made the requisite showing that service by email was reasonably calculated to apprise defendant of the pending lawsuit and thus satisfied due process. The record reflected that, for several months prior to the application for alternative service, the parties had been communicating via email at the two email addresses subsequently used for service. Although defendant claimed that she did not receive either of the emails, she acknowledged receipt of a subsequent email from plaintiff's attorney sent to the same two email addresses. It concluded that, under the circumstances of this case, the court properly determined that service of the summons with notice upon defendant by email was an appropriate form of service (see *Snyder v. Alternate Energy Inc.*, 19 Misc.3d 954, 962).

Claim to Share of Pension Payments Subject to the Six-year Statute of Limitations Set Forth in CPLR 213(1) Which Begins to Run When Pension Payments Received. Mere Silence or Failure to Disclose Receipt of Benefits Insufficient to Invoke Equitable Estoppel

In *Bielecki v. Bielecki*, --- N.Y.S.2d ----, 2013 WL 1848767 (N.Y.A.D. 4 Dept.) the judgment of divorce, entered in 1985, provided that plaintiff was entitled to her Majauskas share of defendant's pension "when said defendant starts to obtain his pension." Defendant began receiving pension benefits in March 1991. Plaintiff was unaware that defendant was receiving such benefits and she did not begin to receive her share until October 2005, when she obtained a qualified domestic relations order (QDRO). By notice of motion filed October 21, 2010, plaintiff sought her share of pension benefits received by defendant from the date of his retirement in March 1991 until October 2005, when plaintiff began prospectively receiving her share of such benefits pursuant to the QDRO. The Appellate Division modified. It held that Supreme Court erred in granting plaintiff's motion in its entirety. Plaintiff's claim with respect to defendant's pension benefits was subject to the six-year statute of limitations set forth in CPLR 213(1) (*Tauber v. Lebow*, 65 N.Y.2d 596, 598). The statute began to run when defendant began receiving his pension in March 1991. Because defendant's obligation to pay plaintiff her share of the pension was ongoing, the statute began to run anew with each missed payment. Thus, plaintiff's claim was untimely to the extent that it sought payments missed within six years prior to her motion filed on October 21, 2010. It rejected plaintiff's contention that defendant was equitably estopped from raising the statute of limitations as a defense inasmuch as defendant made no affirmative misrepresentation to her, and his silence or failure to disclose the date on which he began receiving his pension benefits was insufficient to invoke the doctrine of equitable estoppel.

Supreme Court

Agreements - Prenuptial - Construction - Provision for Waiver of Right to Share in Estate or Property Now Owned or Hereafter Acquired Construed by Supreme Court to Provide That Assets Not Defined as "Separate Property" by the Agreement, Are "Marital Property" Subject to Equitable Distribution

In *Wolanin v. Wolanin*, , 2013 WL 1858768 (N.Y.Sup.), 2013 N.Y. Slip Op. 50691(U) plaintiff sought an order interpreting the parties prenuptial agreement as not "waiv[ing] ... the creation of a marital estate". The Prenuptial Agreement provided, in relevant part: Each of the parties, except as herein provided, shall separately retain all rights in his or her own property, whether now owned or hereafter acquired, and except as otherwise provided herein, each of them shall have the absolute and unrestricted right to dispose of such separate property free from any claims that may be made by the other by reason of their marriage, and with the same effect as if no marriage had been consummated between them. Plaintiff contended that the Agreement did not define the word "separate property", and did not waive the creation of a marital estate or acquisition of marital property. Accordingly, she argued, "[a]ny property acquired during the marriage that

cannot specifically be traced back to property owned by a party at the time of the execution of the Agreement (i.e. separate property), and which was acquired during the marriage through the parties' wages, is in fact marital property subject to distribution pursuant to equitable distribution and the Domestic Relations Law".

Supreme Court observed that a prenuptial agreement that provides for the division of property must be interpreted with Domestic Relations Law § 236(B), which defines both "marital property" and "separate property" and provides that, unless there is a duly executed prenuptial agreement, "marital property" must be equitably distributed and "separate property" must remain separate).The statute permits parties to either "expressly waive or opt out of the statutory scheme governing equitable distribution" or to, "specifically designate as separate property assets that would ordinarily be defined as marital property subject to equitable distribution under Domestic Relations Law s 236(B)(5). Although the parties' intent must be clearly evidenced by the writing there is no categorical requirement that a prenuptial agreement must set forth an express waiver of equitable distribution. It noted that the Domestic Relations Law 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 ..." (Domestic Relations Law § 236 B(1)[c]). The statute defines "separate property" as "property described as separate property by written agreement of the parties pursuant to [Domestic Relations Law § 236 B(3)] (Domestic Relations Law § 236 B(1)[d](4)).

Reading the prenuptial agreement with the statute, the Court found that the prenuptial agreement was not ambiguous. The parties specifically agreed to designate as "separate property" assets that would ordinarily be defined as marital property. The prenuptial agreement clearly defined "such separate property" to be "his or her own property, whether now owned or hereafter acquired". It held that the prenuptial agreement permitted separate ownership of each asset held in each party's name, even if it was acquired during the marriage. Notwithstanding the foregoing, it appeared that the parties agreed that any assets that are not "separate property" as that term is defined by the agreement, are "marital property" and thus subject to equitable distribution. Thus, the factual issue with regard to whether any specific asset falls within the definition of "separate property" or "marital property" remained.

May 1, 2013

Court of Appeals

Paternity - Defense of Equitable Estoppel - Applied to Deny Non-Biological Father Right to Deny Paternity

In Commissioner of Social Services on Behalf of Elizabeth S. v. Julio J., 20 N.Y.3d 995, 985 N.E.2d 127, 961 N.Y.S.2d 363 (2013) the Court of Appeals observed that before a party can be estopped from denying paternity or from obtaining a DNA test that may establish that he is not the child's biological parent, the court must be convinced that applying equitable estoppel is in the child's best interest (Matter of Shondel J. v Mark D., 7 NY3d 320 [2006]). The party seeking to prove paternity, whether by estoppel or otherwise, must do so by clear and convincing evidence. Although the Appellate Division stated that its reversal was on the law, that court, considering the same evidence as Family Court, made different factual findings to support its conclusion that the Commissioner of Social Services had not proven by clear and convincing evidence that respondent Julio J. should be estopped from denying paternity. Accordingly, the Court of Appeals reviewed the record to determine which set of findings more nearly comported with the weight of the evidence (see Matter of Jamie M., 63 NY2d 388, 393 [1984]), and concluded that the evidence more nearly comported with Family Court's findings that the child, who was eight years old at the time of the hearing, knows respondent, with his encouragement, as her father; that a relationship existed insofar as the child was concerned; and that the child relied on respondent to be her father sufficiently such that it would be to her detriment for the court to direct "DNA testing. Upon those findings, Family Court properly decided that respondent should be equitably estopped from asserting nonpaternity.

Appellate Division, First Department

Child Support - Award - CSSA - Shared Custody - First Department Rejects Rule Established in Baraby

That in an Equally Shared Custody Case the Parent Who Has the Greater Income Should Be Considered the Noncustodial Parent for Purposes of Support

In Rubin v. Salla, --- N.Y.S.2d ----, 2013 WL 1681220 (N.Y.A.D. 1 Dept.) the Appellate Division, First Department rejected the rule established in Baraby v Baraby, 250 A.D.2d 201, 681 N.Y.S.2d 826 (3d Dept, 1998), that in an equally shared custody case the parent who has the greater income should be considered the noncustodial parent for purposes of support. It held, based on the plain language of the Child Support Standards Act, that a custodial parent cannot be directed to pay child support to a noncustodial parent, and that the "custodial parent", in an equally shared custody case, is "the parent who has the child the majority of the time, which is measured by the number of overnight time that parent has with the child." Inexplicably, the Court distinguished the decision in Baraby, although it appears to have rejected its holding entirely.

Plaintiff (mother) and defendant (father) were the unmarried parents of a 9-year-old son. The mother and father always lived separately. In April 2009, the mother commenced an action seeking sole legal and residential custody of the child, and an order compelling the father to pay child support. The father also sought primary custody of the child. After trial, the court awarded primary physical custody to the father during the school year, with the mother having parenting time on alternate weekends (from Friday after school to Monday morning) and every Thursday overnight. During the summer, the schedule was reversed and the child would live primarily with the mother, but would spend Thursday overnights and alternate weekends with the father. The mother would also have the child each midwinter school break, and the other school breaks were evenly divided. In addition, each parent was given two weeks with the child during the summer. With respect to legal custody, the court awarded the father decision-making authority, after consultation with the mother, over educational and medical issues. The mother was given authority, after consultation with the father, over decisions on summer and extracurricular activities, and religion.

C

Following the custody decision, the father moved for summary judgment dismissing the mother's cause of action for child support. He argued that, by the terms of the custody order, he was the custodial parent because the child would spend the majority of the year with him. He argued that, as a matter of law, the court could not order him to pay child support to the mother, the noncustodial parent. The father's motion included a calendar showing that during the period from July 2012 to June 2013 there were 206 overnights with the father and 159 with the mother. These custodial periods equated to the child being with the father 56% of the time and with the mother 44% of the time. The mother conceded that the child would reside with the father "most of the time," that the father was the "de-facto custodial parent," and that she may not be the "custodial parent" for purposes of the Child Support Standards Act (CSSA). She also agreed that under a "strict application" of the CSSA, the father could not be ordered to pay child support. Nevertheless, the mother argued that she was entitled to an award of child support because any other result would be unjust and inappropriate.

C

Supreme Court denied the father's summary judgment motion, finding that an award of child support to the mother was not precluded because the parties had "parallel legal custody" of their son and both spent some time with the child, it was impossible to say, as a matter of law, that the father was the custodial parent for child support purposes. The court also focused on the disparity between the parents' financial circumstances and concluded that, regardless of whether the father was the custodial parent, it had the discretion to award the mother child support because she needed funds to pay her monthly rent and to maintain the type of home she could not otherwise afford without the father's assistance.

C

In reversing the order of the Supreme Court, Justice Richter, writing the opinion for the First Department, held that under the current child support structure enacted by the Legislature, the father, as the custodial parent, cannot be directed to pay child support to

the mother, the noncustodial parent. The CSSA provides for “a precisely articulated, three-step method for determining child support” awards in both Family Court and Supreme Court. Unlike the discretionary system of the past, a court is required to make its child support award pursuant to the CSSA’s provisions. Under the CSSA’s plain language, only the noncustodial parent can be directed to pay child support. Domestic Relations Law § 240(1-b)(f)(10) and FCA § 413(1)(f)(10) state that, after performing the requisite calculations, “the court shall order the non-custodial parent to pay his or her pro rata share of the basic child support obligation.” The mandatory nature of the statutory language undeniably shows that the Legislature intended for the noncustodial parent to be the payer of child support and the custodial parent to be the recipient. The CSSA provides for no other option and vests the court with no discretion to order payment in the other direction.

C

Justice Richter observed that in *Bast v. Rossoff*, 91 N.Y.2d 723 (1998) the Court of Appeals addressed how child support awards should be calculated in cases involving shared custody. Contrary to the conclusion reached by the court below, *Bast* left no other option than to direct payment by the noncustodial parent to the custodial parent. The Court in *Bast* recognized that there are “practical challenges” in applying the CSSA to shared custodial arrangements. Nevertheless, *Bast* made clear that even in shared custody cases, courts are required to identify the “primary custodial parent”. *Bast* explained that “[i]n most instances, the court can determine the custodial parent for purposes of child support by identifying which parent has physical custody of the child for a majority of time”.

Justice Richter, referring to *Baraby v Baraby*, 250 A.D.2d 201, 681 N.Y.S.2d 826 (3d Dept, 1998), pointed out that only where the parents’ custodial time is truly equal, such that neither parent has physical custody of the child a majority of time, have courts deemed the parent with the higher income to be the noncustodial parent for child support purposes. She noted that Courts have uniformly followed *Bast*, finding that where parents have unequal residential time with a child, the party with the greater amount of time is the custodial parent for CSSA purposes. The great disparity in overnights here—56% to 44%—stood in marked contrast to the cases cited by the mother where the parents had equal, or essentially equal, custodial time.

C

Justice Richter found that the Supreme Court ignored its own custody schedule when it stated that the parents here shared “very nearly equal” physical custody of the child. In an attempt to equalize the custodial time, the court focused on how much “waking, non-school time” the child spent with each parent. The Supreme Court suggested that a custodial parent could be identified by calculating the number of waking hours he or she spends with the child. This approach was rejected in *Somerville v. Somerville*, 5 AD3d 878 (3d Dept 2004). She reached the same result here and rejected the counting of waking hours as a method of determining who is the custodial parent.

Although the Court in *Bast* did not elaborate on what constitutes a “majority of time,” Justice Richter believed that the number of overnights, not the number of waking

hours, is the most practical and workable approach. She found that there are sound policy reasons why calculating the waking hours spent with each parent should not be the method used to determine who is the custodial parent. Allowing a parent to receive child support based on the number of daytime hours spent with the child bears no logical relation to the purpose behind child support awards, i.e., to assist a custodial parent in providing the child with shelter, food and clothing. Furthermore, because a child's activities are subject to constant change, the number of hours spent with each parent becomes a moving target. The use of this type of counting approach could also lead parents to keep their children out of camp or other activities simply to manipulate their time spent with the child so as to ensure that they are designated the "custodial parent". An hour-by-hour analysis of custodial time is just not workable and would run afoul of the "greater uniformity [and] predictability" the CSSA was designed to promote.

Justice Richter wrote that in finding that the father could be considered the noncustodial parent, the motion court improperly focused on the parties' financial circumstances rather than their custodial status. Neither the CSSA, nor *Bast v. Rossoff*, allows for economic disparity to govern the determination of who is the custodial parent where the custodial time is not equal. Moreover, there was no support for the mother's argument that in shared custody cases, a court has the discretion to determine the custodial parent based on what is "just" and "appropriate."

Child Support- Award - Imputed Income - Court May Impute Income Based upon Value of His Employer-provided Apartment - Support Magistrate Properly Declined to Credit Respondent with "Extraordinary Expenses" in Connection with His Visitation with the Child.

In *Matter of Perel v. Gonzalez*, --- N.Y.S.2d ----, 2013 WL 1578227 (N.Y.A.D. 1 Dept.), the Appellate Division affirmed an order which denied respondent's objection to the Support Magistrate's imputation to him of income based on the full market value of his employer-provided apartment, and an order which denied his objections to the parts of the Support Magistrate's order of support that required him to pay child support in the amount of \$476.49 per week, applied the child support percentage to the parties' combined income above the \$130,000 statutory cap, and required respondent to pay his pro rata share of the child's private pre-kindergarten tuition. It held that the court correctly determined the parties' income for purposes of calculating their basic child support obligations based on his 2008 annual gross income and the value of his employer-provided apartment and petitioner's income based on her 2008 annual gross income and her previous full-time employment as a concierge.

The Appellate Division held that the Support Magistrate properly declined to credit respondent with "extraordinary expenses" in connection with his visitation with the child. The Court of Appeals considered and expressly rejected any use in New York of the

proportional offset formula in *Bast v. Rossoff* (91 N.Y.2d 723, 728-730 [1998]). Thus, it declined to follow *Matter of Carlino v. Carlino* (277 A.D.2d 897 [4th Dept 2000]), as urged by respondent.

The Appellate Division rejected respondent's arguments that income may not be imputed to him based on the value of his employer-provided apartment because the value of lodging furnished to an employee pursuant to employment is excluded from income under the Internal Revenue Code (26 USC § 119[a]), the Supremacy Clause of the United States Constitution requires the value to be excluded as income for child support purposes, and it is unconstitutional because it conflicts with the Internal Revenue Code. The Family Court Act provides that "at the discretion of the court, the court may attribute or impute income from[] such other resources as may be available to the parent, including, but not limited to: ... lodging ... 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 indirec[t]ly confer personal economic benefits" (Family Court Act § 413[1][b][5][iv][B]). The record showed that respondent had a separate office in the same building, that he was not required to be on the premises after completing his 9 to 5 shift, that he used the apartment for his daily living activities, and that he was not restricted in any way in his use of the apartment.

The record supported the Support Magistrate's finding that respondent consented to the enrollment of the child in a private pre-kindergarten school. He admitted that before enrolling the child in the school he and petitioner had looked at several other private schools. There was no evidence that the parties ever considered enrolling the child in a public pre-kindergarten program. Respondent did not sign the enrollment contract, but he was aware that petitioner had made a non-refundable deposit to reserve the child's place in February 2009. It deferred to the Support Magistrate's finding that respondent's consistent denial that he ever consented to the child's enrollment in private school was "wholly incredible and self serving."

Appellate Division, Second Department

Child Custody - Visitation - Grandparent Visitation - Domestic Relations Law § 72 - Grandparent Visitation Order Reversed Where evidence in the record, and children's apprehension regarding visitation with grandmother, established that visitation was not in the best interests of the children.

In Matter of Pinsky v. Botnick, --- N.Y.S.2d ----, 2013 WL 1442510 (N.Y.A.D. 2 Dept.)
The mother, Estee Botnick married Jason Botnick on August 15, 1999, and there were four

children of the marriage. On November 27, 2011, Jason passed away at the age of 35, at which time the children were ages 9, 7, 5, and 3, respectively. According to the mother, immediately prior to Jason's death, "[a]s the ICU team was literally trying to resuscitate Jason," the paternal grandmother, Janet Pinsky (grandmother), said to her, "We are going to have to make a schedule with the kids ."On January 3, 2012, the mother received a letter from the grandmother's attorney, threatening legal action if the mother did not permit the grandmother immediate visitation with the children, and requesting a response by noon the following day. The mother responded by inviting the grandmother over for a visit that evening. In a reply email, the grandmother asserted that her major concern was access to the children going forward, which the mother's email did not address, and requested that the mother respond to the grandmother's attorney as to when the mother or her legal representative could meet before the end of the week. Thereafter, the mother invited the grandmother to her home to visit with the children on January 8, 2012. Nevertheless, three days later, and approximately six weeks after Jason's death, the grandmother caused the mother to be served with the petition for visitation while the mother was at home with the children.

At the hearing on the petition, the grandmother testified that she had a close relationship with the children. The grandmother also acknowledged that the mother was a fit parent. The mother testified that after she was served at home with the petition, the three older children, who were grieving the death of their father, became "hysterical" upon learning that the mother had to go to court. The mother testified that by initiating this proceeding, the grandmother had caused the three older children to become fearful that the grandmother was going to take them away. She testified that the children needed time to get over their fears, and to "deal with the fact that their father has passed away."The attorney for the children informed the Family Court that the children did not wish to see their grandparents. The Family Court accepted into evidence a report prepared by Peter J. Favaro, Ph.D., who was retained by the mother. In the report, Dr. Favaro opined, inter alia, that the children were experiencing symptoms common to "complicated bereavement." According to Dr. Favaro, the three older children had reported having bad dreams about seeing their grandmother and that she would take them away. He concluded that for the sake of the children's future relationship with the grandmother, "it would be unwise to have them pair thoughts of fear of seeing [her] with their father's passing," and that forcing an interaction would only strengthen their fears.

In an order dated March 22, 2012, the Family Court, inter alia, granted the petition for visitation to the extent of awarding the grandmother three hours of visitation with the children every other Sunday commencing on June 3, 2012, as well as such other visitation as to which the parties shall agree. The court also directed the grandmother and the children to communicate daily via email until visitation commenced. On March 23, 2012, the same day the grandmother received a copy of the March 22, 2012, order, she sent an email to the mother informing her that she would be emailing the children daily starting that day, requesting that the mother direct the two older children to respond to the emails,

and directing that either the mother or the two older children respond on behalf of the two younger children.

In May 2012, the mother moved to modify the order dated March 22, 2012, so as to delay the commencement of visitation until October 14, 2012. In her supporting affidavit, the mother averred that prior to the date visitation was scheduled to commence, the grandmother, without authorization, began attending the children's after-school and extracurricular activities. The mother stated that on one occasion, the grandmother showed up at one of the children's after-school activities and watched her through the windows of the gymnasium. The mother indicated that the child did not go to the bathroom because the grandmother was staring at her through the window next to the bathroom, and that the child had reported feeling "stalk[ed]." In addition, the mother asserted that the grandmother had contacted school officials and the children's coaches, and demanded inclusion on mailing lists relating to the children's schedules and activities. The mother maintained that the grandmother's conduct had caused the children distress, and had led to two of the children refusing to attend their little league baseball games. In a reply affidavit, the mother averred that on June 18, 2012, the grandmother and her husband showed up at the kindergarten graduation ceremony of one of the children, and, after the ceremony, each stood at opposite corners of the "party room" by the exit doors. The mother asserted that a security guard noticed what was happening, and escorted the mother and the child to a classroom where they remained during the party. In an order dated July 25, 2012, the Family Court denied the mother's motion.

The Appellate Division observed that a court determining a petition for grandparent visitation under Domestic Relations Law § 72(1), must undertake a two-part inquiry. First, it must determine whether the grandparent has standing to petition for visitation rights based on the death of a parent or equitable circumstances (see *Matter of E.S. v. P.D.*, 8 NY3d 150, 157). If the court concludes that the grandparent has established the right to be heard, then it must determine if visitation is in the best interests of the child (see *Matter of E.S. v. P.D.*, 8 NY3d at 157; *Matter of Wilson v. McGlinchey*, 2 NY3d 375, 380). The courts should not lightly intrude on the family relationship against a fit parent's wishes. It is strongly presumed that a fit parent's decisions are in the child's best interests. It held that the Family Court should have denied the grandmother's petition for visitation. The death of the children's father provided the grandmother with automatic standing to seek visitation (Domestic Relations Law § 72 [1]). Nevertheless, the Family Court improvidently exercised its discretion in granting the petition. The evidence in the record, including, inter alia, the mother's testimony, the report of Dr. Favaro, and the children's apprehension regarding visitation with the grandmother, established that visitation was not in the best interests of the children at the time the Family Court granted the petition.

Pendente Lite Maintenance - Domestic Relations Law § 236(b)(5-a) - Better for the Court to Proceed Sequentially in Accordance with the Statutory Procedure

In *Goncalves v Goncalves*, --- N.Y.S.2d ----, 2013 WL 1632072 (N.Y.A.D. 2 Dept.) the Appellate Division observed that Domestic Relations Law § 236B (5-a) sets forth the substantive and procedural requirements for an award of temporary maintenance, addressing both the amount and the duration of the temporary award. Here, the Supreme Court performed the required calculations, but it did not proceed sequentially through the statutory procedure. Instead, upon its consideration of all the relevant statutory factors, which it explained at length, the court awarded temporary maintenance to the wife that was significantly in excess of the amount that would have been yielded solely by application of the statutory formula. It held that although it would have been better for the court to proceed sequentially in accordance with the statutory procedure (see e.g. *H.K. v. J.K.*, 32 Misc.3d 1226[A]), the court's award of temporary maintenance was "appropriately supported and explained" (*Khaira v. Khaira*, 93 AD3d 194, 201), and it declined to disturb it (cf. *Woodford v. Woodford*, 100 AD3d 875, 877).

Equitable Distribution - Marital Residence - Proper to Award Wife Sole Ownership of Marital Residence Where, Inter Alia,, Supreme Court Noted That it Was Directing Plaintiff to Convey His Interest in the Property in Lieu Of, Inter Alia, Maintenance and an Attorney's Fee.

In *Henery v Henery*, --- N.Y.S.2d ----, 2013 WL 1632079 (N.Y.A.D. 2 Dept.) the Appellate Division found that contrary to the plaintiff's contention, the Supreme Court did not abdicate its responsibility by adopting the defendant's proposed findings of fact, particularly since the court edited them by deleting some of the proposed findings, which necessitated the court's revision of the proposed judgment submitted by the defendant. In awarding the defendant sole ownership of the parties' marital residence, Supreme Court noted that it was directing the plaintiff to convey his interest in the property in lieu of, inter alia, maintenance and an attorney's fee. The court also noted that the mortgage on the marital residence had been satisfied by the defendant's parents, and that the expenses paid by the defendant, her financial sacrifices, her waiver of an attorney's fee, and the loss of retirement benefits resulting from the plaintiff's discharge for cause from a school administrative position, exceeded the plaintiff's share in the equity of the marital residence. It held that under the circumstances of this case, the Supreme Court providently exercised its discretion in awarding sole ownership of the marital residence to the defendant (citing *Ropiecki v. Ropiecki*, 94 AD3d 734, 735; *Mahon v. Mahon*, 129 A.D.2d 684, 684; *Teabout v. Teabout*, 269 A.D.2d 719, 721).

Child Support - Modification - UIFSA - Family Ct Act § 580-611[a] [1] - Family Court Had Jurisdiction to Modify Pennsylvania Support Order, upon Registration

In *Matter of Gowda v Reddy*, --- N.Y.S.2d ----, 2013 WL 1632549 (N.Y.A.D. 2 Dept.) the Appellate Division noted that the Uniform Interstate Family Support Act (UIFSA), codified in article 5-B of the Family Court Act, provides, in pertinent part, that a party seeking to modify and/or enforce a child support order issued in another state "shall register that order in this state" (Family Ct Act § 580-609). The support order governing the father's child support obligations, which was issued by the Court of Common Pleas of Montgomery County, Pennsylvania, and was effective beginning on June 3, 2004 was registered in the Family Court, Suffolk County, pursuant to UIFSA, on May 26, 2009. The Family Court had jurisdiction to modify the Pennsylvania support order, upon registration thereof, since none of the parties resided in Pennsylvania, the petitioner mother did not reside in New York, and the respondent father, at all relevant times, was subject to personal jurisdiction in Suffolk County (Family Ct Act § 580-611[a] [1]). It held that the Family Court erred in calculating the father's child support arrears to include the period prior to August 6, 2008, the date the mother's petition filed in Pennsylvania to modify the father's child support obligation set forth in the Pennsylvania support order was dismissed, upon the parties' stipulation, with prejudice. A stipulation of discontinuance with prejudice without reservation of right or limitation of the claims disposed of is entitled to preclusive effect under the doctrine of res judicata. Thus, to the extent this proceeding sought recovery of the same child support arrears that were sought in the Pennsylvania proceeding which was dismissed upon the parties' stipulation, with prejudice, it was barred by the doctrine of res judicata.

Arbitration - Stipulation Which Provides for Arbitration of " All Disputes Related to Matters Addressed in the Stipulation" Is Enforceable Subject to Vacatur on Public Policy Grounds

In *Wieder v Wieder*, --- N.Y.S.2d ----, 2013 WL 1632809 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order which granted the plaintiff's motion, in effect, to compel arbitration before a rabbinical court and to stay all proceedings in the action and in a related action entitled *Wieder v. Wieder*, while the arbitration was pending, and denied her cross motion to stay arbitration. The parties' stipulation of settlement dated January 11, 2011, which was incorporated but not merged into their judgment of divorce dated January 24, 2011, provided that all disputes related to matters addressed in the stipulation would be subject to arbitration before a rabbinical court. Accordingly, the Supreme Court properly granted the plaintiff's motion, inter alia, in effect, to compel arbitration before a rabbinical court of the financial disputes between the parties and properly denied the defendant's cross motion to stay arbitration. It observed that all financial issues, including the amount of child support, may be determined by an arbitration subject to vacatur on public policy grounds such as failure to comply with the Child Support Standards Act and not being in the best interests of the parties' children (see *Berg v. Berg*, 85 AD3d 952, 953; *Frieden v. Frieden*, 22

AD3d 634, 635; Matter of Hirsch v. Hirsch, 4 AD3d 451, 452-453). Contrary to the defendant's contention, the determination as to whether the stipulation of settlement is unconscionable as a whole is for the arbitrator or arbitrators to decide (see Tsadilas v. Providian Natl. Bank, 13 AD3d 190).

Supreme Court

Maintenance - Modification - DRL § 236(B)(9)(b) -Surviving Agreement - Downward - Extreme Hardship - Extreme Hardship Is Not Merely the Medical Consequence of a Maturing Life but its Plain Meaning Calls for a Substantial Dislocation of the Financial Circumstances So That the Litigant Is Nearly Without Resources or Shelter

In Long v Long, 2011 WL 10618898 (N.Y.Sup.), 2011 N.Y. Slip Op. 52549 (U) the retired plaintiff sought to modify his non-durational maintenance obligations to his now infirm and Medicaid-supported former spouse. He argued that he was enduring an "extreme hardship" from the continued enforcement of this longstanding obligation, and that circumstances have changed to justify a modification. The parties' divorce decree was entered on July 9, 1987. In December 1985, the parties signed a separation agreement, which was subsequently incorporated but not merged into the decree. The husband agreed to pay non-durational maintenance payments of \$160.00 per week until the wife remarried, and provide medical insurance for a five-year period following the divorce. He paid for more than 20 years. The husband retired from full-time employment with New York State in October 1998, but continued to work part-time installing carpets. Recently, the husband has suspended his part-time employment because of health issues. A retirement pension and social security are now the husband's only sources of income. As the husband's second job income declined because of his own infirmities, his maintenance payments became sporadic. As of the filing of this application, \$10,183 of unpaid maintenance obligations have accrued.

The wife, 72, was permanently disabled and resided at Monroe Community Hospital, where Medicaid would cover the costs of her care for the foreseeable future. Because the wife was disabled and publicly-supported, the husband sought to modify his non-durational maintenance and either discontinue the payments or significantly reduce them. In a statement of net worth, prepared by his accountant, the husband contended that "there has been a significant change in my financial circumstances and my financial ability to provide the support as ordered."The statement showed that the husband owns a \$135,000 house encumbered by a \$126,448 mortgage. He had monthly income from his pension and social security totaling \$5,470. In his monthly expenses, he listed the mortgage payment at \$1,140. In addition, he has what

appeared to be credit card charges and associated consumer debt totaling more than \$1,500 monthly. There was no explanation in the statement as to how the personal consumer-related debt accrued, but if this amount is deducted from his expenses, his monthly usual expenses were substantially less than his \$5,470 income, and could easily accommodate the estimated \$640 per month in maintenance payments to his wife.

Supreme Court observed that modification of a maintenance obligation is permissible only when compliance with the order creates an "extreme hardship" for the obligated spouse. DRL § 236(B)(6)(a); *Pintus v. Pintus* 104 A.D.2d 866, 867-868 (2d Dept 1984). The party seeking modification bears the burden of proving extreme hardship. *Pintus* at 868. DRL § 236(B)(6)(a). *Soba v. Soba*, 213 A.D.2d 472, 473 (2d Dept 1995). When assessing the merits for maintenance modification, the court must assess the cause of the hardship. *Fendsack v. Fendsack*, 290 A.D.2d 682, 684 (2d Dept 2002). Anticipated retirement alone, however, cannot be a catalyst for downward modification. *Id.* at 684; *Di Novo v. Robinson*, 250 A.D.2d 898, 899 (3d Dept 1998) (voluntary actions resulting in a diminished income does not warrant downward modification of a maintenance obligation). The husband voluntarily retired from full-time employment in late 1998, but continued to work part-time until a back ailment forced a second retirement. There was no evidence before the Court on the amount of income lost to the husband as a consequence of his retirement from his second job. Nevertheless, in the absence of any data substantiating the loss of income due to his second retirement, modification of maintenance was improper. Due to the age of the husband and the physically demanding nature of installing carpets, eventual retirement from all employment must have been anticipated. Therefore, the Court was not concerned with the loss of income due to cessation of the husband's part-time employment for modification purposes. *McKeown v. Woessner*, 249 A.D.2d 396, 397-398 (2d Dept 1998). Moreover, the husband continued to enjoy sizable pension distributions, augmented by social security income. The Court also noted that a large portion of the husband's monthly expenditures were related to consumer credit counseling services, suggesting much of the husband's financial woes were self-inflicted. *Kaplan v. Kaplan*, 23 Misc.3d 1123A (Sup.Ct. Nassau Cty 2009) (self-imposed loss of income or increased debt does not constitute a severe hardship sufficient to justify a modification). Accordingly, it was difficult for this Court to see how the alleged fiscal crisis of the husband was relevant for maintenance modification purposes. Unpaid general creditors should not displace the former spouse in the hierarchy of the husband's payment obligations. It observed that "Extreme hardship is not merely the medical consequence of a maturing life but its plain meaning calls for a substantial dislocation of the financial circumstances so that the litigant is nearly without resources or shelter". For these reasons, the husband's stressed financial condition as contained in his application did not meet the test of an "extreme hardship" sufficient to justify a modification of his agreed maintenance obligation.

Family Court

Child Custody - Award - Standing - Family Court Holds That Domestic Partner, Having Succeeded in Having Petitioner Declared a Parent for Child Support Purposes Was Judicially Estopped From Asserting That Petitioner Was Not a Parent in this Custody-Visitation Proceeding.

In *Matter of Estrellita A. v. Jennifer D.*, --- N.Y.S.2d ----, 2013 WL 1660674 (N.Y.Fam.Ct.) the parties registered as domestic partners in 2007. Thereafter, they decided to have a child and together went to North Shore University Hospital to choose a sperm donor. In February of 2008, respondent became pregnant by artificial insemination and as a result the child, Hannah Elizabeth A.-D., was born on November 23, 2008. Although there were discussions between the parties regarding petitioner adopting Hannah, no adoption was filed. In September of 2012 the parties stopped residing together.

On October 24, 2012 the respondent herein filed a Petition for an Order of Support of the child against Estrellita A. Ms. D. asserted in her petition that she and Ms. A. had a child in common, Hannah Elizabeth A.-D., born November 23, 2008. The biological father of the child was not legally established as the child was donor conceived. The Family Court was asked to rule upon whether Ms. A. should be declared a parent for the purposes of establishing a child support order. After a hearing it was established that Estrellita A. was a parent to Hannah A.-D. and petitioner was charged with support of the child.

On January 10, 2013 the petitioner Estrellita A. filed a Petition for Custody of Hannah. The petition alleged that the respondent Jennifer D. was the biological mother, and that the child Hannah is their child in common. The petitioner further asserted that it would be in the child's best interest that she have custody as she is better suited to foster a relationship between the child and her biological mother. Respondent asserted that the custody petition must be dismissed as the Petitioner was not a "parent" for purposes of custody/ visitation under the Family Court Act Article 6, Domestic Relations Law § 70 and §240, and thus has no standing to bring this action. Ms. D. relied upon the rulings in two Court of Appeals cases, *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991) and *Debra H. v. Janice R.*, 14 N.Y.3d 576, 930 N.E.2d 184, 904 N.Y.S.2d 363 (2010), *Alison D.* holding where, as here, the biological mother is a fit parent, that the court cannot displace her choices as to the child's best interest, including those with whom she allows the child to associate.

The petitioner argued that she sought custody as a person who had already been adjudicated to be a parent of the subject child and was not asking the court to confer such standing by estoppel. The petitioner argued that she has standing per the "uncontroverted" facts that establish her as a parent to Hannah and asserts that the Court must allow the custody matter to proceed to a "best interests" hearing. Family Court found that in her own child support petition Respondent alleged that she and the

petitioner had "a child in common". She requested and received an estoppel hearing. At that hearing respondent testified, among other things, that petitioner not only performed as a parent, she was in fact a parent. The court relying on this testimony issued an order adjudicating petitioner to be a parent and referred the matter to a support magistrate for the entry of an appropriate child support order. Now, in a complete reversal, and in an effort to preclude petitioner from having her day in court, respondent now claimed that petitioner has no standing to bring a custody/ visitation proceeding because petitioner was not a parent. This is referred to as "inconsistent positions". The Family Court observed that the doctrine against inconsistent positions, or judicial estoppel precludes a party from assuming a position in a court proceeding contrary to one previously taken simply because his or her interests have changed (Mukuralinda v. Kingombe, 100 A.D.3d 1431, 954 N.Y.S.2d 316 (4th Dept.2012). Respondent asserted in one proceeding that petitioner was a parent in order to secure a child support award. In the later custody proceeding she adopted a wholly contradictory position in an attempt to preclude the person from exercising any right or control with respect to that child. Having petitioned the court to recognize the petitioner as a parent, having testified that petitioner was in fact a parent and having prevailed in that matter, the respondent was judicially estopped in this custody/ visitation proceeding from asserting that petitioner was not a parent, and her motion to dismiss was denied.

April 16, 2013

Appellate Division, Second Department

Agreements - Construction - Ambiguity - Ambiguities in a Contractual Instrument Will Be Resolved Contra Proferentem, Against the Party Who Prepared or Presented it

In *DeAngelis v DeAngelis*, --- N.Y.S.2d ----, 2013 WL 1223312 (N.Y.A.D. 2 Dept.) Arthur DeAngelis (decedent) married Mariann DeAngelis in 1966 and they had two children together, the defendant Anthony DeAngelis, born in 1968, and the defendant Catherine DeAngelis, born in 1971. The decedent and Mariann separated in 1986 and divorced in 1987. Their separation agreement, which was incorporated but not merged into the judgment of divorce, provided that the decedent would maintain a \$300,000 life insurance policy on his life for the benefit the defendants. The separation agreement also stipulated that the decedent's failure to maintain a life insurance policy for the defendants' benefit shall result in a charge against the decedent's estate in the sum of \$300,000. After both defendants were emancipated in 1993, the decedent changed the beneficiary on his life insurance policy to his current wife, the plaintiff Jeanne DeAngelis (plaintiff). The decedent died in 2007, and the plaintiff filed a claim with the decedent's life insurance company and was paid the sum of \$300,000, plus interest. At the time of his death, the

decedent did not have a life insurance policy naming the defendants as beneficiaries, and the defendants subsequently filed a claim against the decedent's estate in the sum of \$300,000. The plaintiff then commenced an action in the Supreme Court for a judgment declaring that the defendants had no claim against the decedent's estate for his failure to maintain a \$300,000 life insurance policy for their benefit. After a nonjury trial, the Supreme Court issued a judgment in favor of the plaintiff.

The Appellate Division reversed. It observed that the the terms of a separation agreement 'incorporated but not merged into a judgment of divorce operate as contractual obligations binding on the parties. It has long been the rule that ambiguities in a contractual instrument will be resolved contra proferentem, against the party who prepared or presented it" (151 W. Assoc. v. Printsiples Fabric Corp., 61 N.Y.2d 732, 734). A contract which is internally inconsistent in material respects or that reasonably lends itself to two conflicting interpretations is subject to the rule invoking strict construction of the contract in the light most favorable to the nondrafting party. The separation agreement was ambiguous as to whether the decedent's obligation to maintain a life insurance policy naming the defendants as beneficiaries extended beyond the date of the defendants' emancipation. However, it was undisputed that the decedent's attorney drafted the separation agreement. It held that pursuant to the doctrine of contra proferentem, the Supreme Court should have construed the ambiguity against the decedent's estate (see Graff v. Billet, 64 N.Y.2d 899, 902) .Accordingly, the judgment was reversed and a declaration made that the defendants had a claim against the decedent's estate in the sum of \$300,000.

Equitable Distribution - Separate Property - Gifts - Record Supported Directive That Defendant Pay Wife and Children \$70,000 Each Representing Return of Money Intended as Gifts to Plaintiff and Children

In Finch-Kaiser v Kaiser, --- N.Y.S.2d ----, 2013 WL 1223318 (N.Y.A.D. 2 Dept.) Supreme Court, inter alia, awarded the plaintiff one-half of the value of Pro K Builders, Inc., based on a commencement date valuation rather than a trial date valuation, (b) directed the defendant to evenly divide a certain Shearson Lehman bond account in the minimum amount of \$380,000 and deliver 50% of the proceeds to the plaintiff, (c) awarded the plaintiff \$104,500 as her share of certain sums paid to Lanier & Fountain, Attorneys at Law, which were used to purchase real property in North Carolina, (d) directed the defendant to sell certain real properties in Sound Beach and Port Jefferson, and evenly divide the proceeds with the plaintiff, (e) directed the defendant to pay the plaintiff and the parties' two children \$70,000 each, representing sums intended as gifts by the defendant's father, but used by the defendant to pay life insurance premiums, (f) awarded the plaintiff the marital residence, (g) awarded the plaintiff counsel fees of \$16,225.50, and (h) awarded the plaintiff maintenance of \$10,000 per month to continue until her death or remarriage.

The Appellate Division held that contrary to the defendant's contention, the record supported the Supreme Court's directive that he pay the plaintiff and the parties' two children \$70,000 each. Those amounts represented a return of money given over a period of years by the defendant's father, and intended as gifts to the plaintiff and the children, but which was instead used by the defendant to pay life insurance premiums. It also held that Supreme Court properly exercised its discretion in making the other awards except that Supreme Court should not have directed that 50% of a Shearson Lehman bond account be distributed to the plaintiff. The testimony established that prior to the commencement of this action, the funds in that bond account were transferred into the defendant's Axiom account, which the Supreme Court distributed equally between the parties.

Divorce - Attorneys - Right to Counsel - No Absolute Right to Assignment of Counsel in Matrimonial Action

In *Meara v Meara*, --- N.Y.S.2d ----, 2013 WL 1223346 (N.Y.A.D. 2 Dept.) an action for a divorce Supreme Court granted the plaintiff's application for an award of an attorney's fee of \$15,000, and a judgment of divorce. It held that there is no absolute right to assignment of counsel in a matrimonial action (*Matter of Smiley*, 36 N.Y.2d 433). After nine attorneys representing the defendant had been either relieved or discharged, the Supreme Court did not improvidently exercise its discretion in refusing to appoint another attorney to represent the defendant. Given the defendant's conduct in unnecessarily prolonging the litigation, the Supreme Court did not improvidently exercise its discretion in granting the plaintiff's application for an award of an attorney's fee of \$15,000.

Child Visitation - Conditions - Court May Not Order That a Parent Undergo Counseling or Treatment as a Condition of Future Visitation

In *Matter of Lew v Lew*, --- N.Y.S.2d ----, 2013 WL 1223387 (N.Y.A.D. 2 Dept.), the Appellate Division observed that a court may not order that a parent undergo counseling or treatment as a condition of future visitation or reapplication for visitation rights, but may only direct a party to submit to counseling or treatment as a component of visitation. Thus, it was also improper for the Family Court to determine that the father could not file further petitions concerning his visitation rights until he completed, inter alia, therapeutic counseling, anger management classes, and parenting skill classes. The matter was remitted to the Family Court or an evidentiary hearing and a new determination of the father's petition.

Appellate Division, Third Department

Agreements - Stipulations - Set Aside - Unconscionability - No Right to a Hearing Where Party Now Regrets the Bargain That Was Struck

In *Bishopp v Bishopp*, --- N.Y.S.2d ----, 2013 WL 1234851 (N.Y.A.D. 3 Dept.) pursuant to the terms of their September 2004 stipulation of settlement, which was incorporated but not merged into their subsequent judgment of divorce, the parties agreed that defendant (husband) would pay plaintiff (wife) spousal maintenance in the amount of \$860 per month for five years and, further, that the wife would convey to the husband all right, title and interest in the family trash hauling business in exchange for a distributive award in the amount of \$252,000 (payable in monthly installments of \$3,000). When the husband fell into arrears, the wife moved to enforce the terms of the agreement, and the husband cross-moved to set aside the stipulation of settlement. Supreme Court partially granted the wife's application by directing that a judgment be entered in her favor in the net sum of \$40,163.32.

The Appellate Division affirmed. It observed that a "party who has made a voluntary and informed decision" to enter into a separation agreement or stipulation of settlement-even one that is one-sided-does not enjoy "an absolute entitlement to a judicial hearing" simply because he or she now regrets the bargain that was struck (citing *Curtis v. Curtis*, 20 A.D.3d at 656, 798 N.Y.S.2d 764). The documentary evidence submitted in support of the husband's cross motion established only that he had second thoughts about the deal he made, without counsel, which was insufficient to trigger a hearing regarding the claimed unconscionability of the settlement agreement.

Equitable Distribution - Judgments - Not an Abuse of Discretion to Direct Wife to Pay Half of Storage Unit Fees , Where Unit Rented to Store the Parties' Possessions While They Worked out Distribution Issues. Abuse of Discretion to Determine Wife Liable for Half of Taxes Where Wife Not Obligated to File Joint Tax Returns, or Split Child-care Deductions.

In *Nolan v Nolan*--- N.Y.S.2d ----, 2013 WL 1234881 (N.Y.A.D. 3 Dept.) Plaintiff (husband) and defendant (wife) were married in 1999 and had two children, a daughter (born in 2002) and a son (born in 2004). They separated in 2006 and subsequently agreed to joint custody with the wife having primary physical custody and the husband having visitation. The day after the dismissal of the second of the wife's two unsuccessful divorce actions, the husband commenced an action claiming abandonment and seeking primary

physical custody of the children. The wife agreed to the ground of abandonment and sought sole legal custody. After a trial, Supreme Court granted the divorce, continued joint legal custody as well as a slightly reduced schedule of midweek overnight visitation with the husband, and awarded him, among other things, counsel fees of \$15,000.

The Appellate Division held that Supreme Court's requirement that the wife pay half the amount of the storage unit fees was not an abuse of discretion. The storage unit was rented to store the parties' possessions while they worked out distribution issues. However, it was an abuse of discretion for Supreme Court to determine that the wife was liable for half of the husband's tax liabilities in 2007 and 2008. The husband presented no evidence that the wife was obligated to file joint tax returns in either year, or to split child-care deductions. Nor did the husband establish the amount by which his taxes were increased or the wife's taxes were decreased by either action. Accordingly, there was insufficient proof that the husband's individual income tax obligation should be treated as marital debt.

The Appellate Division observed that in determining whether to award counsel fees a sufficient evidentiary basis must exist for the court to evaluate the respective financial circumstances of the parties and the value of the services rendered. Here, the disparity in the parties' incomes was not significant and the husband offered no retainer agreements or billing statements. Nor did he establish the nature or value of the services rendered. In the absence of any such evidence, Supreme Court erred in awarding counsel fees to the husband.

Adoption - Consent - Domestic Relations Law § 111[1][d] - Biological Father's Consent to Adopt Child over Six Months Old Born out of Wedlock Is Required Only If the Father "Maintained Substantial and Continuous Contact with the Child as Manifested By" Payment of Reasonable Child Support and Either Monthly Visitation or Regular Communication with the Child or Custodian.

In *Matter of John Q. v Erica R.*, --- N.Y.S.2d ----, 2013 WL 1234941 (N.Y.A.D. 3 Dept.) the Appellate Division affirmed an order of the Family Court which granted petitioner's application to determine that the consent of respondent was not required for the adoption of his child.

John Q. (father) and respondent Erica R. (mother) were the biological parents of one child (born in 2004). A stipulated order entered in 2006 granted sole legal custody to the mother and limited visitation to the father at Phoenix House, a residential drug treatment facility where he was residing. The father left Phoenix House for another treatment facility, then was incarcerated until September 2008. In August 2009, he commenced a proceeding

seeking visitation and joint custody. Soon thereafter, petitioner Rick R. (petitioner), who married the mother in 2008 and had been living with her and the child since 2007, commenced a proceeding seeking to adopt the child without the father's consent. Family Court orally granted petitioner's application and dismissed the father's modification petition.

The Appellate Division affirmed holding that the father's consent was not required for the child's adoption. A biological father's consent to adopt a child over six months old who was born out of wedlock is required only if the father "maintained substantial and continuous contact with the child as manifested by" payment of reasonable child support and either monthly visitation or regular communication with the child or custodian (Domestic Relations Law § 111[1][d]). Only after the [biological] father establishes his right of consent to the adoption, by satisfying both the support and communication provisions of the statute, does the court proceed to determine whether he has forfeited that right by evincing 'an intent to forego his ... parental ... rights and obligations' " as outlined in Domestic Relations Law § 111(2)(a). Here, the father did not meet his threshold burden of establishing his right to consent, so the court did not have to proceed to whether he evinced an intent to forgo his parental rights. As to the support provision, the father paid approximately \$800 during the child's entire life and had not paid any support since 2005. Although the father was incarcerated or unemployed after that and may not have been financially able to pay much, he did not establish that he was unable to pay anything to support his child. The absence of a court order for child support does not excuse the father's failure to provide any financial support for his child. As to the communication provision, the father did not visit or communicate regularly with the child or the mother, who had custody. He last saw the child in November 2005. His incarceration did not obviate his obligation to maintain regular contact with the child. The father testified that he could not locate the mother and child after his release from prison, but he did not exert even minimal efforts to do so, such as looking in the phone book.

Grandparent Visitation - DRL §72 - Standing - Visitation Granted

In *Matter of Laudadio v Laudadio*, --- N.Y.S.2d ----, 2013 WL 1234952 (N.Y.A.D. 3 Dept.) Respondents, Rocco Laudadio (father) and Stephanie Montalvo (mother), were the unmarried parents of a child (born in 2011), and petitioner was the child's paternal grandmother. Following an incident that occurred when the child was approximately two months old, during the course of which the mother's sister struck petitioner, respondents cut off visitation between petitioner and the child. Petitioner thereafter commenced a proceeding seeking visitation with the child and, following a bifurcated hearing, Family Court granted petitioner's application and awarded petitioner visitation on the first Sunday of each month.

The Appellate Division affirmed. Petitioner testified that she purchased a crib and dresser for the child, was present for the child's birth, visited the child in the hospital, prepared dinner for the family when the child came home from the hospital and thereafter visited the child "at least [10] times" during the first month of the child's life. According to petitioner, each of these visits would last "[a] few hours," during which time she would hold, feed and change the child. Additionally, petitioner attended the child's first doctor's appointment, brought respondents and the child to a local shopping mall for the child's first photos and transported the family to New York City to visit other relatives and retrieve gifts for the child. Although the mother contended that petitioner lost interest in the child in late April 2011, the mother also acknowledged that petitioner curtailed her visitations-at the mother's request-in order to give the mother more time alone with the child. Finally, the father testified that after visitation between petitioner and the child was cut off in May 2011, petitioner contacted him and asked to see the child on approximately four occasions, which he would not permit. Such proof demonstrated a sufficient existing relationship between petitioner and the child to confer standing-particularly given the age of the child and the brief interval of time that elapsed between her birth and the interruption in visitation. It also found that Family Court's decision to award visitation to petitioner had a sound and substantial basis in the record. The mother's stated objections to the requested visitation were conclusory and, although the father raised legitimate concerns in this regard, including the child's alleged exposure to secondhand smoke at petitioner's home, Family Court's order contained sufficient safeguards to address these issues.

Child Custody - Lincoln Hearing - Wishes of the Child - Lincoln Hearing to Ascertain Child's Wishes, Though Often Preferable, Is Not Mandatory, but Due to "Unusual Circumstances" Appellate Division Remitted for a Lincoln Hearing

In *Matter of Jessica B v Robert B*, --- N.Y.S.2d ----, 2013 WL 1234967 (N.Y.A.D. 3 Dept.) Petitioner, who lived in Massachusetts, has two younger siblings, Joseph B. (born in 1994) and Melissa B. (born in 1997). Joseph and Melissa resided together in Broome County, in the custody of respondent, their paternal uncle, until September 2010. Joseph then moved to Massachusetts, where he resided with petitioner and in the custody of the Massachusetts Department of Children and Families. In November 2010, petitioner commenced a proceeding on behalf of herself and Joseph, seeking visitation with Melissa. Family Court granted visitation following a hearing, but, citing Joseph's troubled background, limited visitation to occur during daytime hours, on one weekend per month, in Broome County.

The sole issue raised on appeal was a challenge to Family Court's denial of the request by the attorney for Joseph for a Lincoln hearing to ascertain Melissa's wishes

(Matter of Lincoln v. Lincoln, 24 N.Y.2d 270 [1969]). The Appellate Division observed that such a hearing, though often preferable, is not mandatory, and the determination is addressed to Family Court's discretion. On the final day of the fact-finding hearing, the attorney representing Joseph made a written application requesting that the court conduct a Lincoln hearing prior to rendering a determination, but the attorney representing Melissa stated that a Lincoln hearing was not necessary, as he would convey her wishes. The appellate attorney for the child representing Melissa offered strong support for Joseph's appeal, alleging that Melissa's wishes were not accurately or adequately conveyed by her trial counsel. In light of this argument, the Appellate Division found its record lacking. It noted that although not determinative, the wishes of this 14-year-old child should be considered, and the insight she may provide will be helpful. In what it termed as "unusual circumstances" it remitted for a Lincoln hearing, affirmed the order appealed from and remitted the matter to the Family Court for further proceedings not inconsistent with its decision.

Child Custody - Hearing - Rule Against Hearsay - Professional Reliability Exception to the Hearsay Rule Enables Expert Witness to Provide Opinion Evidence Based on Otherwise Inadmissible Hearsay, Provided it Is Demonstrated to Be the Type of Material Commonly Relied on in the Profession

In Matter of Greene v Robarge, --- N.Y.S.2d ----, 2013 WL 1234970 (N.Y.A.D. 3 Dept.) Petitioner (father) and respondent (mother) were the unmarried parents of two sons (born in 2001 and 2003). Pursuant to a February 2009 order entered on consent, the parties shared joint legal custody of the children with primary physical custody to the mother and scheduled parenting time to the father. After the mother was found to have violated the order by impeding the father's parenting time, the father commenced proceedings seeking sole legal and physical custody. At the conclusion of the fact-finding hearing and following a Lincoln hearing, Family Court awarded sole custody to the father, established a visitation schedule for the mother and dismissed the remaining pending petitions.

The Appellate Division affirmed. It rejected the argument of the mother and the attorney for the children contend that the opinion testimony of Elizabeth Schockmel, the court-appointed forensic psychologist, should have been stricken because her opinion was based in part upon information she obtained from Department of Social Services caseworkers who were not subject to cross-examination. The professional reliability exception to the hearsay rule ... enables an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession (Hinlicky v. Dreyfuss, 6 NY3d 636, 648 [2006]; Hamsch v. New York City Tr. Auth., 63 N.Y.2d 723, 725-726 [1984]; O'Brien v. Mbugua, 49 AD3d 937, 938 [2008]). Schockmel testified, without contradiction, that

information obtained from collateral sources is commonly relied upon within her profession when conducting a forensic psychological evaluation in the context of a custody proceeding. Moreover, her opinion was principally based upon information she obtained from her extensive interviews with the mother, father and children, with the collateral source information serving as but "a link in the chain of data" that assisted her in forming her opinion. Accordingly, Schockmel's expert opinion testimony was properly admitted.

Appellate Division, Fourth Department

Judgments - Enforcement - Res Judicata Bars Relitigation of Previously Adjudicated Disputes Even Where Further Investigation of the Law or Facts Indicates That the Controversy Has Been Erroneously Decided

In *Lo Maglio v Lo Maglio*, --- N.Y.S.2d ---, 2013 WL 1028245 (N.Y.A.D. 4 Dept.) a post-divorce action, defendant wife moved for a determination that plaintiff husband was in contempt for failing to comply with a prior order and for an order directing plaintiff to provide her with continued medical insurance coverage in accordance with the prior order (*Lo Maglio v. Lo Maglio*, 273 A.D.2d 823). The Appellate Division agreed with defendant that the court erred in terminating plaintiff's obligation to provide her with medical insurance coverage inasmuch as its prior order required plaintiff to provide her with that coverage. It observed that as a general rule, the doctrine of res judicata bars relitigation of previously adjudicated disputes even where further investigation of the law or facts indicates that the controversy has been erroneously decided, whether due to oversight by the parties or error by the courts. As relevant here, "a final judgment of divorce settles the parties' rights pertaining not only to those issues that were actually litigated, but also to those that could have been litigated" (*Xiao Yang Chen v. Fischer*, 6 NY3d 94, 100). "[A]bsent unusual circumstances or explicit statutory authorization, the provisions of [such a] judgment are final and binding on the parties, and may be modified only upon direct challenge" (*Rainbow v Swisher*, 72 N.Y.2d at 110). Plaintiff did not take an appeal from the prior order, seek reargument of that order, or make a proper application to modify it. He was therefore foreclosed from collaterally attacking it in the context of this action. The order was reversed on the law, plaintiff's cross motion seeking an order terminating his obligation to provide defendant with the same level of medical insurance coverage that he provided during the marriage was denied, defendant's motion seeking an order directing plaintiff to provide defendant with that medical insurance coverage was granted, and the matter was remitted for further proceedings.

Child Custody - Jurisdiction - Continuing Jurisdiction - Domestic Relations Law §76-a - Family Court Had Exclusive, Continuing Jurisdiction to Determine Custody Where the Initial Child Custody Determination Was Rendered in New York, and There Was Ample Evidence of a Significant Connection by the Child with this State

In Matter of Mercado v. Frye, --- N.Y.S.2d ----, 2013 WL 1173944 (N.Y.A.D. 4 Dept) Petitioner father, who resided in New York, commenced a proceeding seeking to modify the parties' joint custody arrangement pursuant to which respondent mother had primary physical residence of the parties' children in California. Family Court awarded the father sole custody of the parties' youngest child. The Appellate Division affirmed. It held that Family Court had exclusive, continuing jurisdiction to determine custody pursuant to Domestic Relations Law § 76-a. It was undisputed that the initial child custody determination was rendered in New York, and there was ample evidence of a significant connection by the child with this state for Family Court to retain jurisdiction. The father's extensive parenting time took place in New York, the child had extended family in this state, and her medical and dental providers were located here. It rejected the mother's contention that the court should have dismissed the modification petition on the ground that New York is an inconvenient forum (Domestic Relations Law § 76-f). There was substantial evidence in this state from which to make a custody determination inasmuch as the father, the child, the child's treating therapist, the child's extended family, and the child's medical and dental providers are located in New York. In addition, the New York courts were more familiar with the parties and the child than the California courts, and the court permitted the mother to appear electronically for all proceedings except the fact-finding hearing.

The Appellate Division concluded that the court properly determined that "the father established the requisite change in circumstances to warrant an inquiry into whether the best interests of the child would be served by modifying the existing custody arrangement and that there was a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to award sole custody to the father. Although the child lived in California with her mother for approximately five years, the quality of the parties' respective home environments, the parties' ability to provide for the child's emotional and intellectual development, the financial status of the parties, and the needs and expressed desires of the child all support the court's custody determination. The child, who was 13 years old at the time of the hearing, expressed her desire to reside with the father and, given her age and relative maturity, her wishes were entitled to substantial weight. To the extent that the mother challenged the court's consideration of her violation of the divorce judgment for non payment of travel expenses in making its custody determination, it concluded that the court had discretion to consider that violation as part of its best interests analysis.

April 1, 2013

Court of Appeals

The Court of Appeals has adopted the Court-Pass system, which provides the public with free access to the following Court of Appeals materials for appeals, 500.27 certified questions, and judicial conduct matters pending on or filed after January 1, 2013: Motion papers in civil cases where the Court has granted leave to appeal; Briefs; Records or appendices; Videos of oral arguments; Transcripts of oral arguments; and Court decisions. In addition, parties with appeals, certified questions pursuant to section 500.27 of the Court of Appeals Rules of Practice, or judicial conduct matters before the New York State Court of Appeals must use the Court-PASS Upload Service to submit digital copies of records and briefs as required by the Court's Rules, which were amended effective February 1, 2013.

Public Access to Records of Court of Appeals

According to the Court of Appeals website certain briefs and records are sealed and not available for public view because they contain confidential information. Some briefs and records are redacted to protect sensitive information and are available in the redacted form only. Material will not be available on Court-PASS until it is processed by the Clerk's Office.

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You may search case records by party name, decision date, calendar date, authoring Judge, decision number, subject matter classification or citation. You may limit searches to civil or criminal matters.

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The search result screen will display a listing of all cases matching your search terms. Each case name will provide a link to available documents for that case for viewing or downloading.

Browsing Case Listings

As an alternative to searching for an individual case, you may browse through all cases available on Court-PASS. You may sort the cases alphabetically by party name and may also restrict the listing to a particular date or date range.

Court Docket

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What is the retention period for Court-PASS material?

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Is pre-2013 material available on Court-PASS?

No. The Court of Appeals website provides access to the full text of all Court of Appeals decisions and webcasts for the immediately preceding two years. Transcripts of webcasts are available for cases argued on or after September 1, 2012. The Court's archive of records and briefs since 1847 is maintained at the New York State Archives (518-474-8955). Photocopies are available for a charge. These materials may be obtained on microfiche at the New York State Library (518-474-5355).

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Information for Attorneys about the Court - Pass Upload Service

About the Upload System

Parties with appeals, certified questions pursuant to section 500.27 of the Court of Appeals Rules of Practice, or judicial conduct matters before the New York State Court of Appeals must use the Court-PASS Upload Service to submit digital copies of records and briefs as required by the Court's Rules (see section 500.2).

Section 500.2: Submission of Briefs and Record Material in Digital Format

(a) The Court requires the submission of briefs and record material in digital format (see sections 500.11[k]; 500.12[h]; 500.14[g]; 500.23[a][1][ii] and 500.27[e] of this Part) as companions to the required number of copies of printed briefs and record material filed and served in accordance with this Part.

(b) The companion briefs and record material in digital format shall comply with the technical specifications and instructions for submission available from the Clerk's Office.

(c) The companion briefs and record material in digital format shall be identical to the original printed briefs and record material, except they need not contain an original signature.

(d) Unless otherwise permitted by the Clerk of the Court, companion briefs and record material in digital format shall be received by the Clerk's Office no later than the filing due date for the printed briefs and record material.

(e) A request to be relieved of the requirements of this Part to submit companion briefs and record material in digital format shall be by letter addressed to the Clerk of the Court, with proof of service of one copy on each other party, and shall specifically state the reasons why submission of companion briefs and record material in digital format would present an undue hardship.

(f) The Clerk of the Court may reject briefs and record material in digital format that do not comply with the requirements of this Part or the technical specifications and instructions for submission available from the Clerk's Office.

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Appellate Division, First Department

Child Custody - Jurisdiction - Home State - Domestic Relations Law §76-a [7] - New York Jurisdiction Continues Where Temporary Absence From New York

In *Matter of Ruth L. v. Clemese Theresa J.*, --- N.Y.S.2d ----, 2013 WL 1149851 (N.Y.A.D. 1 Dept.), the Appellate Division affirmed an order which, inter alia, granted custody of the subject child to petitioner paternal grandmother. It rejected respondent mother's argument that the court did not have jurisdiction over this custody proceeding because New York was not the child's home state. The child lived in New York continuously with his mother, his father and his paternal grandmother from the age of about two weeks until he was almost six months old. His absence from New York, brought about by respondent's desire to prevent the father or petitioner from obtaining custody, was "a temporary absence which did not interrupt the six-month pre-petition residency required by the UCCJEA (Domestic Relations Law § 75-a[7]).

The evidence established extraordinary circumstances that justified the award of custody to petitioner (*Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543 [1976]). This evidence

included respondent's extensive history of neglect and abuse of her nine previous children, which resulted in the death of one child who was left unattended in a bathtub and the termination of her parental rights as to all the others. Respondent also had an extensive history of drug abuse, addiction, and criminal activity, as well as mental illness for which she refused to engage in treatment or take prescribed medication and her living situation continued to be unstable, and she failed to plan for the child's return. The court's determination that awarding custody to petitioner was in the child's best interests is supported by the evidence that petitioner supported the child, given structure to his life, and provided a stable and loving home, where he was thriving. The forensic evaluator concluded that removing the child from his grandmother's care would have disastrous consequences.

Child Support - Award - Imputed Income - Income May Be Imputed Based Upon Lack of Credibility

In *Matter of William P. v. Yojacni P.*, 103 A.D.3d 552, 960 N.Y.S.2d 46 (1 Dept, 2013) the Appellate Division affirmed an order of the Family Court which denied the mother's objections to support magistrate order modifying her child support obligations. The Support Magistrate's finding that respondent failed, despite multiple opportunities in a three-year period, to present credible proof of her income and his finding that she lacked credibility was supported by the record. For example, respondent testified that she worked washing hair at a beauty salon, but her 2009 Schedule C listed her as the sole proprietor of the salon. Respondent filed two financial disclosure affidavits within months of each other, with her expenditures shown as markedly lower on the second than on the first and in any event far in excess of her reported income. Under the circumstances, the Support Magistrate was not bound to determine respondent's income solely from the figures reported on her 2008 and 2009 income tax returns, and appropriately set support based on the children's needs.

Adoption - Extra Judicial Consent - DRL §115-b - Motion to Set Aside - technical noncompliance with Domestic Relations Law § 115-b(4)(a) does not invalidate consent which complied with all substantive requirements of §115-b and there was no showing of injury or prejudice to biological mother.

In *re Eliyahu*, --- N.Y.S.2d ----, 2013 WL 978806 (N.Y.A.D. 1 Dept.), the Appellate Division affirmed an order that granted the adoptive parents' motion for summary judgment dismissing the mother's petition to set aside her extrajudicial consent to the adoption of the child on technical grounds. It held that although the consent form was

not in 18-point type, this technical noncompliance with Domestic Relations Law § 115-b(4)(a) does not invalidate the consent especially since the consent complied with all the substantive requirements of §115-b and there was no showing of injury or prejudice to the biological mother. The record showed that the biological mother consulted with an attorney prior to signing the consent, that the attorney read and reviewed the entirety of the consent, and that the mother understood that she could revoke the consent within 45 days of its execution. "Neither mistake as to the meaning of the form nor failure to read the form before signing it constitutes a valid ground for vitiating the consent" (Matter of Baby Boy B., 163 A.D.2d 673, 674 [3d Dept 1990]). Nor did the prospective adoptive parents' failure to obtain judicial certification of their qualifications before taking custody of the child, in violation of Domestic Relations Law § 115(1)(b), or to file an adoption petition within ten days of taking custody, in violation of § 115-c, invalidate the birth mother's consent or disqualify the prospective adoptive parents from adopting the child. It noted that the statute does not provide a penalty for failure to comply with these provisions. The provisions are designed to ensure prompt court supervision of such placements, and in this case the prospective adoptive parents acted with reasonable promptness to bring themselves in compliance with the statute by obtaining certification and filing an adoption petition.

Equitable Distribution - Marital Residence - Wife Entitled to Distributive Award of Proceeds of Sale of Residence Used to Fund Investments

In *Mimran v. Mimran*, --- N.Y.S.2d ----, 2013 WL 1197270 (N.Y.A.D. 1 Dept.), Supreme Court, among other things, dissolved the parties' marriage and divided the marital property, awarding plaintiff a distributive award of \$3,768,921.50, placed a value of \$32,603 on the defendant's interest in certain family-controlled business enterprises; found plaintiff's equitable interest in one of defendant's investments to be \$1.25 million; imputed to the defendant annual income of \$650,000 per year for purposes of calculating child support; and declined to allocate the parties' liabilities extant on the day that plaintiff commenced the divorce action.

The Appellate Division held that trial court erred when it limited plaintiff's distributive award with respect to the Breeden investments to the sum of \$1,250,000, representing one half of the \$2,500,000 in liquidation proceeds that defendant retained and invested in *Mirman Schur*, a start-up movie company. Between May 2006 and June 2007, defendant made a \$26,550,000 investment in three Breeden entities: Breeden Capital Management (BCM), Breeden Capital Partners, LLC (BCP), and Breeden Partners (Cayman) Ltd. (Breeden Cayman). To fund the investment, defendant used \$8,250,000 from the proceeds of the sale of the parties' marital residence on Central Park West and borrowed the rest. In 2008, defendant effectively liquidated his investment in Breeden Cayman for \$18,600,000. Between March 2009 and January 2010, he liquidated his interests in BCP

and BCM for \$6,675,000 and \$2,800,000, respectively. Thus, by January 2010, defendant had received from his Breeden investments a total of \$28,075,000. Because \$8,250,000 in marital property was used to fund the Breeden investments, plaintiff should have been awarded \$4,125,000 from the liquidation proceeds, representing her half-interest, under the parties' post-nuptial agreement, in the proceeds from the sale of the Central Park West apartment. Further, because defendant invested \$26,550,000 and received \$28,075,000, plaintiff was entitled to an additional \$762,500, representing half of the \$1,525,000 gain. It increased the distributive award with respect to the Breeden funds to \$4,887,500 from \$1,250,000, a net increase of \$3,637,500. This raised the total distributive award to \$7,406,421.50.

Appellate Division, Second Department

Agreements - Child Support - Enforcement - Modification and Waiver - Contractual Rights May Be Waived If They Are Knowingly, Voluntarily and Intentionally Abandoned. Such Abandonment 'May Be Established by Affirmative Conduct or by Failure to Act So as to Evince an Intent Not to Claim a Purported Advantage.

In *Hannigan v. Hannigan*,--- N.Y.S.2d ----, 2013 WL 950793 (N.Y.A.D. 2 Dept.) the parties, the parents of twins, John and Jenny, born in 1986, executed a stipulation of settlement, which was subsequently incorporated, but not merged, into a judgment of divorce dated November 18, 1992. It provided that the father's monthly child support obligation shall be adjusted as of January 1 of each calendar year and shall be either 25% of the father's gross income or the sum of \$5,000 per month, adjusted by Consumer Price Index for the Greater New York area, "whichever is greater." It further provided that the parties agreed to pay for the undergraduate and postgraduate education of each of the unemancipated children of the marriage "in proportion to their respective incomes at the time such expenses [are] incurred."The stipulation contained a "Modification and Waiver" clause providing: "[N]either this Stipulation, nor any provision hereof, shall be amended or modified, or deemed amended or modified, except by a Stipulation in writing duly subscribed and acknowledged with the same formality as this Stipulation. Any waiver by either party of any provision of this Stipulation or any right or option hereunder shall not be deemed a continuing waiver, and shall not prevent or estop such party from thereafter enforcing such provision, right or option, and the failure of either party to insist in any one or more instances upon the strict performance of any of the terms or provisions of this Stipulation by the other party shall not be construed as a waiver or relinquishment for the future of any such term or provision, but the same shall continue in full force and effect."

In July 2008, the mother moved, inter alia, to direct the father to pay "additional child support" arrears for the years 2004, 2005, and 2007, in effect, to direct the father to pay arrears for college expenses for the 2004/05, 2005/06, and 2006/07 school years, and to direct the father to pay his pro rata share of Jenny's college expenses for the 2008/09 school year. In her supporting affidavit, the mother contended that the Stipulation obligated the defendant to pay "basic child support in the sum of \$5,000 monthly based upon his income of \$240,000" and that the defendant was obligated to pay as "additional child support," 25% of his income over \$240,000. Using the 25% formula, the mother requested that the father be directed to pay \$7,368 in additional child support for the year 2004, \$4,943 in additional child support for the year 2005, and an amount to be determined by the court in additional child support for the year 2007. The mother stated that the father "appears to owe no additional child support for 2006 as his income, as reflected on his income tax return, did not exceed \$240,000." The father paid the mother \$13,079 by check after this motion was made and still pending.

In October 2008, the mother made a second motion, in effect, to direct the father to pay child support arrears for the years 2003 through 2008. In the October motion, the mother calculated the father's child support obligation as \$5,000 per month, adjusted by Consumer Price Index for the Greater New York area, instead of 25% of the father's income. After a hearing on both motions, the Supreme Court, inter alia, granted those branches of the July motion which were, in effect, to direct the father to pay arrears for college expenses for the 2004/05, 2005/06, and 2006/07 school years, denied that branch of the July motion which was to direct the father to pay his pro rata share of Jenny's college expenses for the 2008/09 school year, granted those branches of the October motion which were to direct the father to pay child support arrears for the years 2003, 2006, and 2008, and, in effect, denied those branches of the October motion which were, in effect, to direct the father to pay child support arrears for the years 2004, 2005, and 2007.

The Appellate Division held, inter alia, that Supreme Court properly denied those branches of the October motion which were to direct the father to pay child support arrears for the years 2004, 2005, and 2007, and, should have also denied those branches of the October motion which were to direct the father to pay child support arrears for the years 2003 and 2006. It observed that contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned. Such abandonment 'may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage. Generally, the existence of an intent to forgo such a right is a question of fact. Here, it was clear from the explicit language of the July motion that the mother was seeking additional child support arrears for the years 2004, 2005, and 2007 using the 25% formula, and that she did not seek additional child support arrears for the years 2003 or 2006 because the father had not earned income over \$240,000 for those years. Accordingly, when the father paid the mother \$13,079 by check after the first motion was made by the mother, the entire amount originally sought by the mother as accrued

additional child support arrears for the years 2003 through 2007, and the mother accepted and cashed the check, as she testified that she did, the mother waived her right to demand additional child support arrears based upon the Consumer Price Index formula. The mother's own testimony that she "never intended to ask for [an increase based on the Consumer Price Index formula]" evidenced a manifestation of intent ... to relinquish that contractual right. Contrary to the mother's suggestion, "[a] waiver, to the extent that it has been executed, cannot be expunged or recalled" (Nassau Trust Co. v. Montrose Concrete Products Corp ., 56 N.Y.2d at 184).

However, the Supreme Court properly determined that the mother was entitled to child support arrears based on the Consumer Price Index formula for 2008, since she had not requested, or received, additional child support for 2008 at the time of the October motion. Based on the clear and unambiguous language of the Stipulation's "Modification and Waiver" provision, the mother's past waiver of her right to adjustments based on the Consumer Price Index formula could not be construed as a waiver of the same for the future, and there is no other basis in the record to conclude that the mother waived her right to adjustments based on the Consumer Price Index formula with regard to 2008.

The Supreme Court also properly granted those branches of the July motion which were, in effect, to direct the father to pay arrears for college expenses for the 2004/05, 2005/06, and 2006/07 school years. The Stipulation required the parties to pay educational expenses on a pro rata basis, "in proportion to their respective incomes at the time such expenses [are] incurred." The father contended that the parties orally modified the Stipulation to split the college expenses 50/50 instead of on a pro rata basis. "Generally, a written agreement which prohibits oral modification can only be changed by an 'executory agreement ... in writing' " (Calica v. Reisman, Peirez & Reisman, 296 A.D.2d 367, 368, quoting General Obligations Law § 15-301[1]). However, an oral modification is enforceable if the party seeking enforcement can demonstrate partial performance of the oral modification, which performance must be unequivocally referable to the modification. In order to be unequivocally referable, conduct must be inconsistent with any other explanation. Here, while the father testified that the parties orally agreed to split the college expenses 50/50, instead of on a pro rata basis, the mother testified that she only agreed to pay 50% of the college expenses up front, with the understanding that the parties would "settle up" later. There was no basis in the record to set aside the hearing court's determination to credit the mother's testimony on this matter. Crediting the mother's testimony, the mother's actions in paying 50% of the college expenses were not unequivocally referable to the modification that the father alleges was made.

Neglect - Family Court Act § 1051(c) - Although Neglect Established Petition Dismissed on the Ground That the Aid of the Court Was Not Required

In Matter of Kayden H, --- N.Y.S.2d ----, 2013 WL 950829 (N.Y.A.D. 2 Dept.) the grandmother of the seven-month-old child left the child in the kitchen sink with the water running, asking the child's mother, who was in the living room about 10 feet away, to watch the child while she went into the next room to retrieve a birth certificate for her other daughter. Moments later, while the mother and grandmother were outside the kitchen, the temperature of the water spiked and the child sustained burns to his body. A neglect petition was filed against the mother and the grandmother, and, following a fact-finding hearing, the Family Court sustained the petition against both of them. The mother and the grandmother separately moved to dismiss the petition insofar as asserted against each of them pursuant to Family Court Act § 1051(c) on the ground that the aid of the court was not required. The court denied those motions.

The Appellate Division held that a preponderance of the evidence presented at the hearing supported the Family Court's finding that they neglected the subject child. Nevertheless, although facts sufficient to sustain the petition were established, a neglect petition may still be dismissed if "the court concludes that its aid is not required on the record before it" (Family Ct Act§ 1051 [c]). Under the circumstances of this case, the Family Court should have granted the separate motions of the mother and the grandmother to dismiss the petition insofar as asserted against each of them pursuant to Family Court Act §1051(c). Following the incident, the mother completed all the services required by the Administration for Children's Services, including therapy sessions and parenting classes, and ACS did not request that the mother complete any additional services. The grandmother, although not required to do so, also attended parenting classes with the mother. In January 2010, 18 months before the fact-finding hearing concluded, the child, upon ACS's consent, was returned to the mother. In the interim, ACS, during home visits, documented that the mother and the grandmother had taken steps to ensure that the child was not left unsupervised, and that he was bathed appropriately. ACS noted in its progress notes that it had no safety concerns. The mother stated that the pipes in her apartment building have been replaced and, as a result, the water temperature no longer fluctuated. The foregoing demonstrated that the incident on which the petition was based was an isolated one, that the mother and the grandmother had been rehabilitated, and that the child was no longer at risk of being neglected. Since the aid of the court was no longer required to protect the child, the petition insofar as asserted against the mother and the grandmother should have been dismissed.

Appeals - Inadequate Record on Appeal - Effect upon Determination - Where Appendix Omitted Evidence Proffered by the Defendant at Trial Relating to Plaintiff's Restaurant Business, Appeal Dismissed Where Omission Inhibited Court's Ability to Render an Informed Decision Merits of the Appeal.

Child Support- Award - Imputed Income - Court May Impute Income Based upon the Parent's past Income or Demonstrated Earning Potential.

In Reale v Reale, --- N.Y.S.2d ----, 2013 WL 951011 (N.Y.A.D. 2 Dept.), after a non jury trial, Supreme Court directed plaintiff to pay \$415 per week in child support; awarded the defendant certain real property located in Franklin, New York, as her separate property; directed him to pay the defendant \$6,000, purportedly representing 20% of the increase in the value of certain property located in Somers, New York; directed him to pay the defendant \$62,500, representing her share of the plaintiff's restaurant business; and directed the sale of the former marital residence.

The Appellate Division observed that an appellant who perfects an appeal by using the appendix method must file an appendix that contains all the relevant portions of the record in order to enable the court to render an informed decision on the merits of the appeal. The appendix shall contain those portions of the record necessary to permit the court to fully consider the issues which will be raised by the appellant and the respondent. Here, the plaintiff omitted from his appendix certain evidence proffered by the defendant at the trial relating to the plaintiff's restaurant business. This omission inhibited the court's ability to render an informed decision on the merits of the appeal. Accordingly, the appeal from so much of the judgment as directed the plaintiff to pay the defendant \$62,500, representing the defendant's share of the plaintiff's restaurant business, had to be dismissed. Moreover, inasmuch as the former marital residence was foreclosed upon, the appeal from so much of the judgment as directed the sale of the former marital residence had to be dismissed as academic.

The Appellate Division found that Supreme Court properly imputed to the plaintiff an annual income of \$127,000, and correctly directed him to pay \$415 per week in child support. 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. Additionally, the Supreme Court properly awarded to the defendant certain property located in Franklin, New York, as her separate property. This property had been acquired by the defendant before the parties' marriage, and improvements were made with the defendant's separate funds. However, the Supreme Court erred in directing the plaintiff to pay the defendant \$6,000, which purportedly represented 20% of the increase in the value of certain property located in Somers, New York. There was no evidence to support the court's calculation of the increase in the value of this property. Although the Supreme Court directed the parties to complete an appraisal of that property, no such appraisal was conducted.

Maintenance - Modification - Required papers - 22 NYCRR 202.16 - Statement of Net Worth - Where Party Fails to Include Statement of Net Worth Court May Decline to Hear the Motion or Deny it Without Prejudice to Renewal upon Compliance with the Applicable Requirements.

In *Garcia v. Garcia*, --- N.Y.S.2d ----, 2013 WL 1136601 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order of the Supreme Court which denied, without prejudice, defendant's motion for a downward modification or suspension of his maintenance obligation set forth in a stipulation of settlement, which was incorporated but not merged into the judgment of divorce, and granted the plaintiff's motion for leave to enter a money judgment against him for arrears in maintenance and health insurance payments, and for an award of an attorney's fee. It observed that a party seeking to modify a maintenance award must include, in his or her moving papers, a sworn statement of net worth (22 NYCRR 202.16[k][2]). The proper course where a party fails to include the required statement of net worth is "to decline to hear the motion ... or to deny it without prejudice to renewal upon compliance with the applicable requirements" (*Matter of Fischer-Holland v. Walker*, 12 AD3d 671, 672). Contrary to the defendant's contention, there was no language in the stipulation of settlement exempting the parties from that requirement. As the defendant failed to provide a statement of net worth in support of his motion for a downward modification of his maintenance obligation pursuant to the stipulation, the Supreme Court providently exercised its discretion in denying the motion without a hearing (22 NYCRR 202.16[k][2], [5][ii]).

The defendant did not dispute the amount of arrears allegedly owed, but argued that he could not afford to pay that amount or, indeed, any amount. However, instead of seeking to modify the maintenance obligation when his employment was terminated in January 2010, the defendant waited until March 1, 2011, to file his motion for a downward modification. Since, during the period from the termination of the defendant's employment until his filing of the deficient motion, the defendant improperly resorted to the "self-help" measure of unilaterally ceasing payment of maintenance and health insurance costs, the Supreme Court properly determined that the plaintiff was entitled to arrears for the period from March 1, 2009, until the filing of the cross motion. The Supreme Court also properly granted that branch of the plaintiff's cross motion which for an award of an attorney's fee, as the plaintiff was entitled to such an award pursuant to the default provision in the parties' stipulation of settlement. The plaintiff was not required to provide proof regarding the parties' relative financial circumstances, as the stipulation of settlement entitled her to attorney's fees, "without regard to the willfulness of the defaulting party or the means of the nondefaulting party".

Maintenance and Child Support- Award - Imputed Income - Court May Impute Income Where Testimony Proffered By Defendant Lacked Credibility.

In *Zloof v. Zloof*, --- N.Y.S.2d ----, 2013 WL 1136892 (N.Y.A.D. 2 Dept.), an action for a divorce and ancillary relief, the Appellate Division affirmed a judgment which after a nonjury trial, inter alia, directed defendant to pay child support of \$3,396 per month and

awarded the plaintiff maintenance of \$2,250 per month for a period of five years commencing on July 1, 2011. It held that in light of the Supreme Court's finding, which was supported by the record, that the testimony proffered by the defendant and his brother lacked credibility, the court properly imputed income to the defendant.

Appellate Division, Fourth Department

Child Custody - Attorney for Child - Role - Must Zealously Advocate the Child's Position If Child Is Capable of Knowing, Voluntary and Considered Judgment

In *Mason v Mason*, 103 A.D.3d 1207, 959 N.Y.S.2d 577 (4th Dept, 2013) the Appellate Division observed that there are only two circumstances in which an attorney for the child (AFC) is authorized to substitute his or her own judgment for that of the child: "[w]hen the [AFC] 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" (Swinson, 101 A.D.3d at 1687, 956 N.Y.S.2d 765, quoting 22 NYCRR 7.2[d][3]). The obligation of the AFC, where the AFC is "convinced" that one of those two circumstances is implicated, is to inform the court of the child's wishes, if the child requests that the AFC do so (22 NYCRR 7.2[d][3]).

Child Support - CSSA - Income as Reported on Most Recent Income Tax Returns - Parties Use of 2010 Tax Returns Appropriate Where Parties Did Not Provide Court with More Recent Financial Documents to Use in Calculating Defendant's Support Obligation

In *Griffin v Griffen*, --- N.Y.S.2d ----, 2013 WL 1165363 (N.Y.A.D. 4 Dept.) Supreme Court granted the Plaintiff mother a modification of certain provisions with respect to the parties' access arrangement set forth in their settlement agreement, which was incorporated in the judgment of divorce; an upward modification of defendant father's child support obligation; and an award of attorney's fees. The Appellate Division agreed with defendant that the court erred in modifying certain access provisions in the settlement agreement. An existing access arrangement may be modified only upon a showing that there has been a subsequent change of circumstances which plaintiff failed to establish. Defendant's contention that the court erred in using his 2010 tax returns to calculate his child support obligation was raised for the first time on appeal and thus not properly before the Appellate Division. In any event, with respect to the court's use of the parties' 2010 tax returns, the Court found that the record did not indicate that the

parties provided the court with more recent financial documents to use in calculating defendant's support obligation.

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Granted - Although Respondent's Conduct Did Not Take Place in Public, Disorderly Conduct' Includes Disorderly Conduct Not in a Public Place.

In *Matter of McLaughlin v. McLaughlin*, --- N.Y.S.2d ----, 2013 WL 1172682 (N.Y.A.D. 4 Dept.), the Appellate Division affirmed an order of protection. It found that petitioner met her burden of establishing by a preponderance of the evidence that respondent committed the family offense of disorderly conduct (Family Ct Act § 832). Although respondent's conduct did not take place in public, section Family Court Act §812(1) specifically states that, "[f]or purposes of this article, 'disorderly conduct' includes disorderly conduct not in a public place." In addition, disorderly conduct may be committed when a person "recklessly creat[es] a risk" of annoyance or alarm through violent or threatening behavior (Penal Law § 240.20[1]). It rejected respondent's contention that the statute "requires more than a 'risk.'" It also rejected respondent's contention that the court erred in admitting in evidence an audio recording of the incident made by the parties' son. While there was no dispute that the parties were not aware that he was recording the incident and did not give consent thereto, the eavesdropping statutes are implicated only when the recording is made "by a person not present thereat" (Penal Law § 250.00[2]; see CPLR 4506[1], [2]). The parties' son, who made the recording from his bedroom, was "present" for the purposes of the statutes (see *People v. Kirsh*, 176 A.D.2d 652).

Supreme Court

**Pendente Lite Maintenance - Domestic Relations Law § 236(B)(5-a) - Unjust or Inappropriate
Child Support - Pendente Lite - CSSA Followed - Unjust or Inappropriate
Counsel Fees - Domestic Relations Law §237 - Award - Denied - Inadequate Documentation
Maintenance pendente lite denied based upon, inter alia, existence of a pre-divorce separate household and delay is seeking award.**

In *Ferguson v Ferguson*, 2013 WL 1092900 (N.Y.Sup.), 2013 N.Y. Slip Op. 50371(U) plaintiff commenced the proceeding with the filing of a Summons with Notice and Verified Complaint on September 15, 2011. On June 28, 2012, Plaintiff moved for pendente lite relief. Plaintiff sought temporary non-taxable maintenance. Defendant argued in

opposition that Plaintiff was employed full time and had additional self-employment income in the State of Georgia. Defendant further argues that Plaintiff was attempting to reap a financial windfall by application of the temporary maintenance guidelines of the State of New York since there was no equivalent statute in the State of Georgia where Plaintiff resided with the parties' children. Supreme Court observed that DRL § 236(B)(5-a) provides statutory guidelines to be applied in determining temporary maintenance awards in matrimonial proceedings. Like the Child Support Standards Act, application of the statutory guidelines results in a presumptive award of temporary maintenance. Unless the parties waive the application of the statutory guidelines, the Court must order the presumptive temporary maintenance award unless the court finds that the presumptive award would be unjust or inappropriate. Where the court finds that the presumptive temporary maintenance award would be unjust or inappropriate the court may adjust the presumptive temporary maintenance award upon consideration of the following factors as provided in DRL §236(B)(5-a)(e)(1).

Plaintiff's 2011 W-2, reflected an annual income of \$18,216.19. After statutory deductions of \$765.08 for Social Security taxes and \$264.13 for Medicare taxes, Plaintiff's income was calculated in the sum of \$17,186.98. Plaintiff also earned an additional \$8,914.70, from a second job, as reported on her 2011 1099 forms. Thus, Plaintiff's annual income was determined in the sum of \$25,381.68. Defendant's gross annual income is reported in the sum of \$174,166.86, including his income as reported on his 2011 W-2 forms and \$6,000.00 of rental income as reported on his Statement of Net Worth. After statutory deductions in the sum of \$6,282.03 for Social Security taxes, \$2,639.99 for Medicare taxes and \$6,000.64, for New York City locality taxes, Defendant's annual income was calculated in the sum of \$159,243.34. Thus, Defendant was the payor spouse with an income of \$159,243.33 and Plaintiff was the payee spouse with an income of \$25,381.68. The presumptive temporary maintenance award was \$42,696.67 annually, or \$3,558.06 monthly, or \$1,642.18 bi-weekly, or \$821.09 weekly. Considering the circumstances of this case and of the respective parties, the Court found that the amount of maintenance would be unjust and inappropriate and adjusted the award accordingly, in consideration of the factors as enumerated in DRL § 236(B)(5-a)(e)(1), considering factors: (g) the existence and duration of a premarital joint household or a pre-divorce separate household and (q) any other factor which the court shall expressly find to be just and proper.

The statute provides that the Court may consider the existence of a pre-divorce separate household to determine if the presumptive temporary maintenance award is unjust or inappropriate. It was undisputed that Plaintiff and the parties' children relocated to Georgia in 2007, while Defendant continued to reside in New York. Although the parties offered opposite rationales for Plaintiff's relocation to the State of Georgia, there was no dispute that Defendant maintained both properties in the State of New York and State of Georgia from 2007 to present. As indicated in Defendant's Statement of Net Worth, Defendant paid both mortgages, home owner's insurances and real estate taxes of \$4,705.00 without any contribution from Plaintiff. However, the utility bills were paid for individually with Plaintiff paying approximately \$665.00 monthly for the property in the

State of Georgia and Defendant paying approximately \$400.00 monthly for the New York State property. From 2007, Plaintiff has been able to meet her monthly expenses without any bill being delinquent or in default. The parties maintained their individual life style in separate states as they have chosen to do since 2007. The statute further provides that the Court may consider any factor which the Court expressly finds to be just and proper. A review of Plaintiff's Statement of Net Worth shows that Plaintiff met monthly expenses without incurring any debt. Significantly, Plaintiff argued that she has little income and was unable to meet her monthly expenses since 2007. However, Plaintiff did not avail herself for approximately five years of the judicial system in Georgia or New York to seek financial assistance from Defendant. There was no explanation provided by Plaintiff for her delay given that she was in need of financial assistance. Now Plaintiff commenced the instant proceeding to seek relief as provided under DRL 236. Upon considering the circumstances of this case, Plaintiff's application seeking temporary maintenance was denied.

Defendant opposed the application for temporary child support. The parties had two children. The youngest was 18 years of age. Defendant argued that Plaintiff commenced this proceeding within New York State to take advantage of the New York State statute which provides for later termination of child support until the age of 21. In the State of Georgia, the child support obligation terminates at the age of 18. Although the children have emancipated under the State of Georgia child support statute, Defendant argued that he continued to provide financial support for the children which continued from 2007 to present although the children reside in the State of Georgia. Although the youngest child was working, Defendant purchased a car for her and paid the monthly car note in the sum of \$245.00. He also gave the child a monthly allowance of \$120.00. Assuming, arguendo, that the Court applied the applicable child support percentage to the excess income, Defendant's basic child support obligation was \$26,992.18 annually or \$2,249.35 monthly. The Court found the Defendant's presumptive child support obligation, both on income up to \$136,000.00 and on the sum which exceeds \$136,000.00 to be unjust and inappropriate. The Court considered the factors enumerated in DRL § 2401-b (f). The child was currently attending college and was employed. The Court observed that "in high income cases, the appropriate determinate under DRL § 240(1-b)(f) for an award of child support where parental income exceeds the sum of \$130,000 should be based on the child's actual needs and the amount required for the child to live an appropriate lifestyle, rather than the wealth of one or both parties" (*Levesque v. Levesque*, 73 AD3d 990, 990 [2010] 0. Although the parties separated in 2007, Defendant continued to contribute to the expenses of Plaintiff and the parties' children. Both the subject child and the parties' emancipated daughter received automobiles as gifts from Defendant. Defendant paid expenses for the child, including her prom expenses and graduation expenses. Furthermore, Plaintiff had not submitted evidence regarding the financial needs of the child. Although Plaintiff alleged that she was unable to pay the children's expenses without Defendant's financial assistance, she did not dispute that Defendant paid certain expenses and failed to submit evidence to substantiate her claim. Notably, despite Plaintiff's current claims, she did not avail herself of the legal system in Georgia or New York seeking child support since her relocation in 2007. Plaintiff's inaction suggested that there was sufficient income to

manage her household expenses. Plaintiff's application seeking temporary child support was denied with leave to renew at trial.

It was undisputed that Defendant paid the mortgage expenses, real estate taxes, homeowner's insurance, and home owner's association fees on the parties' residence in Georgia and in New York. Considering the lifestyle of the parties, since their separation in 2007, Defendant was directed to maintain the status quo payments. Plaintiff's application for an Order directing Defendant to pay all the carrying charges and expenses related to the Georgia property was denied. Considering the circumstances of this case and the parties' lifestyle after Plaintiff's relocation to Georgia in 2007, Plaintiff's application seeking an Order directing Defendant to pay all unreimbursed health expenses of Plaintiff and the parties' unemancipated child was denied.

Plaintiff sought an Order directing Defendant to pay interim counsel fees of \$10,000.00 to Plaintiff's attorney pursuant to DRL § 237. Defendant opposed the application and argued that the time records supplied by counsel were incomplete. A review of the affidavits and exhibits annexed to the Order to Show Cause included conflicting information regarding funds received and payments made. Although Plaintiff's counsel's affirmation indicated that Plaintiff paid an initial retainer of \$3,500.00, he further stated that Plaintiff incurred \$4,230.37 for legal fees and expenses, but had not fully exhausted the retainer. Additionally, a review of what appeared to be a "time sheet" used by Plaintiff's counsel's firm for the purposes of billing, indicated that as of May 1, 2012, Plaintiff's counsel billed Plaintiff \$4,230.37. However, exhibit "I," which appeared to be an invoice for Plaintiff's legal services and fees, showed a credit balance in favor of Plaintiff of \$2,279.63. Although Plaintiff's counsel stated that copy of invoices for legal services from the date counsel was retained until September 2012 were annexed to his reply papers, the invoices were not annexed. Upon Plaintiff's failure to clearly set forth sums paid by Plaintiff toward counsel fees, and legal fees actually incurred by Plaintiff, the application seeking counsel fees was denied.

Property Determination - Separate Property - Lottery Winnings - Supreme Court Vacates Order, Retroactively to June 22, 2011, Which Directed Plaintiff to Pay Interim Maintenance, Where Defendant Conceded She Was No Longer in Need of Temporary Maintenance, but Was in Need of Maintenance until She Received the Winning Proceeds.

In *Questel v Questel*, --- N.Y.S.2d ----, 2013 WL 1111821 (N.Y.Sup.) Plaintiff moved for an Order declaring that the proceeds of certain lottery winning as a marital asset. Plaintiff argued that Defendant purchased the lottery ticket with marital funds, as Plaintiff continued to support the Defendant and children after the commencement of the action. Defendant opposed the application and argues that the ticket was purchased after the

commencement of the action, and therefore, the proceeds were not an asset subject to equitable distribution.

Supreme Court observed that the Appellate Division, Second Department has held, "the proceeds of a winning lottery ticket acquired by a spouse during the marriage constitute marital property" (*Damon v. Damon*, 34 AD3d 416, 416-417 [2d Dept 2006]). Domestic Relations Law § 236 Part B(1)(c) defines marital property as property acquired by either or both spouses during the marriage and before the commencement of a matrimonial action. DRL § (B)(5)(c) provides that marital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties. Plaintiff commenced the proceeding on October 28, 2010. Defendant purchased the lottery ticket after commencement of this proceeding. Thus, the lottery winning proceeds of May 2011 were not a marital asset, as the ticket was purchased after the commencement of the action. Although Plaintiff argued that Defendant purchased the ticket with marital funds because he continued to support the family after commencement of the action Supreme Court held that this argument was unpersuasive. The trend in the Appellate Division, Second Department disfavors the use of marital funds to meet pendente lite obligations and requires that the payor reimburse the other party for their equitable share of marital funds used to satisfy pendente lite obligation. (*Many v. Many*, 84 AD3d 1036, 1037 [2d Dept 2011]). It is well settled in the Appellate Division, First Department, that pendente lite payments should be paid from the payor's income, not marital funds. (*Elkaim v. Elkaim*, 176 A.D.2d 116,118 [1st Dept 1991]; *McInnis v. McInnis*, 23 AD3d 241, 242 [1st Dept 2005]; *Azizo v. Azizo*, 51 AD3d 438, 440 [1st Dept 2008]). This trend indicates that the funds used to pay maintenance and/or carrying charges pendente lite, after commencement of a matrimonial proceeding, are not marital funds. Rather, the funds, derived from the payor's income, are deemed to be a non-marital asset. Therefore, the funds Defendant used to purchase the lottery ticket were non-marital, and the resulting proceeds were also deemed to be a non-marital asset. Accordingly, Plaintiff's application was denied.

Plaintiff sought, among other things, an Order vacating the portion of the Court's Decision and Order, dated June 22, 2011, retroactively to June 22, 2011, which inter alia directed Plaintiff to pay interim maintenance of \$127.39 weekly. Defendant conceded that she was no longer in need of temporary maintenance, but was in need of maintenance until she received the winning proceeds on May 21, 2012. Supreme Court found that a substantial change in circumstances occurred when Defendant became the winner of the lottery that being May 2011. Therefore, a modification of the temporary maintenance order was warranted. However, the statute explicitly provides that arrears of temporary maintenance which accrue prior to an application seeking to modify or annul temporary maintenance, shall not be subject to modification, except for good cause shown. Although the statute does not expressly provide that an application seeking to modify temporary maintenance is retroactive to the date of application, it is implied. Additionally, courts have held that downward modifications of temporary maintenance "may only operate prospectively" (*Petek v. Petek*, 239 A.D.2d 327, 328 [2d Dept 1997]). The Court noted that

Plaintiff alleged that Defendant had constructive knowledge that she possessed a winning ticket and that she was an avid lottery player. Defendant did not dispute that she was unaware she was the winner on the date of the lottery game, May 2011. Therefore, Plaintiff's application seeking to vacate the provision of the Decision and Order, dated June 22, 2011, directing Plaintiff to pay temporary maintenance in the sum of \$127.39 weekly, was granted. However, Plaintiff application for credit back to the date of the Order was granted only to the extent of the date of his application.

Divorce - Defenses - Res Judicata - Decision and Order Granting Divorce, Support and Equitably Distributing Marital Property Vacated and Action Dismissed on Ground That at the Time of Commencement of Action Parties Were Already Divorced

In Hester v Hester, 2013 WL 1092889 (N.Y.Sup.), 2013 N.Y. Slip Op. 50369(U) the parties married on June 19, 1976 and lived separate and apart since 1989. On November 12, 2010, the husband commenced an action seeking a judgment of divorce and equitable distribution of the marital assets. After a hearing the Court awarded the wife maintenance of \$350 per month for the rest of her life commencing on July 1, 2012; \$4,000 toward debts accumulated by her during the course of the marriage for the support of the parties' children; directed that the husband and wife share in husband's pension; and directed the husband to pay the wife \$110 representing the quarterly payment on the wife's life insurance for January 2012 which he failed to make. The husband, who appeared pro se during this litigation moved to set aside this Court's July 18, 2012 decision and order and dismiss the action on the ground that at the time of this action the parties were already divorced pursuant to a 1988 Judgment of Divorce.

A review of the papers in the action of Hester v. Hester Index No. 6315/1988 revealed that in July of 1988 the wife, with the help of the Legal Aid Society of Westchester, commenced a matrimonial action. The husband was personally served with the summons and complaint on July 21, 1988. The husband neither appeared in the action nor answered the complaint. In her complaint the wife sought, inter alia, child support and spousal maintenance as well as equitable distribution of the marital property. On September 6, 1988, the wife moved for a judgment of divorce. The husband was served with the motion as well as all the supporting documents by certified mail return receipt. The return receipt was signed by the husband and placed in the Court file. In her motion, the wife sought an award of child support, maintenance, counsel fees, as well as a direction that the husband pay her life insurance and medical insurance for the children of the marriage. On September 30, 1988, the Court granted the wife a judgment of divorce on default. With respect to the issue of equitable distribution, the judgment states, in relevant part: **ADJUDGED AND DECREED that the Family Court shall have concurrent jurisdiction with this Court with respect to all future applications pertaining to support, custody, visitation and maintenance, and it is further ADJUDGED AND DECREED that the parties have**

heretofore resolved all questions of equitable distribution pursuant to Section 236(B)(5) of the Domestic Relations Law. Both the Finding of Fact and Conclusion of Law and the Judgment of Divorce were silent as to the issues of child support and spousal maintenance. There is no indication in the County Clerk's file that the Judgment of Divorce was received by or served upon any party.

In opposition to the husband's motion the wife noted that she did initiate a legal separation with the help of the Legal Aid Society in 1988. At that time she was seeking child support and spousal support. The wife contended that she did not know that the judgment of divorce had been granted. The wife stated that in 1988 she called the Legal Aid Society to get the status of her action and was told that no papers had been filed on her behalf. The Court noted that a valid Judgment of Divorce was signed and filed with the Clerk of the Court in 1998 and that, the husband could not maintain an action for divorce when he is already divorced. Typically, *res judicata*, or claim preclusion, requires that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Xiao Yang Chen v. Fischer*, 6 NY3d 94, 100, 810 N.Y.S.2d 96, 843 N.E.2d 723, quoting *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158). "In the context of a matrimonial action, [the Court of Appeals] has recognized that a final judgment of divorce settles the parties' rights pertaining not only to those issues that were actually litigated, but also to those that could have been litigated" (*Xiao Yang Chen v. Fischer*, 6 NY3d at 100, 810 N.Y.S.2d 96, 843 N.E.2d 723). Thus, this Court's decision dated July 18, 2012 was vacated and the action dismissed.

The Court found that the husband commenced this divorce action when he was already divorced. He had knowledge of the prior action because he was served with the summons and complaint and notice of motion in 1988. Yet, rather than locate the 1988 Judgment of Divorce, he commenced this action. The Court found that the husband's act of commencing this action without first discovering the outcome of the 1988 action was frivolous and resulted in the unnecessary expenditure of time and money. Accordingly, the Court granted the wife's application for attorneys fees and awards her legal fees in the amount of \$7,500.

March 18, 2013

Appellate Division, First Department

Equitable Distribution - Property Distribution - Credit for Payment of Separate Debt with Marital Property - When Marital Funds Used to Pay off Separate Liabilities or to Increase Value of Separate Property, Court Has Authority to Recoup Such Funds and to Distribute Them When Equity Warrants Recoupment.

In Spathis v Spathis, --- N.Y.S.2d ----, 2013 WL 709570 (N.Y.A.D. 1 Dept.) Supreme Court granted a judgement of divorce and ordered plaintiff to pay pendente lite maintenance arrears, awarded plaintiff \$49,087.05 as a distributive award and denied counsel fee awards to both parties. The Appellate Division modified. It held that the court correctly determined that defendant was responsible for a portion of plaintiff's tax liability incurred during the marriage, and also providently exercised its discretion in finding that plaintiff's payments for his mother's care and for the mortgage on his mother's house were not a waste of marital assets. The court correctly found that plaintiff's interest in his business could not be distributed because the court-appointed forensic accountant found that the business had no value.

The court correctly found that defendant could not be awarded a portion of the appreciation in the value of the marital apartment, which was plaintiff's separate property, because defendant failed to demonstrate that the property in question increased in value. Neither party submitted expert appraisals or testimony regarding the apartment (Burgio v. Burgio, 278 A.D.2d 767, 717 N.Y.S.2d 769 [3rd Dept 2000]). However, defendant should have been awarded half of the mortgage payments made on the apartment with marital funds. When marital funds are used to pay off separate liabilities or to increase the value of separate property, "a court has the authority to effectively recoup [such] marital funds ... and to distribute such funds to the parties in accordance with Domestic Relations Law s 236(B)(5)(c) when equity warrants such recoupment.

Plaintiff also failed to provide the court-appointed forensic expert with sufficient information to value his stock options at the time of the marriage or the present value of the shares he purchased, and thus plaintiff could not be credited in the amount of the value as of the date of the marriage of his right to acquire the shares of stock. Nor could the value of the shares be distributed since the same was unknown. In such circumstances, it is necessary and appropriate to resolve the issue by ordering an in-kind distribution of the shares, and it modified the judgment accordingly.

The Appellate Division held that the trial court providently exercised its discretion in denying maintenance. Defendant was awarded pendente lite maintenance for longer than the length of this short marriage. She was also only 44 years old and was capable of becoming gainfully employed. It also held that the court providently exercised its discretion in denying defendant an award of counsel fees. Both parties had engaged in dilatory tactics and had caused the large expenditure of counsel fees.

Child Custody - UCCJEA - Domestic Relations Law §76-f [1] - Supreme Court Properly Weighed All Factors Relevant to a Determination Whether North Carolina Was a More Appropriate Forum and Properly Concluded That it Was Not

In *Gottlieb v. Gottlieb*, --- N.Y.S.2d ----, 2013 WL 709639 (N.Y.A.D. 1 Dept.), the Appellate Division affirmed an order which declared New York the home state of the parties' children and denied defendant's motion to decline jurisdiction pursuant to the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and directed defendant to return the children to New York.

Defendant did not dispute that the trial court correctly determined that New York was the home state based It observed that Supreme Court properly weighed all factors relevant to a determination whether North Carolina was a more appropriate forum and properly concluded that it was not (DRL § 76-f[1], [2]). The court weighed defendant's superior financial circumstances and the much shorter length of time the children resided in North Carolina, as well as the fact that the majority of witnesses and documents were located in New York, including evidence relevant to the parents' allegations of misconduct against each other. In addition, defendant himself seemed to acknowledge that New York was a more appropriate forum to look into allegations of abuse and neglect of his daughter, which are relevant to any custody determination, because he reported these allegations to the New York City Administration for Children's Services, although he claimed to have learned of the alleged abuse only after moving to North Carolina. The court also gave proper weight to plaintiff's claims that defendant moved the children to North Carolina without her consent, and thus engaged in "unjustifiable conduct," which, if true, would obligate the North Carolina court to decline jurisdiction (DRL § 76-g). Without making any determination whether defendant engaged in such conduct, the court observed, correctly, that if a determination were made that he did so, North Carolina would have no basis for continuing jurisdiction, whereas there are no such potential hindrances to jurisdiction in New York.

Appeals - Interim Orders - Custody - Right to Appeal Intermediate Order Extinguished with Entry of Final Custody and Visitation Order

In *Diaz v Diaz*, --- N.Y.S.2d ----, 2013 WL 709759 (N.Y.A.D. 1 Dept.) the Appellate Division dismissed an appeal from an interim order which had granted plaintiff mother alternate weekend overnight visitation with the one child and discontinued defendant father's Thursday overnight visits with the other child. It held that the right to appeal from the instant intermediate order was extinguished with the entry of the final custody and

visitation order during the pendency of this appeal (see *Matter of Aho*, 39 N.Y.2d 241, 248 [1976]).

Appellate Division, Second Department

Antenuptial Agreements - Construction - Clear and Unambiguous Agreement Will Be Enforced According to its Terms.

In *Bennett v Bennett*, --- N.Y.S.2d ----, 2013 WL 692690 (N.Y.A.D. 2 Dept.), the Appellate Division held that plaintiff's contention that the appeal should be dismissed because certain portions of the order were not appealable was without merit, because the defendant's appeal was limited to a portion of the order that was appealable (CPLR 5701[a][2][i], [v]).

It noted that in contemplation of marriage, the parties executed a prenuptial agreement in which they agreed, inter alia, to define "marital property" to be "(a) any property that is jointly owned by the parties, and (b) all household furniture and furnishings owned by either party, whether heretofore or hereafter acquired and regardless of the form in which title is held."The prenuptial agreement defined all other property as "separate property," including real property purchased by either party during the marriage using their own separate property, as well as the appreciation of such property during the marriage "whether caused by the efforts of a party or a third party, or by inflation, or by any other cause or stimulus."The prenuptial agreement also provided that it could only be modified in a writing signed by both parties. Shortly after the parties were married, the plaintiff purchased a house in East Hampton for \$295,000. She made a \$150,000 down payment using proceeds from the sale of her separate property, and the defendant took out a mortgage, in his name, for the balance. The house, which would become the parties' marital residence, was titled solely in the plaintiff's name. The plaintiff was not employed after the parties were married, and the defendant paid, inter alia, the mortgage and all the carrying costs for the house. After the plaintiff filed for divorce, the defendant moved, inter alia, for a determination that, pursuant to the terms of the prenuptial agreement, the house was marital property subject to equitable distribution, and not the plaintiff's separate property. The Supreme Court denied that branch of the defendant's motion.

The Appellate Division affirmed the order holding that the house was plaintiff's separate property. It found that the prenuptial agreement provisions clearly and unambiguously defined what constituted the parties' marital property and separate

property, and under the circumstances of this case, the house was separate property. Contrary to the defendant's contention, the fact that he paid the mortgage and carrying costs on the house was immaterial, and, according to the modification provisions of the prenuptial agreement, could not serve as a basis for its modification.

Child Support - Modification - Downward - Emancipation - Support Magistrate's Findings Based on Credibility Determinations and Supported by Record Should Not Be Disturbed - Reluctance to See a Parent Is Not Abandonment

In *Matter of Gansky v. Gansky*--- N.Y.S.2d ----, 2013 WL 692782 (N.Y.A.D. 2 Dept.) the Appellate Division held that the Support Magistrate did not improvidently exercise her discretion in declining to rely on the father's account of his finances in determining that he failed to establish a substantial change of circumstances warranting a downward modification. As the Support Magistrate's findings were based on credibility determinations and supported by the record, they should not be disturbed. The credibility determinations of a Family Court support magistrate, who is in the best position to hear and evaluate the credibility of the witnesses, are entitled to deference.

It also held that Family Court properly denied the father's subsequent petition to terminate his child support obligation on the ground of constructive emancipation. Where the parent causes a breakdown in communication with his or her child, or has made no serious effort to contact the child and exercise his or her visitation rights, the child will not be deemed to have abandoned the parent. The burden of proof as to emancipation is on the party asserting it and the father failed to meet his burden. Although there was evidence that the children failed to return the father's telephone calls for several weeks before he filed his termination petition, such an occurrence shows no more than the children's reluctance to contact him. Reluctance to see a parent is not abandonment. Moreover, there was ample support for the court's determination that the father made no serious effort to maintain his relationship with the children during the relevant time period.

Child Support - Modification - Surviving Agreement - Boden - Brescia Rule - Substantial and Unanticipated Change in Circumstances - Change Is Measured by Comparing the Payor's Financial Situation at the Time of the Application for a Downward Modification with That at the Time of the Order or Judgment.

In *Matter of Nuesi v Gago*, --- N.Y.S.2d ----, 2013 WL 692799 (N.Y.A.D. 2 Dept.), the Appellate Division observed that the terms of a stipulation of settlement that is incorporated but not merged into a judgment of divorce operate as contractual obligations

binding on the parties. However, the court has the power to modify such terms upon a showing of a substantial and unanticipated change in circumstances. In determining whether there has been a substantial change in circumstances, the change is measured by comparing the payor's financial situation at the time of the application for a downward modification with that at the time of the order or judgment. The father did not meet his burden. Although he provided the Family Court with information concerning his income and other financial circumstances as of the time the petition for modification was filed, he failed to offer any evidence regarding these matters as of the time of the judgment of divorce.

Child Support - Award - DRL § 240(1-b) - Family Court Act § 413(1) - Court must Articulate Basis for Award Based on Parental Income above \$136,000. - Reasons Do Not Have to Be Based upon Needs of the Child; Test Generally Applied Is Whether the Child Is Receiving Enough to Meet His or Her "Actual Needs and the Amount Required ... to Live an Appropriate Lifestyle".

In *Matter of Parsick v Rubio*, --- N.Y.S.2d ----, 2013 WL 692802 (N.Y.A.D. 2 Dept.), petitioner, David S. Parsick, and the respondent, Thomas P. Rubio, were the parents of two children. Parsick had sole custody of the children pursuant to an agreement between the parties. In 2006, Parsick resumed his work as a public school teacher, and Rubio voluntarily made support payments, most recently of \$1,234 per week. In May 2008, Rubio stopped making voluntary support payments. Parsick petitioned for child support in 2010. A pendente lite order dated November 1, 2010, awarded Parsick temporary child support in the sum of \$1,000 per week. At a subsequent hearing on child support, Parsick testified that in 2010, his salary as a public school teacher was \$91,396 per year, representing a substantial raise from his income in 2008 of \$82,274. He and the children occupied a house given to him by Rubio. The children took music lessons and went to summer camp. The parties' son, who had special needs, received occupational therapy covered by Parsick's health insurance. Rubio owned 24.5% of a family business, and earned a weekly gross salary from the family business of \$6,500. The Support Magistrate found that combined parental income was \$468,259.36, 82% of which was attributable to Rubio. The Support Magistrate declined to award any child support above a combined parental income of \$130,000, determining that, upon consideration of the factors specified in Family Court Act § 413(1)(f), Rubio's pro rata share of the basic child support obligation above that amount would be "unjust and/or inappropriate," inter alia, because Parsick failed to submit evidence of the children's standard of living prior to the parties' separation, and Parsick had been supporting the children for two years without help. The Support Magistrate granted Parsick's petition to the extent of directing Rubio to pay child support of \$512.50 per week and directed that Rubio be credited for overpayments made pursuant to the November 1, 2010, temporary support order. Family Court denied Parsick's objections on

the ground that the facts cited supported the determination that the needs of the children were being met.

The Appellate Division granted the objections and granted the petition to the extent of directing Rubio to pay basic child support of \$1,025 per week. It observed that the Family Court must articulate an explanation of the basis for its calculation of child support based on parental income above \$130,000. The reasons do not have to be based upon the needs of the child. The test generally applied is whether the child is receiving enough to meet his or her "actual needs and the amount required ... to live an appropriate lifestyle" *Levesque v. Levesque*, 73 A.D.3d 990, 990, 900 N.Y.S.2d 663; see *Matter of Brim v. Combs*, 25 A.D.3d 691, 693, 808 N.Y.S.2d 735). The record revealed that the children enjoyed a comfortable lifestyle, participating in music lessons and attending summer camp. On the question of the amount of support necessary to maintain that lifestyle, Rubio's most recent voluntary payments, made in 2008, were over \$1,200 per week, and while since then, Parsick received a substantial raise in salary, that raise did not compensate for Rubio's termination of support payments. Although Parsick was able to maintain the children's lifestyle for two years without any financial contributions from Rubio, it held that he should not be expected to do so indefinitely, without Rubio contributing his equitable share. If a child's lifestyle may be maintained by the support provided pendente lite, a similar award may be made, and the "cap" adjusted to meet that level of support (see *Lago v. Adrion*, 93 A.D.3d 697, 699). The Appellate Division found that the children's needs would be met, and their lifestyle maintained, with an award based upon applying the child support percentage to the first \$260,000 of combined parental income, which yielded an award of \$1,025 per week.

Family Court - Jurisdiction - Proper to Dismiss Petition where summons not served.

In *Matter of Denise W. v. Charles R.*, --- N.Y.S.2d ----, 2013 WL 692826 (N.Y.A.D. 2 Dept.) a child custody proceeding, the Appellate Division affirmed an order which, without a hearing, dismissed, without prejudice, the mother's petition to modify a prior order of custody. It held that Family Court properly dismissed the petition, since she did not serve the father of the child with her petition (Family Ct. Act § 154-a)

Agreements - Prenuptial - Construction - When Agreement Is Clear and Unambiguous on its Face, Intent of Parties Is Gleaned from Four Corners of the Writing as a Whole with a Practical Interpretation of the Language Employed So That the Parties' Reasonable Expectations Are Met.

In *Monter v Balong*, --- N.Y.S.2d ----, 2013 WL 811872 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order which denied the defendant's motion to direct the plaintiff to pay her \$3 million pursuant to paragraph 30 of the parties' prenuptial agreement dated January 24, 2008, which was incorporated but not merged into the parties' judgment of divorce, for an award of postjudgment interest on that sum retroactive to the date of entry of the judgment of divorce, and for an award of counsel fees pursuant to Domestic Relations Law § 238. It observed that when a prenuptial agreement is clear and unambiguous on its face, the intent of the parties is gleaned from the four corners of the writing as a whole with a practical interpretation of the language employed so that the parties' reasonable expectations are met. Paragraph 30 of the parties' prenuptial agreement clearly provided that, upon separation, the plaintiff would be obligated to pay the defendant the sum of \$3 million "in \$500,000 installments," and that the first installment "shall be paid upon sale of the [marital residence]." Since the sale of the marital residence had not occurred by the time that the defendant made her motion Supreme Court correctly denied her motion since the plaintiff's obligation to make installment payments was not triggered. While paragraph 30 of the prenuptial agreement provided that "any ... balance" of the \$3 million would be due upon dissolution of the marriage, which had already occurred, there was no balance due as of the date of dissolution, since the plaintiff's obligation to pay the first installment had not been triggered in the first instance.

Agreements - Construction - Court Construes Phrase "or its equivalent if same is no longer available."

In *Matter of Bokor v. Markel*, --- N.Y.S.2d ----, 2013 WL 811880 (N.Y.A.D. 2 Dept.) the parties' Stipulation of Settlement, which was incorporated, but not merged, into their judgment of divorce, provided that the father agreed to "furnish at his own expense the Guardian PHS health and major medical insurance (or its equivalent if same is no longer available) for the benefit of the children of the parties until their respective emancipation." It was undisputed that the Guardian PHS health and major medical insurance plan provided out-of-network benefits, whereas the current health and major medical insurance plan the father was providing for the parties' unemancipated children did not include any out-of-network benefits. Thus, it held that the Family Court properly granted the mother's enforcement petition and directed the father to provide Guardian PHS health and major medical insurance, or its equivalent, for the children.

Right to Counsel -Family Ct Act § 262[a] - Deprivation of Party's Right to Counsel Guaranteed by Statute Requires Reversal, Without Regard to the Merits of the Unrepresented Party's Position

In *Matter of Savoca v. Bellofatto*, --- N.Y.S.2d ----, 2013 WL 811966 (N.Y.A.D. 2 Dept.) the Appellate Division found that contrary to the statement in the order appealed from to the effect that a hearing had been held, the mother's petition for custody was granted without a hearing. In addition, the Family Court did not conduct an examination of the parties or obtain a forensic report from an expert. Although the Family Court did ask the attorney for the child for an argument on behalf of her two-year-old client, the attorney for the child stated that a social worker from her office would be sent to visit the child, but this had not yet been done when the order was issued. Under these circumstances, it could not be concluded that the court possessed sufficient information to render an informed determination consistent with the child's best interests. Since there was no hearing, the court also failed to make specific findings of fact with respect to the issue of custody, as it is required to do. The order was reversed and the matter remitted for an evidentiary hearing not only for the reasons stated above, but for the additional reason that the father effectively was deprived of his statutory right to counsel (Family Ct Act § 262[a][v]). The deprivation of a party's right to counsel guaranteed by this statute requires reversal, without regard to the merits of the unrepresented party's position. At the start of the proceeding, the Family Court acknowledged that, prior thereto, the father's attorney had requested an adjournment "to at least consider whether she want[ed] to continue representing [the father]." Nonetheless, the court proceeded to determine the custody issue without a hearing. Moreover, the court neither advised the father of his right to an attorney, nor advised him of his right to an adjournment to obtain new counsel, notwithstanding a statement to the contrary contained in the order appealed from. An attorney from the office of the father's counsel was apparently present when the court rendered its determination, but she did not appear to be representing the father. While adjournments are within the discretion of the trial court the range of that discretion is narrowed where a fundamental right such as the right to counsel is involved. Under the circumstances presented here, instead of directing the matter to go forward, the Family Court should have exercised its discretion to grant an adjournment to permit the father to reach an understanding with his counsel, or to obtain new counsel.

Supreme Court

Attorneys - Legal Fees - Judiciary Law § 475 - Charging Lien - Charging Lien Cannot Be Asserted Against an IRA, Which Is Otherwise Exempt from Creditor's Claims Pursuant to CPLR 5205.

In **J.K.C. v. T.W.C.**, --- N.Y.S.2d ----, 2013 WL 791299 (N.Y.Sup.) an attorney sought to enforce a charging lien against his former client's IRA, which was funded through a roll-over of her marital share of the husband's IRA. The Supreme Court held that a charging lien under Section 475 of the Judiciary Law can not be asserted against an IRA, which is otherwise exempt from creditor's claims pursuant to CPLR 5205. After a trial of the divorce action, the referee directed that the husband's IRA account was marital property subject to equitable distribution. The wife received 38.6% of the account which was to be distributed according to a qualified domestic relations order (QDRO). Pursuant to the judgment of divorce, the court later signed a QDRO. There was no dispute that the wife's account, created when her marital share was rolled-over by the plan administrator, qualified as an IRA under the Internal Revenue Code. The wife, as the designated beneficiary, had a nonforfeitable right to the balance held in the rolled-over IRA account. The Court declined to read the phrase in the Judiciary Law that permits the charging lien to be pursued into "whatever hands they may come" to contravene the federal taxation treatment, ERISA-protection, and state exemption scheme which inheres in IRAs. As a matter of state law, reading the Judiciary Law to create a lien against the IRA roll-over would elevate the attorney's claims for fees over all other creditors, secured or otherwise, and give him a right unknown to any other creditor under the CPLR. The request for a charging lien was denied. The matter of the amount of fees that were encompassed in the attorney's retaining lien was referred to arbitration consistent with the rules of the court.

March 1, 2013

Appellate Division, First Department

Paternity - Acknowledgment of Paternity - Equitable Estoppel - Acknowledgment Not Void Where Mother Married at Time It Was Acknowledged

In **Matter of Andre Asim M. v. Madeline N.** --- N.Y.S.2d ----, 2013 WL 599359 (N.Y.A.D. 1 Dept.), the Appellate Division affirmed an order which denied the petition to vacate an acknowledgment of paternity of the child. It held that the acknowledgment of paternity was not void because the mother was legally married at the time she and petitioner executed it, as nothing in Public Health Law § 4135-b(2)(b) requires the mother to have been unmarried at the time the child was born.

Assuming that petitioner demonstrated that he signed the acknowledgment of paternity under a mistake of fact, the Family Court was required to conduct a hearing on

the best interests of the child before ordering a genetic marker test, and properly determined that it was not in the child's best interests on the basis of equitable estoppel to order genetic marker tests (Family Ct Act s 516-[a][b] [ii]). A man who mistakenly represents himself as a child's father may be equitably stopped 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 because it is shown that a parent-child relationship has developed between the two (see Matter of Shondel J. v. Mark D., 7 NY3d 320, 324, 327 [2006]). After the child was born in 2005, appellant held himself out to be the father of the child to his family and coworkers, permitted the child to call him "daddy," provided the mother with support for the child, and placed the child on his medical insurance until January 2009, when he ceased interacting with the child based on his belief he was not the biological father. At the time appellant sought to vacate the acknowledgment of paternity, the child recognized him as his father and continued to have a relationship with appellant's family even after appellant stopped seeing him.

The court properly excluded email's appellant sought to introduce into evidence, because the mother's belief as to whether maintaining the legal relationship between appellant and the child was in her son's best interest was irrelevant to the court's determination of whether equitable estoppel applied.

Agreements - Child Support - Opting out of Cssa - Remainder of Agreement That Failed to Comply with Domestic Relations Law § 240[1-b][H] (Cssa) Could Not Be Salvaged by Deeming it Divisible Where Provisions Pertaining to Child Support Constituted the Main Objective of the Agreement,

In David v Cruz, --- N.Y.S.2d ----, 2013 WL 599368 (N.Y.A.D. 1 Dept.) the Appellate Division observed that an agreement purporting to opt out of the basic child support obligations set forth in the Child Support Standards Act (CSSA) must "include a provision stating that the parties have been advised of the provisions of [the CSSA]," must specify the amount that the basic child support obligation would have been, and the reason or reasons for the deviation (Domestic Relations Law § 240[1-b][h]). Here, both the settlement agreement and the subject order effectuating it failed to recite that the parties were aware of the CSSA guidelines, failed to set forth the basic child support obligation, and failed to set forth the reasons for deviating from the guidelines. It held that although the invalidity of a child support provision does not necessarily invalidate the agreement in its entirety the agreement at issue could not be salvaged by deeming it divisible for partial illegality and severing and enforcing the provisions that did not pertain to child support. The provisions pertaining to child support constituted the main objective of the agreement, or the bargained-for consideration inducing defendant to agree to the remainder of the agreement, including the injunctive provisions.

Appellate Division, Second Department

Child Custody - Jurisdiction - Home State - Domestic Relations Law §76 - Family Court Lacks Subject Matter Jurisdiction Where New York Not Child's Home State - under the Uccjea, Home State Jurisdiction Is Paramount and Whether to Accept Jurisdiction Is a Home State Prerogative

In *Matter of Agueda v. Rodriguez*, --- N.Y.S.2d ----, 2013 WL 518360 (N.Y.A.D. 2 Dept.) the parties were the parents of a daughter who was born in 1999, and who had lived at times with the mother and at times with the father. In July 2010, while the child was residing with the mother, the mother allegedly asked the father if the child could visit with him for several weeks at his home in Texas. The father agreed, and on July 7, 2010, the child arrived in Texas. At some point thereafter, the father informed the mother that the child wished to remain in Texas and that he had enrolled her in school there. The mother agreed to allow the child to complete the school year in Texas, but claimed that she and the father agreed that the child would return to New York after the completion of the 2010-2011 school year. According to the mother, in July 2011 the father told the mother that the child would not be returning to New York, so she filed a petition for custody. The father moved to dismiss the petition on the ground that the Family Court lacked jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and the Family Court granted the motion.

The Appellate Division affirmed. It observed that under the UCCJEA, home state jurisdiction is paramount and whether to accept jurisdiction is a home state prerogative. A court of this state has jurisdiction to make an initial custody determination if it is the child's home state (Domestic Relations Law §76[1][a]). A home state is defined 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" (Domestic Relations Law §75-a [7]). The definition of a home state also permits a period of temporary absence during that six-month time period. Family Court correctly determined that it lacked subject matter jurisdiction, as the child did not live in New York for at least six consecutive months immediately before the commencement of the child custody proceeding. Therefore, the Family Court properly granted the father's motion to dismiss the mother's custody petition for lack of jurisdiction and properly denied the mother's cross motion for temporary custody of the subject child and to set a visitation schedule.

Child Support - Modification - Imputed Income - Substantial Change in Circumstances - Significant Increase in the Father's Income over the Last Decade, and the Increase in the Child's Expenses since the Original Order of Support Was Entered, Warranted a New Determination of Child Support

In *Matter of Braun v Abenti*, --- N.Y.S.2d ----, 2013 WL 518406 (N.Y.A.D. 2 Dept.) an order of support entered February 27, 2001, set the father's child support obligation and directed the father to pay 100% of "future reasonable health care expenses not covered by insurance." The child's orthodontia expenses of \$1,329 were not covered by insurance. The mother paid only \$20 of that sum, claiming she could not afford to pay more. The mother filed a petition to enforce the order of support. The mother also filed a petition for an upward modification of the father's child support obligation. The Family Court granted the mother's petition to enforce the order of support entered February 27, 2001, only to the extent of directing the father to pay the sum of \$20 to her for unreimbursed medical expenses, and denied her petition for an upward modification of the father's child support obligation.

The Appellate Division modified. Since the mother demonstrated that she paid \$20 of the child's unreimbursed orthodontia expenses, the Family Court's award of \$20 to the mother was properly limited to "those sums for which the mother submitted proof of actual payment to the third-party medical providers" (*Matter of Uriante v. Ippolito*, 54 AD3d 379, 379). However, Family Court Act § 413(1)(c)(5)(v) authorizes the Family Court to direct the payment of reasonable health care expenses unreimbursed by insurance which remain unpaid directly to the health care provider. It held that to insure that the child received prompt and adequate health care, in addition to awarding the sum of \$20 directly to the mother, the Family Court should have directed the father to pay the sum of \$1,309 which remained outstanding directly to the child's orthodontist.

The Support Magistrate concluded that mother failed to establish grounds for an upward modification of the father's child support obligation because she did not demonstrate that her income plus the current child support award were not sufficient to meet the child's needs, citing *Matter of Michaels v. Michaels* (56 N.Y.2d 924) and *Matter of Brescia v. Fitts* (56 N.Y.2d 132). However, where a party is seeking to modify a prior court order of child support, which is not based on an agreement between the parties, the movant need only demonstrate a substantial change in circumstances, defined as a change of circumstances "sufficient to warrant a modification" Here, the significant increase in the father's income over the last decade, and the increase in the child's expenses since the original order of support was entered, warranted a new determination of child support pursuant to the Child Support Standards Act.

Family Court - Jurisdiction - Family Court Act §167 - Submission to Jurisdiction by Appearance without Objection

In Matter of Jackson v Idlett, --- N.Y.S.2d ----, 2013 WL 518447 (N.Y.A.D. 2 Dept.) the Appellate Division held that the mother's voluntary appearance in court with respect to the family offense petition and failure to raise any objection to the manner of service of the petition, as well as her active participation at the fact-finding hearing, defeated her current claim that the Family Court did not obtain personal jurisdiction over her because she was not served with notice of the father's petition (Family Ct Act § 167; Matter of Wood v. Brown, 26 AD3d 390).

Agreements - Construction - Retirement Benefits - Courts Are Required to Equitably Distribute Not Only the Parties' Assets but Their Liabilities as Well

In Adelsberg v Amron, --- N.Y.S.2d ----, 2013 WL 673673 (N.Y.A.D. 1 Dept.) the Appellate Division reversed on the law an order directing that the parties' retirement assets be distributed without postcommencement earnings and/or losses in value as a result of market forces. It observed that a stipulation is an independent contract which is subject to the principles of contract law. A court should construe a stipulation made in open court in accordance with the intent of the parties and the purpose of the stipulation by examining the record as a whole. The parties' postjudgment stipulation provided that the commencement date of the divorce action would serve as the valuation date for the distribution of their retirement assets, which they had previously agreed to distribute equally. While the stipulation was silent on the issue of whether the transfers of all retirement accounts were with losses and/or earnings, courts are required to equitably distribute not only the parties' assets but their liabilities as well. Nevertheless, the stipulation was clear that the valuation date of the retirement assets would be the commencement date of the action, and therefore the plaintiff was only required to share in the earnings and/or losses as of that date. She did not stipulate that valuation as of the date of the commencement of the action was to also include "post-commencement" value changes attributable to market forces.

Pendente Lite Maintenance - Award - Effect of Prenuptial Agreement - Notwithstanding Waiver of Claim to Final Award Maintenance in Prenuptial Agreement, Court Entitled, in its Discretion, to Award Pendente Lite Relief in Absence of Express Agreement to Exclude.

In Lennox v Weberman,--- N.Y.S.2d ----, 2013 WL 673777 (N.Y.A.D. 1 Dept.) the Appellate Division modified an order which awarded the wife tax-free maintenance

pendente lite of \$38,000 per month, directed plaintiff to pay, inter alia, defendant's unreimbursed medical expenses up to \$2,000 per month, interim counsel fees of \$50,000, and expert fees of \$35,000.

The Appellate Division found that the court properly applied the formula set forth at Domestic Relations Law §236(B)(5-a)(c)(2)(a) in calculating defendant's temporary spousal maintenance award. The court listed all 19 of the enumerated factors, explained how 7 of them supported an upward deviation to \$38,000 per month from the \$12,500 a month in guideline support, and found that \$38,000 per month was not "unjust or inappropriate." It further found that the court properly imputed an annual income to plaintiff of \$2.29 million when it computed maintenance, since this was his income on the most recent tax return. 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 (see *Hickland v. Hickland*, 39 N.Y.2d 1 [1976]). The court properly took into account plaintiff's income from his investments, voluntarily deferred compensation, and substantial distributions (Domestic Relations Law §§ 236[B][5-a][b][4]; 240[1-b][b][5][i], [iv]), which was \$50.5 million the previous year. It rejected the plaintiff's argument that defendant waived temporary maintenance in the parties' prenuptial agreement. Notwithstanding that defendant waived any claim to a final award of alimony or maintenance in the prenuptial agreement, the court was entitled, in its discretion, to award pendente lite relief in the absence of an express agreement to exclude an award of temporary maintenance. Under the circumstances of this case, however, it deemed it appropriate to charge the interim awards against the one-half share of the marital property to which defendant is entitled under the prenuptial agreement. In so doing it found it significant that the parties provided in the agreement that each waived any right to the separate property of the other, that living expenses were to be paid out of the marital property, and, that the marital property would be equally divided in the event of divorce. It also found it significant that, here, the equal division of the marital property to which the parties agreed would leave each of them with substantial wealth.

It also held that the court's award of interim counsel fees of \$50,000 and expert fees of \$35,000 was warranted under the circumstances where the parties' assets, appeared to be anywhere from \$77 million to \$90 million. While there were some funds in defendant's possession, plaintiff was in a far better financial position than defendant, and defendant should not have to deplete her assets in order to have legal representation comparable to that of plaintiff.

Child Support - Award - Imputed Income - No Basis to Disturb Court's Credibility Determinations Particularly in Light of Numerous Omissions from Respondent's Tax Returns and Financial Disclosure Affidavit Discrepancies.

In Matter of McElhaney v. Okebiyi, --- N.Y.S.2d ----, 2013 WL 627231 (N.Y.A.D. 1 Dept.) the Appellate Division held that the Support Magistrate properly imputed income to respondent in calculating the support obligation and there was no basis to disturb the Support Magistrate's credibility determinations particularly in light of the numerous omissions from respondent's tax returns and Financial Disclosure Affidavit discrepancies. The evidence established that respondent, an accountant who worked for an entity where his brother was the director, failed to include as income \$110,000 in his bank account which respondent characterized as a loan from his brother but which was not reflected as a loan on his tax return, as well as money in a joint bank account with a board member of the entity where respondent worked, and that his bank account activity was generally inconsistent with respondent's claimed income. The court thus properly imputed income based on the higher amount of wages listed in respondent's 2009 tax return rather than his 2010 tax return. Contrary to respondent's assertions, this did not amount to a deviation from the statutory formula (FCA § 413[1][b][5][iv] and [v]). The Support Magistrate also properly considered respondent's education and the fact that he has an M.B.A. degree in questioning the veracity of his purported limited income in 2010 and onward. She also properly refused to acknowledge child support payments allegedly made for two non-subject children given the evidence in the record that respondent and the mother of the children lived at the same address, the limited evidence that a valid order existed, and respondent's failure to present any evidence that he was making such payments.

Appeal - Arguments Raised First Time in Reply Papers and Not Addressed by Supreme Court Not Before Appellate Division

In Hayes v Hayes, --- N.Y.S.2d ----, 2013 WL 616922 (N.Y.A.D. 2 Dept.) the Appellate Division held that defendant's argument on appeal was not properly before the Court, as it was raised for the first time in reply papers submitted to the Supreme Court, and that court did not address it.

Equitable Distribution - Distributive Award - Supreme Court May Not Modify Distributive Award

In Wasserman v Wasserman, --- N.Y.S.2d ----, 2013 WL 617015 (N.Y.A.D. 2 Dept.), the Appellate Division held that Supreme Court properly denied plaintiff's motion to modify the equitable distribution provisions of the parties' judgment of divorce based on a

post-judgment change in circumstances. While the law permits modification of child support and maintenance awards there is no comparable provision allowing modification of equitable distribution awards. Thus, a distributive award pursuant to Domestic Relations Law section 236(B)(5)(e), once made, is not subject to change.

Child Support - Award - Family Ct Act § 413 - Unreimbursed Health Care Expenses - Health Insurance Premiums Are Not the Equivalent of "Unreimbursed Health Care Expenses" Pursuant to Family Court Act Former § 413(1)(C)(5)

In *Matter of Kreiswirth v. Shapiro*, --- N.Y.S.2d ----, 2013 WL 518485 (N.Y.A.D. 2 Dept.) an order dated January 3, 2006, entered on consent directed that the father pay certain child support for the parties' child, that the mother continue to maintain health insurance coverage for the child through her employer, and that each party pay 50% of "uncovered health care expenses incurred on behalf of the subject child." In 2007, the parties entered into a separation agreement providing that the terms of the order dated January 3, 2006, were to continue. In 2008, the parties' judgment of divorce directed the father to pay for "future reasonable health care" pursuant to the order dated January 3, 2006, and provided that the separation agreement was incorporated but not merged into the judgment. The father paid 50% of the child's health insurance premiums until 2010.

In January 2012, the mother filed a petition seeking to direct the father to pay 50% of the health insurance premiums attributable to the child. The Family Court denied the petition. The Appellate Division reversed. It observed that Health insurance premiums are not the equivalent of "unreimbursed health care expenses" pursuant to Family Court Act former § 413(1)(c)(5), which was in effect when the parties entered into the separation agreement. However, the circumstances of this case indicated that the parties intended that health insurance premiums were to be included in the father's obligation to pay 50% of "uncovered health care expenses." The father acknowledged that he interpreted the agreement as requiring him to pay 50% of health insurance premiums, and made those payments until 2010. Accordingly, the mother's petition which was to direct the father to pay 50% of the health insurance premiums attributable to the subject child was granted.

Appellate Division, Third Department

Counsel Fees - Domestic Relations Law §237 - Award - Agreement Provision - a Party May Seek Fees under Both the Statute and an Agreement Provision. While Both Parties Noncompliance May Justify Denial of an Application for Fees under the Agreement, a Statutory Award of Counsel Fees Remains Discretionary

In **Momberger v. Momberger**, --- N.Y.S.2d ----, 2013 WL 530867 (N.Y.A.D. 3 Dept.) the Appellate Division affirmed the denial of plaintiff's motion for termination of his maintenance obligation, but directed defendant to provide plaintiff with certain disclosure required by the parties' separation agreement (97 AD3d 945 [2012]). The agreement, which was incorporated but not merged into the parties' judgment of divorce, contained a provision directing that, in the event of a default requiring either party to retain counsel to enforce the agreement, the losing party to the controversy would pay the successful party's reasonable counsel fees. While the prior appeal was pending, defendant sought appellate counsel fees pursuant to Domestic Relations Law § 237, rather than under the parties' agreement and prior to the determination of the appeal, Supreme Court awarded interim appellate counsel fees to defendant pursuant to Domestic Relations Law §§ 237 and 238. After the determination reversing the portion of Supreme Court's prior decision relating to disclosure (97 AD3d at 946-947), plaintiff appealed from the order awarding interim appellate counsel fees to defendant.

The Appellate Division affirmed. It noted that generally, 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. However, a party may seek the recovery of fees under both the statute and an agreement, unless the agreement contains an express waiver of the right to apply under the statute and provided that the party may not recover twice for the same fees. While noncompliance with a separation agreement by both parties may justify denial of an application for fees under the statute as well, a statutory award of counsel fees remains discretionary. Moreover, the statute contains a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. The separation agreement did not contain an express waiver of counsel fees under the statute and, thus, the discretionary award was permissible. Although both parties failed to abide by the separation agreement to some extent the interim award of appellate counsel fees pursuant to the Domestic Relations Law was not an abuse of discretion under the circumstances of this case-including defendant's status as the less monied spouse and the fact that she was the party who substantially prevailed on the prior appeal.

February 18, 2013

Appellate Division, First Department

Family Court - Support - Family Ct Act § 439(e) - Objections to Order of Support Magistrate-

In Matter of Reid v Moodie, --- N.Y.S.2d ----, 2013 WL 452156 (N.Y.A.D. 1 Dept.) Family Court denied the father's objection to an order denying his motion to vacate an order which dismissed with prejudice his petition to terminate the order of child support. The Appellate Division, in affirming held that Family Court erred in its determination that the objection was untimely, because the record before the Court did not establish that the order denying the father's motion to vacate was served with notice of entry (citing Matter of Belolipskaia v. Guerrand, 65 AD3d 932 [1st Dept 2009]).

Family Court - Support - Family Court Act § 412 - in Deciding Application for Child Support Family Court - Support Magistrate Properly Declined to Award Petitioner Child Care Expenses Incurred on Overseas Trips with Her Mother and the Child. Support Magistrate Erred in Directing Respondent to Make a Provision in His Testamentary Estate for the Child If Life Insurance Is "Unavailable" to Respondent. State's Child Health Insurance Plan Should Not Be Used Where, as Here, One of the Parents Has Health Insurance Benefits That May Be Extended to Cover the Child (Family Ct Act § 416[c], [E][2][iii])

In Matter of Vulpone v. Rose, --- N.Y.S.2d ----, 2013 WL 425433 (N.Y.A.D. 1 Dept.) the Appellate Division found that the Support Magistrate properly declined to award petitioner child care expenses incurred on overseas trips with her mother and the child. The Support Magistrate also properly declined to award petitioner prospective private school expenses for the then-toddler. Although the Support Magistrate properly ordered respondent to obtain life insurance for himself naming the subject child as the beneficiary and petitioner as the child's trustee, it erred in directing respondent to make a provision in his testamentary estate for the child if life insurance is "unavailable" to respondent. The respondent has more than two life insurance policies. If respondent was unable to obtain another life insurance policy for the subject child's benefit, he should be able to add the child as a beneficiary of one of his existing policies. Accordingly, the matter was remanded to the Support Magistrate to order respondent to name the child as the beneficiary and petitioner as the trustee on a term life insurance policy in his name, without any exceptions. It also held that Family Court properly required respondent to place the child on his health insurance plan. The State's child health insurance plan should not be used where, as here, one of the parents has health insurance benefits that may be extended to cover the child (Family Ct Act § 416[c], [e][2][iii]). The Family Court properly declined to direct respondent to make child support payments through the Support Collection Unit. From the time of the temporary order of child support until the final order of support, respondent made the required child support payments directly to petitioner on a timely basis. Petitioner did not provide any reason to change the manner of payment.

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Although Respondent's Violence Was Directed Toward Petitioner, it Occurred a Number of Times in the Presence of the Child; Thus the Inclusion of the Child in the Order Was Warranted

In *Matter of Coumba F. v. Mamdou D.*, --- N.Y.S.2d ----, 2013 WL 362834 (N.Y.A.D. 1 Dept.) the Appellate Division modified an order of the Family Court which directed respondent father, for a period of five years, to stay away from petitioner and to refrain from communicating with her except with regard to the child, to refrain from committing any family offenses against petitioner and the child, and to attend anger management and domestic violence counseling, to direct respondent to complete the anger management and counseling courses within six months of the date of entry of this order, and otherwise affirmed it. It found that the finding of aggravating circumstances was supported by a preponderance of the evidence showing that the child was present during a number of violent incidents directed at petitioner (Family Court Act §§ 827[a][vii]; 842). The evidence also showed that petitioner sustained a physical injury, i.e., pain and bruises after respondent struck her, and back pain for a month, for which she sought medical treatment. Although respondent's violence was directed toward petitioner, it occurred a number of times in the presence of the child; thus the inclusion of the child in the order was warranted. In addition, there was evidence that respondent acted violently toward the child. However, the order permitted court-ordered visitation and contact between respondent and the child, enabling respondent to maintain a relationship with the child.

Appellate Division, Second Department

Referees - Referee to Hear and Report - Judicial Hearing Officer's Report Should Be Confirmed When the Findings Are Substantially Supported by the Record

In *Matter of Stewart v. Moseley*, --- N.Y.S.2d ----, 2013 WL 362729 (N.Y.A.D. 2 Dept.) the Appellate Division held that a Judicial Hearing Officer's report should be confirmed when the findings are substantially supported by the record, and the Judicial Hearing Officer has clearly defined the issues and resolved matters of credibility (see *Matter of Taub v. Taub*, 94 AD3d 901; *Breidbart v. Wiesenthal*, 44 AD3d 982, 984)

Property Determination - Separate Property - Banking Law § 675[b] - by Depositing the Proceeds of a Personal Injury Lawsuit in Account Titled Jointly with the Plaintiff, Defendant Created Presumption That the Funds Were Marital. This Presumption May Be Overcome by Evidence That Account Was Titled Jointly as a Matter of Convenience, Without Intention of Creating a Beneficial Interest.

In Signorile v Signorile, --- N.Y.S.2d ----, 2013 WL 360530 (N.Y.A.D. 2 Dept.), the Appellate Division held that Supreme Court correctly concluded that 90% of a certain personal injury award was the defendant's separate property, even though he placed those funds in an 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 (Banking Law § 675[b]. 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, however, 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 as separate property of the spouse who claims the separate interest. Here, the defendant overcame the presumption that he intended to commingle his funds by establishing that he deposited them in the parties' joint account for only a few days, and then removed the funds and placed them into an account in his name only.

The Appellate Division held that considering, among other factors, the distribution of marital property, the duration of the marriage, the health of the parties, the present and future earning capacity of both parties, and the ability of the plaintiff to become self-supporting Supreme Court providently exercised its discretion in denying the plaintiff an award of spousal maintenance. It also held that Supreme Court properly imputed an annual income of \$30,000 to the plaintiff based upon the evidence at trial.

Maintenance - Award - Durational - in Calculating Child Support Error for Supreme Court to Deduct from Wives Income for Federal Insurance Contributions Act Where Plaintiff's Sole Source of Income Was Spousal Maintenance to Be Paid to Her by the Defendant. FICA Taxes Should Be Deducted Only from Income upon Which FICA Taxes Are "Actually Paid" Prior to Applying the Provisions of Domestic Relations Law § 240(1-b)(C) and FICA Taxes Are Not Paid from Amounts Received for Maintenance.

In Kaufman v Kaufman, --- N.Y.S.2d ----, 2013 WL 360596 (N.Y.A.D. 2 Dept.), Supreme Court, after a nonjury trial, awarded the plaintiff maintenance in the sum of \$577 per week until she reaches the age of 66, remarries, or dies, whichever occurs first; directed

defendant to continue the plaintiff's health insurance coverage during the period he is obligated to pay maintenance, or until the plaintiff becomes entitled to Medicare or is otherwise insured, whichever is sooner; directed the plaintiff to pay child support of \$155 per week for the period from December 2, 2010, until February 28, 2013, \$133 per week from "February 29, 2013," until July 18, 2015, and \$91 per week from July 19, 2015, until July 24, 2017 and directed the defendant to pay the cost of uncovered health care for the parties' three unemancipated children, the cost of the children's college expenses, and payments toward a certain loan debt.

The Appellate Division held that Supreme Court providently exercised its discretion in awarding the plaintiff maintenance. In calculating the plaintiff's share of child support under Domestic Relations Law § 240[1-b] the Supreme Court first deducted a certain amount from her income for Federal Insurance Contributions Act (26 USC, subtit C, ch 21; FICA) taxes. However, in this case, the plaintiff's sole source of income was the spousal maintenance to be paid to her by the defendant. Since FICA taxes should be deducted only from income upon which FICA taxes are "actually paid" prior to applying the provisions of Domestic Relations Law § 240(1-b)(c) (Domestic Relations Law §240[1-b][b][5][vii][H]), and since FICA taxes are not paid from amounts received for maintenance, the Supreme Court's calculations were erroneous.

Agreements - Construction - Where, as Here, the Parties' Separation Agreement Contains a Provision That Expressly Provides That Modifications must Be in Writing, an Alleged Oral Modification Is Enforceable Only If There Is Part Performance That Is Unequivocally Referable to the Oral Modification.

In *Parker v Navarra*, --- N.Y.S.2d ----, 2013 WL 362070 (N.Y.A.D. 2 Dept.) a proceeding to enforce the maintenance provisions of the parties separation agreement which was incorporated but not merged into their judgment of divorce, required the defendant to pay one half of the plaintiff's medical insurance premiums the defendant opposed the motion, alleging that the parties had orally modified the maintenance provisions of the separation agreement and, alternatively, that the plaintiff should be equitably estopped from enforcing the maintenance provisions of the separation agreement. The defendant requested an evidentiary hearing so that he could present the testimony of witnesses on those issues, but did not file a cross motion to modify the separation agreement. The Supreme Court denied the defendant's request and, granted the plaintiff the relief that she requested. The Appellate Division affirmed. It observed that where, as here, the parties' separation agreement contains a provision that expressly provides that modifications must be in writing, an alleged oral modification is enforceable only if there is part performance that is unequivocally referable to the oral modification. The defendant did not demonstrate that the plaintiff's acceptance of reduced monthly maintenance payments was unequivocally

referable to an alleged oral modification by, for example, demonstrating that consideration was given in exchange for the plaintiff's alleged oral agreement to accept reduced maintenance payments. Thus, he failed to make a showing sufficient to entitle him to a hearing on this issue.

To establish equitable estoppel, the defendant was required to show that the plaintiff's conduct induced his significant and substantial reliance upon an oral modification, and that the conduct relied upon to establish estoppel was not otherwise compatible with the agreement as written" (*Rose v. Spa Realty Assoc.*, 42 N.Y.2d 338, 344.) The plaintiff's acceptance of the reduced maintenance payments was compatible with the agreement as written, which contained a clause providing that any waiver of strict enforcement of a provision of the agreement did not constitute a waiver of the party's right "to strictly enforce the provision waived at a later time."As the defendant failed to allege facts demonstrating that the plaintiff's conduct was incompatible with the written agreement, the Supreme Court properly denied his request for a hearing on the issue of equitable estoppel.

Appellate Division, Fourth Department

Maintenance - Award - Nondurational -

In *Knobe v Knobe*, --- N.Y.S.2d ----, 2013 WL 474529 (N.Y.A.D. 4 Dept.) the Appellate Division concluded that the record did not support an award of nondurational maintenance to plaintiff. The record did not support the Referee's finding that defendant signed an Immigration and Nationalization Form I-864 (I-864 affidavit) providing that "he would be completely liable for the plaintiff's support once she had obtained a visa which allowed her to enter the United States."Additionally, the record did not support the Referee's finding that plaintiff was "unable to work to support herself financially," now or at any point in the future. At the hearing, plaintiff testified that she suffered from certain medical conditions that prevented her from being able to work or to seek job training in the United States, including dizziness, depression, stress, constant tinnitus, and a complete loss of hearing in one ear. Although a person seeking maintenance may submit "general testimony" regarding a medical condition where the effect of that condition on the person's "ability to work is readily apparent without the necessity of expert testimony" (*Battinelli v. Battinelli*, 174 A.D.2d 503, 504), that was not the case here. Thus, plaintiff was required to submit medical records or expert testimony, which she failed to do. Instead, plaintiff offered a letter from the Social Security Administration that referenced another letter allegedly declaring that plaintiff would have been eligible for disability benefits if she was a United States citizen. A decision of the Social Security Administration may serve as some evidence of a disability, but it is not prima facie evidence thereof (*Matter of*

Frenke v. Frenke, 267 A.D.2d 238, 238). Here, there was no decision in the record, and the letter submitted by plaintiff only referenced a decision. That letter did not indicate the nature, extent or permanence of plaintiff's disability, or the basis for the alleged determination by the Social Security Administration that plaintiff was disabled. Further, the Referee's finding that plaintiff's inability to speak English prevented her from seeking employment was belied by plaintiff's testimony, much of which was in English despite the instructions of the Referee that she testify in Russian and use an interpreter. Thus, based on the statutory factors, including the short duration of the marriage and plaintiff's age, education and job skills, it concluded that plaintiff was entitled to maintenance for a period of six years and modified the judgment accordingly.

Judgments - Amendment - CPLR 5019(a) - Mistakes Contemplated for Correction Are Mere Ministerial Ones, Not Those Involving New Exercises of Discretion or a Further Turn of the Fact-finding Wheel

In Meenan v Meenan, --- N.Y.S.2d ----, 2013 WL 474741 (N.Y.A.D. 4 Dept.) the wife appealed from an amended judgment that incorporated by reference the terms of a letter decision and modified the judgment of divorce with respect to maintenance and child support arrears in accordance with that decision. The Appellate Division held that Supreme Court erred in granting plaintiff's motion and applying CPLR 5019(a) to amend the judgment by changing the amount of the husband's maintenance and child support arrears. It observed that CPLR 5019(a) provides that "[a] judgment or order shall not be stayed, impaired or affected by any mistake, defect or irregularity in the papers or procedures in the action not affecting a substantial right of a party. A trial or an appellate court may require the mistake, defect or irregularity to be cured."The court's power to amend orders or judgments under that statute is limited, however, to correcting orders or judgments that contain "a mistake, defect, or irregularity not affecting a substantial right of a party, or [that are] inconsistent with the decision upon which they are based." The kinds of mistakes contemplated for correction pursuant to CPLR 5019 (a) are mere ministerial ones, not those involving new exercises of discretion or a further turn of the fact-finding wheel" (Herpe v. Herpe, 225 N.Y. 323, 327). "The rule has long been settled and inflexibly applied that the trial court has no revisory or appellate jurisdiction to correct by amendment error in substance affecting the judgment. It cannot, by amendment, change the judgment in matter of substance for error committed on the trial or in the decision, or limit the legal effect of it to meet some supposed equity subsequently called to its attention or subsequently arising. It cannot correct judicial errors either of commission or omission. Those errors are, under our system of procedure, to be corrected either by the vacating of the judgment or by an appeal" (Herpe, 225 N.Y. at 327). A court has no power to reduce or increase the amount of a judgment when there is no clerical error. This case did not involve an inconsistency between the judgment and an underlying decision or stipulation of the parties. Rather, the husband sought the correction of "[m]istakes of

[f]act," i.e., the court's allegedly erroneous calculation of a credit for maintenance and support payments made by the husband during the pendency of the action in accordance with a temporary order, and the court's failure to credit him for the wife's equitable share of premiums he paid for the children's medical insurance. The court, however, was not empowered to amend the judgment substantively "to meet some supposed equity subsequently called to its attention" (Herpe, 225 N.Y. at 327).

Child Custody - Right to Counsel - FCA § 262 - Respondents in Visitation Proceedings Are Entitled to Assigned Counsel

In *Matter of Wright v. Walker*, --- N.Y.S.2d ----, 2013 WL 387336 (N.Y.A.D. 4 Dept.) the Appellate Division reversed an order of the Family Court which granted the mothers petition to modify an order of custody entered upon consent, which inter alia, awarded the grandmother, the mother, and respondent Kevin Noltee, the child's father, joint legal custody of the child and awarded the grandmother primary physical custody of the child. In her petition, the mother did not seek to modify custody but, rather, she sought only visitation with the child in the mother's own home. Family Court granted the petition. The Appellate Division observed that Family Court Act § 262(a)(iii) provides that the court must advise respondents "in any proceeding under part three of article six of this act" of their right to be represented by counsel of their own choosing, their right to an adjournment to confer with counsel, and their right to have counsel assigned by the court in any case where they are financially unable to obtain their own counsel. The Court concurred with the result reach by the Second and Third Departments, which have held that respondents in visitation proceedings are entitled to assigned counsel (see e.g. *Matter of Samuel v. Samuel*, 33 AD3d 1010, 1010-1011; *Matter of Wilson v. Bennett*, 282 A.D.2d 933, 934). Although ... the word ' visitation' does not appear anywhere in Family Court Act § 262, a proceeding to modify a prior order of visitation plainly is a proceeding under Family Court Act article 6, part 3 and, hence, falls within the purview of the assigned counsel statute. The grandmother, as a respondent in a proceeding under Family Court Act article six, part three, was entitled to be advised of her right to assigned counsel and to be provided with assigned counsel, if financially eligible. The deprivation of a party's fundamental right to counsel in a custody or visitation proceeding requires reversal, without regard to the merits of the unrepresented party's position. It reversed the order and remitted the matter to Family Court for further proceedings on the petition.

Child Support - Award - DRL § 240(1-b)(c)(7) - Educational Expenses

In Belec v. Belec, --- N.Y.S.2d ----, 2013 WL 387872 (N.Y.A.D. 4 Dept.) the Appellate Division held that the Referee did not abuse his discretion in ordering the father to pay 40% of the child's private elementary school tuition. A court may award educational expenses "[w]here [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 present or future provision of ... private ... education for the child is appropriate" (Domestic Relations Law § 240[1-b][c][7]). The evidence established that the parties agreed to send the child to a certain private school rather than the public school where they resided, and at the time of the trial the child had been in that school for three years and was thriving. Although the father testified that he wanted the child to attend the public school in the district where he now lived, there was no evidence that the child could attend that school, that it was in her best interests to attend that school, or that the father was financially unable to provide the necessary funds for the private school.

Child Support - Modification - Family Court Was Empowered to 'Make, with or Without Holding a New Hearing, its Own Findings of Fact

In Matter of Jeffery v. Sprague, --- N.Y.S.2d ----, 2013 WL 387999 (N.Y.A.D. 4 Dept.) the Appellate Division affirmed an order of Family Court that granted respondent father's objections to the order of the Support Magistrate and denied the petition for an increase in child support. It rejected the mother's contention that, in determining whether to grant the objections to the Support Magistrate's order, the court was limited to determining whether the Support Magistrate abused his discretion. Family Court "was empowered to 'make, with or without holding a new hearing, its own findings of fact. Thus, the court had broad authority to review the order of the Support Magistrate and to grant a party's objections to the order upon determining that it would impose a hardship on that party.

Surrogates Court

Estates - Disqualification as Surviving Spouse - Standard Used to Determine If a Surviving Spouse Abandoned Decedent Is Same Standard Used to Determine Whether the Party Would Have Been Entitled to Separation or Divorce on Grounds of Abandonment.

In Matter of Estate of Hama, 957 N.Y.S.2d 583, 2012 N.Y. Slip Op. 22378 (Surr. Ct, NY County) Decedent's wife, a non-resident alien, petitioned for issuance of letters of administration to herself and her designee. Decedent's parents, also non-resident aliens,

cross-petitioned for issuance of letters of administration to their designee, who moved for order consolidating administration proceedings with a declaratory judgment action and summary judgment dismissing the other administration petition, revoking temporary letters issued to surviving spouse's designee, granting letters of administration to him, and declaring that decedent's wife was not a spouse for purposes of his annuity contract. Decedent's wife and her designee filed cross-motion for summary judgment dismissing cross-petition and adjudging her to be the default beneficiary of decedent's annuity contract.

The narrow issue before the court was whether Yuko Machida abandoned her husband, Shoichiro Hama, and therefore has forfeited the rights with respect to his estate that would otherwise accrue to her as his surviving spouse (EPTL 5-1.2[a][5]).

The Surrogate observed that the applicable statute, EPTL 5-1.2, provides as follows: "Disqualification as surviving spouse "(a) A husband or wife is a surviving spouse within the meaning, and for the purposes of 4-1.1, 5-1.1, 5-1.1-A, 5-1.3, 5-3.1 and 5-4.4, unless it is established satisfactorily to the court having jurisdiction of the action or proceeding that: ... (5) The spouse abandoned the deceased spouse, and such abandonment continued until the time of death." The statute contains no definition of "abandonment," but historically, the courts have recognized the requirements of the DRL as implicit in the EPTL. That is, "[t]he standard used to determine if a surviving spouse abandoned the decedent is the same standard used to determine whether the party would have been entitled to a decree of separation [or divorce] on grounds of abandonment". "To constitute abandonment under this statute something more is necessary than a departure from the marital abode or living apart To amount to abandonment the departure of a spouse from the marital home must be unjustified and without the consent of the other spouse ". Matter of Maiden, 284 N.Y. 429, 432, 31 N.E.2d 889 (1940)). That abandonment must include a lack of consent by the spouse who has been left continues as the law to this day (Matter of Morris, 69 A.D.3d 635, 893 N.Y.S.2d 161 [2d Dept.2010] [even if decedent and the surviving spouse have been living separately for decades, without evidence that the spouse's departure was without decedent's consent, there can be no finding of abandonment]). The burden of proof as to abandonment,- including lack of consent - is on the party alleging it (Matter of Rechtschaffen, 278 N.Y. 336, 16 N.E.2d 357 [1938]).

The Surrogate's Court held that decedent's parents failed to show that his wife had abandoned her husband so that she had forfeited rights with respect to his estate that would otherwise accrue to her as his surviving spouse under Estates, Powers and Trusts Law. The Surrogate held that on the facts presented here, decedent's parents could meet that burden. She noted that the abandonment disqualification of EPTL 5-1.2(5) applies to several distinct issues relating to a decedent's estate: the right to serve as administrator (SCPA 1001), the right to an intestate share (EPTL 4-1.1), and the right to elect against a will in which the surviving spouse is left less than one-third of the decedent's estate (EPTL 5-1.1-A). Like so much of the law, the purpose of the disqualification statute in each of

these areas is based on assumptions which have, over time, evolved into policy. These assumptions (and the resulting policies) are, in turn, grounded in the conditions and mores of a particular society, at a particular time. (Citing 1 Henry H. Foster Jr., et al., *Law and the Family New York, Divorce, Separation and Annulments* 6.1 at 348-349 [2nd ed. 1987] ["Foster, Freed & Brandes"]). The Court observed that the importation of strict definition of abandonment in the old fault-based Domestic Relations Law into EPTL for purposes of determining intestate succession or right of spousal election might be due for reappraisal and discussed this issue at length.

February 1, 2013

Appellate Division, First Department

Family Court - Paternity - Meritorious Claim - Where there is proof in the record that a man other than the respondent has had intercourse with the petitioner during the critical time period, the evidence is insufficient as a matter of law to Support the Petitioners Claim to Paternity.

In *Matter of Cecil R v Rachel A*,--- N.Y.S.2d ----, 2013 WL 221611 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order of the Family Court, which, after a hearing, denied petitioner's motion to vacate an order dismissing his paternity petition on default. While petitioner demonstrated a reasonable excuse for his default in appearing, he failed to show a meritorious claim of paternity. Petitioner testified that, although he knew of the child's birth within the year after she was born, he did not believe he was the father because of the mother's lifestyle. This testimony tended to undermine petitioner's claim, which he was required to prove by clear and convincing evidence. Where there is proof in the record that a man other than the respondent has had intercourse with the petitioner during the critical time period, the evidence is insufficient as a matter of law. The record also supported the application of the doctrine of equitable estoppel to preclude petitioner from pursuing his paternity claim. Petitioner waited almost four years after the child's birth before commencing the paternity proceeding, during which time he failed to communicate with her or provide any financial support. The child, who had been removed from her mother's care at the age of five months, lived with Jason A. and his extended family and an order of filiation was issued in 2007 declaring Jason A. her father. It agreed with the court that it was not in the child's best interests to interfere with her relationship with the only father she had ever known.

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Granted - Summary Judgment -

In Matter of Angela C v Harris K, --- N.Y.S.2d ----, 2013 WL 322635 (N.Y.A.D. 1 Dept.), the Appellate Division affirmed an order of the Family Court which, inter alia, granted petitioner mother's motion for summary judgment on her family offense petition, finding that respondent father committed acts that constituted aggravated harassment in the second degree, and awarded her a five-year order of protection directing respondent to, inter alia, stay away from and cease communication with her and the parties' child. Respondent's conviction on four counts of aggravated harassment in the second degree as to petitioner served as conclusive proof of the underlying facts in the proceeding, since he had a full and fair opportunity to contest the issues raised in the criminal proceeding. The Family Court properly found aggravating circumstances, based on respondent's conduct in sending harassing letters to petitioner from prison in repeated violation of the prior order of protection (FCA § 827[a] [vii]), his criminal conviction of four counts of aggravated harassment with regard to petitioner, and his aggressive threatening conduct in court, which the court observed and determined constituted an immediate and ongoing threat to petitioner. Although respondent's threats were directed at petitioner, they impacted upon the child, and thus the Family Court properly issued a five-year order of protection in favor of both the mother and the child. A full stay-away order was also appropriate, since the father had no relationship with the then six-year-old child due to his incarceration from the time the child was only four months old.

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Granted - But Error to Consider Post Petition Events

In Matter of Maria C v Jaime G, --- N.Y.S.2d ----, 2013 WL 174082 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order of the Family Court which dismissed the family offense petition for an order of protection finding Petitioner failed to establish by a preponderance of the evidence that respondent committed a family offense (Family Court Act § 832). It held that Petitioner was correct that the court erred in taking judicial notice of post-petition orders of protection issued against her in favor of respondent. However, in light of the court's finding that petitioner's testimony was incredible, the error was harmless.

Appellate Division, Second Department

Child Support - Modification - Downward - Inability to Work - Burden of Proof - Modification Denied for Failure to Prove Loss of Employment Not Father's Fault and He Diligently Sought Re-employment Commensurate With Earning Capacity.

In *Anderson v Anderson*, --- N.Y.S.2d ----, 2013 WL 238756 (N.Y.A.D. 2 Dept.) the Appellate Division reversed an order which granted defendant downward modification of a child support obligation contained in a stipulation of settlement. It observed that to obtain such relief, the defendant was required to demonstrate "a substantial and unanticipated change in circumstances since the entry of the judgment of divorce" (citing *Matter of Peterson v. Peterson*, 75 AD3d 512, 512; see L.2010, ch 182, §s 13; *Matter of Riendeau v. Riendeau*, 95 AD3d 891, 892; *Matter of Karagiannis v. Karagiannis*, 73 AD3d 1064, 1065). Among several factors that may be considered on a motion for downward modification of child support, a court may consider whether "a supporting parent's claimed financial difficulties are the result of that parent's intentional conduct" (*Matter of Knights v.. Knights*, 71 N.Y.2d 865, 866). The record demonstrated that the defendant's financial difficulties were the result of his intentional criminal conduct and subsequent incarceration. Although the defendant averred that he was forced to shut down his businesses in 2007 due to a federal criminal investigation, and at some point began cooperating with the federal government, he did not aver that the federal authorities prevented him from obtaining any other form of employment or from earning income prior to his incarceration in 2011. Nonetheless, the defendant did not offer any evidence of efforts he made during those years to earn money. The evidence showed that during that time the defendant simply continued to deplete a child support reserve held in escrow without replenishing it, even though he was required by the terms of the parties' stipulation to replenish the account. Accordingly, the defendant failed to show a substantial and unanticipated change of circumstances warranting a reduction of his child support obligation.

Equitable Distribution - Property Distribution - Pre-Marital Debt - No Credit for Paying Debts Obligated to Pay by Pendente Lite Order and Personal Debts Incurred after the Commencement Date

In *Heyman v Heyman*, --- N.Y.S.2d ----, 2013 WL 238767 (N.Y.A.D. 2 Dept.) the Appellate Division observed that upon the commencement of this divorce action, the marital partnership ceased for the purposes of equitable distribution of property. Upon the termination of the marital partnership, the plaintiff could use marital property to satisfy joint familial obligations such as educational expenses of the children incurred during the pendency of the action. However, in his trial testimony, the plaintiff admitted that he used the distributions from his deferred compensation account to pay his share of expenses which the parties agreed to split evenly, as well as to pay his obligations pursuant to a

pendente lite order which directed him to pay the defendant child support of \$3,000 per month, retroactive to December 2009, plus an attorney's fee of \$15,000. Since those obligations were the sole obligations of the plaintiff, his use of marital funds to make those payments was improper, and the defendant was entitled to her equitable share of those funds. Accordingly, the defendant was entitled to 50% of all distributions from the deferred compensation account, retroactive to the date of the commencement of this action.

In light of the defendant's earning capacity and the distribution of marital property, the Appellate Division declined to disturb the Supreme Court's determination denying the defendant maintenance. It was undisputed that the parties enjoyed a high standard of living during the marriage, which they could no longer afford after the plaintiff lost his high-paying position. At the time of the trial, the plaintiff was employed again, at a lesser salary. The marital standard of living and the pendente lite child support award of \$3,000 per month was relevant to what would constitute a just and appropriate child support award. There was no basis to limit the child support award to the statutory cap of the first \$130,000 of combined parental income. In view of the standard of living enjoyed by the children during the marriage, and the earnings and assets of the parties, the Appellate Division deemed it appropriate that the child support award be based upon total combined parental income. It declined to disturb the Supreme Court's determination that the defendant was not entitled to an attorney's fee. In light of the substantial distributive award in her favor, she was capable of paying for her own attorney.

Counsel Fees - Domestic Relations Law §237 - Award - Presumption Rebutted - Not Improvident Exercise its Discretion in Denying Interim Counsel Fees Where No Significant Disparity in the Parties' Financial Circumstances

In *Kaminash v. Levi*,--- N.Y.S.2d ----, 2013 WL 238773 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order which denied the wife's motion for an award of interim counsel fees, to direct the plaintiff to pay all fees for services rendered by the attorney for the child and the forensic evaluator, and to direct the plaintiff to pay for certain translation and linguistic services. It observed that 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 generally warranted where there is a significant disparity in the financial circumstances of the parties. Supreme Court did not improvidently exercise its discretion in denying the defendant's motion for an award of interim counsel fees, since the record demonstrated that there was no significant disparity in the parties' financial circumstances. Similarly, the court did not improvidently exercise its discretion in denying defendant's motion to direct the plaintiff to pay all fees for services rendered by the attorney for the child and the forensic evaluator.

Child Support - Waiver - Child Support Payments May Be Waived Prospectively, Before the Obligation to Make Such Payments Has Accrued. 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.

In *Tafuro v Tafuro*, --- N.Y.S.2d ----, 2013 WL 238835 (N.Y.A.D. 2 Dept.) the parties were divorced in 2004 and the mother was awarded residential custody of their three children. The father was directed to pay biweekly child support to the mother of \$522. In September 2008, the parties' child H. began living with the father. The parties' two other children, at various times from 2008 until the date of the petition, also lived with the father. In November 2010, the father petitioned for a termination of the child support order on the ground that the children resided with him. The parties thereafter agreed that the child support payments from the father to the mother should cease on the ground that the father had residential custody of the children and Family Court terminated the child support order. The mother subsequently filed a petition to recover child support arrears of \$15,314. After a hearing, the Support Magistrate granted the petition. The father objected on the ground that the mother had waived prospective child support payments after the children began living with him. The Supreme Court denied the father's objections.

The Appellate Division modified the order. It observed that child support payments may be waived prospectively, before the obligation to make such payments has accrued. A mere change in custody is insufficient to constitute a waiver of child support. Rather, 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. The record demonstrated, and the mother did not dispute, that H. lived with the father beginning in September 2008. The father presented a letter dated September 28, 2008, which was signed by the mother, in which the parties agreed that the mother would not seek child support for H. and that the father, in turn, would not seek child support from the mother. The mother's express waiver of her future child support payments for H. was valid and enforceable. However, the evidence adduced at the hearing did not warrant the conclusion that the mother waived her future child support payments as to the parties' other two children. The father's objection to so much of the Support Magistrate's order as awarded child support arrears for H. should have been granted.

Right to Counsel - Family Ct Act §262[a] - County Law § 722 -D - Support Magistrate Property Directed Respondent to Pay the Attorney Assigned to Represent Him the Difference Between the Amount the Attorney Would Charge a Privately Retained Client for the Services Rendered and the Amount the Attorney Claimed from the Assigned Counsel Plan

In Matter of Cherrez v Lazo, --- N.Y.S.2d ----, 2013 WL 163839 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order which directed Respondent to pay the attorney assigned to represent him the difference between the amount the attorney would charge a privately retained client for the services rendered and the amount the attorney claimed from the assigned counsel plan. It observed that County Law § 722-d provides that, "[w]henver it appears that the defendant is financially able to obtain counsel or to make partial payment for the representation or other services, counsel may report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the public defender, private legal aid bureau or society, private attorney, or otherwise." The record supported the Support Magistrate's assessment of the father's financial circumstances, including his income and the properties he owned. Accordingly, the Family Court properly denied the father's objection to the Support Magistrate's determination.

Family Court - Support - Family Ct Act § 439(e) - Objections to Order of Support Magistrate-Party Challenging Support Magistrate's Order must Make Specific Objections to Preserve Such Challenges for Review

In Matter of Cherrez v Lazo, --- N.Y.S.2d ----, 2013 WL 163840 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order of the Family Court, which, after a hearing, dismissed the petition to modify a prior order of support. It observed that Family Court Act § 439(e) provides, in pertinent part, that "[s]pecific written objections to a final order of a support magistrate may be filed by either party with the [Family Court] within thirty days after receipt of the order in court or by personal service, or, if the objecting party or parties did not receive the order in court or by personal service, thirty-five days after mailing of the order to such party or parties." An order of a Support Magistrate is final, and the Family Court's review of objections to such an order is the equivalent of appellate review. As such, the party challenging the Support Magistrate's order is required to make specific objections in order to preserve such challenges. Since the father's objections to the Support Magistrate's order were not specific within the meaning of Family Court Act § 439(e), the Family Court properly denied his objections on that ground.

Child Support - Enforcement - Where Court Fails to Allocate Specific Amounts for Maintenance and Child Support, Judgment for Arrears of Child Support Can't Be Entered until the Award Is Redetermined by the Court That Issued the Order

In Matter of Fixman v Fixman, --- N.Y.S.2d ----, 2013 WL 163842 (N.Y.A.D. 2 Dept.) a child support proceeding pursuant to the Uniform Interstate Family Support Act, the petitioner contended on appeal that the Family Court erred in failing to award child support

arrears which were allegedly due and owing pursuant to a pendente lite order of the Supreme Court, Nassau County. The Appellate Division rejected her argument holding that where, as here, a court fails to allocate specific amounts for maintenance and child support, the proper action is for the matter to be redetermined by the court that issued the order. Family Court properly declined to allocate the total amount set forth in the pendente lite order or to award arrears at this time, as the pendente lite order was not issued by it.

Appellate Division, Fourth Department

Child Custody - Relocation - Relocation Not in Child's Best Interests Where No Showing Child Would Benefit from Economic Stability and Security Move Would Bring.

In *Williams v Epps*, 101 A.D.3d 1695, 956 N.Y.S.2d 773 (4th Dept, 2012) the Appellate Division affirmed an order which denied the mother's petition seeking permission for the parties' child to relocate with her to Atlanta, Georgia. Although the mother testified that she was offered a position as a hair stylist at a salon in Atlanta, there was little evidence adduced concerning the salary, benefits, hours of work, and other incidentals of the employment. In addition, as of the time of the hearing, the child had regular and meaningful access with respondent father, as well as with the child's maternal and paternal extended family. Inasmuch as the mother failed to establish that the lives of the mother and the child would be 'enhanced economically or educationally by the move (*Matter of Tropea v. Tropea*, 87 N.Y.2d 727, 741) and the credible evidence supported the court's determination that the child's relationship with the father and other relatives in the Buffalo area would be adversely affected by the proposed relocation, the mother failed to meet her burden of establishing that relocation is in the child's best interests.

Supreme Court

Family Court - Support - Family Court Act § 412 - in Deciding Application for Spousal Support Family Court May Not Consider Veteran's Disability Benefits but May Consider Social Security Payments

In *Alvarado v Alvarado*, 2013 WL 196521 (N.Y.Sup.), 2013 N.Y. Slip Op. 50077(U) the husband sought an order declaring the disability benefits payable to him by Social Security and by the Veterans Administration to be separate property not to be considered for purposes of equitable distribution or maintenance. The husband argued that these benefits were not subject to consideration as the Uniformed Services Former Spouse's Protection Act declares them to be separate property. 10 U.S.C. § 1408 (2009). The Parties

were married on June 21, 1980. Prior to the marriage Husband served in the United States Marine Corps from 1965 until 1969. As a result of his military service Husband received monthly veteran's disability benefits.

Supreme Court observed that the Third and Fourth Departments have held that state courts are prohibited from distributing veteran's disability benefits in an action for divorce. (Citing *Hoskins v. Skojec*, 265 A.D.2d 706 (3d Dept.1999); See also *Newman v. Newman*, 248 A.D.2d 990 (4th Dept.1998). While disability benefits obtained from other sources may be considered for purposes of maintenance, veteran's disability payments are precluded from consideration. (Citing 10 U.S.C. § 1408; *Carl v. Carl*, 58 AD3d 1036 (3d Dept.2009). It rejected the wife's argument that *Nizolek v. Nizolek*, 93 AD3d 934 (3d Dept.2012) was controlling on the issue of veteran's disability benefits. In *Nizolek*, the Third Department held that the Family Court, deciding an application for spousal support in an ongoing marriage, may consider veteran's disability benefits "under the broad language of Family Court Act § 412". However, the Court expressly distinguished an application for "spousal support" under the Family Court Act from an application for "maintenance" under Domestic Relations Law § 236(B). In an action for divorce the Court may not order the allocation of veteran's disability benefits absent a contractual agreement between the parties. (Citing *Mills v. Mills*, 22 AD3d 1003 (3d. Dept.2005); *Hoskins*, *Supra* at 707). The husband's motion was granted to the extent that his veteran's disability benefits were not to be included in the marital estate at trial for purposes of equitable distribution or maintenance.

The husband also received social security disability benefits. The Court observed that it has been held that Social Security Disability Benefits are separate property and are not subject to equitable distribution. However, it held that Social Security Disability Benefits, unlike veteran's disability benefits, are to be considered by the Court when determining a payor spouses ability to pay maintenance. (Citing *Cerabona v. Cerabona*, 302 A.D.2d 346 (2d Dept.2003); *Carl*, *Supra* at 1037.)

Family Court

Child Support - Award - Family Ct Act § 412 - Jurisdiction - Family Court Has No Jurisdiction to Enforce a Child Support Agreement

In *Matter of Kristina Lynn B. v. Joseph T.M.*, --- N.Y.S.2d ----, 2013 WL 310247 (N.Y.Fam.Ct.) Family Court held that the Support Magistrate correctly determined that the father was responsible for 71% of his son's private school tuition even though the mother agreed that she would pay the full cost of that tuition. These parents had two children, ages 10 and 12. The mother switched her oldest son, then in sixth grade, from a local public school to Christian Brothers Academy (CBA) for reasons related to the child's emotional circumstances, the learning environment and bullying issues at the public school. The mother sought a tuition contribution from the father pursuant to FCA §

413(1)(c)(7). Both parents conceded that they agreed to send their child to private school. The mother also conceded that she agreed to pay the full tuition. The Court observed that FCA § 413(1)(c)(7) reads as follows: “ Where the court 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 present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, the court may award educational expenses. The non-custodial parent shall pay educational expenses, as awarded, in a manner determined by the court, including direct payment to the educational provider.” The father consented to his son attending private school.

The court held that the parents' agreement that the mother would pay for CBA was not relevant to the outcome of these objections because Family Court has no authority to enforce contracts (citing *Boden v. Boden*, 42 N.Y.2d 210, 397 N.Y.S.2d 701, 366 N.E.2d 791; *Brescia v. Fitts*, 56 N.Y.2d 132, 451 N.Y.S.2d 68, 436 N.E.2d 518). Because Family Court is a court of limited jurisdiction, it has no authority to rule on such issues. Its jurisdiction is limited, in this case, to applying FCA § 413(1)(c)(7) to the evidence. The interpretation of an oral contract between the parties or imposing equitable relief is beyond this Court's authority.

The Family Court found that the Magistrate's finding that the father should be responsible for his proportional share of the son's private school expenses possesses a sound and substantial basis in the record. It was also established that the father's income increased by 41% or \$44,600 since the last support order, which was the judgment of divorce issued in 2007. The Court observed that the language of FCA §413(1)(c)(7) does not command any formula with respect to apportionment of private school tuition. However, it no reason to deviate from the proportionate formula set forth in FCA § 413(1)(c)(5)(v) that governs reimbursement for uninsured health costs and day care.

January 16, 2013

Appellate Division, First Department

Domestic Relations Law § 234 - Injunctions Pendente Lite - Pursuant to DRL § 234, Supreme Court Can Order Defendant to Pay 50% of the Balances Owed on the Mortgages on the Marital Residence

In *Nederlander v. Nederlander*, --- N.Y.S.2d ----, 2013 WL 28258 (N.Y.A.D. 1 Dept.)the Appellate Division affirmed an order of Supreme Court which ordered defendant to pay 50% of the balances owed on the mortgages on the marital residence in the event

that he was unable to refinance the mortgages or obtain extensions of the mortgage notes. It noted that Domestic Relations Law § 234 empowers the court to "make such direction, between the parties, concerning the possession of property, as in the court's discretion justice requires having regard to the circumstances of the case and of the respective parties." Accordingly, pursuant to DRL § 234, the court can not only order that a party turn over marital property, but also that he or she refrain from transferring or disposing of it. The power to issue preliminary injunctions affecting property in divorce actions stems from the recognition that while spouses have no legal or beneficial interest in marital property prior to a judgment of divorce, they nevertheless have an expectancy in that property. Thus, in order to protect that expectancy pending equitable distribution, to maintain the status quo, and to prevent the dissipation of marital property, the court must be able to issue orders to ensure that such marital property is protected should it later become the subject of equitable distribution. The motion court's order, was a proper exercise of its discretion pursuant to DRL §234. The record indicated that the bank was planning to foreclose on the marital residence and that defendant, in failing to submit a requested application and financial information to the bank until after the motion was made, months after the same was requested by the bank, and months after plaintiff submitted her information and application to the bank, was either by design or neglect contributing to the foreclosure. To ensure that the marital home would not be lost to foreclosure, prior to trial and a final judgment of divorce, the court providently exercised its discretion in ordering defendant to cooperate in obtaining an extension of the loans and/or a refinancing of the loans. For the very same reasons, despite defendant's purported inability to pay half of the outstanding mortgages on the marital home, the court properly ordered that he do so if he was unsuccessful in refinancing or obtaining an extension.

The Appellate Division held that the court did not err in implicitly concluding that defendant had the ability to pay half of the outstanding mortgages. While defendant claimed that he lacked the financial resources to comply with the court's order, his deposition testimony evinced that he had access to seemingly unlimited financial resources, which were justifiably imputed to defendant as income and/or assets. At his deposition, defendant testified that while he only earned approximately \$700 per week as an employee with his father's company, all of his bills, both personal and business, were, and had been paid by his father. Defendant further testified that all of his bills were mailed directly to his father's company where they were then reviewed by defendant's assistant. Thereafter, defendant's father wired funds to the company's account sufficient to cover defendant's expenses, defendant's assistant then draws company checks, and defendant then executes them. Thus, the record evinced significant distributions to defendant from his family business during the marriage and that defendant received support from his father extending over several years. While defendant characterized his father's aid as loans, totaling \$4 million at the time of his deposition, and as per his statement of net worth, over \$6.5 million in 2010, he nevertheless testified that he had not paid his father back. Based on the foregoing, the substantial and ongoing financial aid provided to defendant by his father

was either a gift, imputable as income or a benefit provided to defendant by his father's company, also imputable as income.

The Court rejected defendant's contention that the motion court's order constituted prejudgment equitable distribution of marital property. The motion court never made any determination as to the parties' interests in the marital residence. Nor did the motion court order the equitable distribution of the marital property pendente lite.

Attorneys - CPLR 321 - Automatic Stay - No Automatic Stay Where Voluntary Withdrawal of Counsel

Parties - Joinder - Proper to Join in Action Third Party Who Controls Spouses Finances, or Possesses Assets That Can Be Imputed to Spouse

Pendente Lite Maintenance - Third Party Can Be Directed, as Agent, to Satisfy Spouses Pendente Lite Obligations.

In *Shurka v Shurka*, 100 A.D.3d 566, 955 N.Y.S.2d 12 (1 Dept, 2012) Supreme Court granted a motion to join appellant as a party to the matrimonial action and to require appellant to turn over defendant's proportionate share of payments on certain promissory notes, to pay to defendant plaintiff's support and other obligations pursuant to a September 10, 2008 pendente lite order, to provide certain discovery to defendant, and to surrender her passports.

The Appellate Division modified the order, on the law, to the extent of denying that part of the motion seeking to require appellant to surrender her passports and vacated that part of the order directing appellant to pay plaintiff's obligations under the pendente lite order, and remanded the matter for an evidentiary hearing consistent with its decision and otherwise affirmed. It held that appellant was not entitled to an automatic stay of the proceedings pursuant to CPLR 321(c), because counsel withdrew pursuant to a voluntary discharge. It also held that the court properly granted defendant leave to amend her pleadings to assert claims against appellant and to join appellant as a party to the action (CPLR 3025[b]). Defendant presented evidence that plaintiff had fled the country, that appellant was the chief financial officer of the umbrella organization, Signature Investment Group (SIG), which held all of plaintiff's assets, and that appellant has administered and controlled the payment of the promissory notes on which defendant was a payee, thus creating a fiduciary relationship between defendant and appellant (CPLR 1001; 1003; *Solomon v. Solomon*, 136 A.D.2d 697, 698, 523 N.Y.S.2d 900 [2d Dept.1988]). The court also properly ordered appellant to produce documents related to SIG and the other companies involved, and to pay to defendant her proportionate past and future payments on the promissory notes, which it appears appellant had withheld at plaintiff's direction. The notes directed a substantial portion of the annual payments to defendant; moreover, they were an unconditional promises

to pay. It noted that plaintiff has failed to comply with a previous order directing him to turn over these proceeds to defendant.

The Appellate Division held that Supreme Court should have held a hearing on defendant's request to have appellant arrange for the payment of support and other expenses due under the September 10, 2008 pendente lite order. Defendant submitted evidence showing that throughout the parties' marriage, appellant, who was a signatory on the parties' joint personal bank account, deposited funds into, and paid bills from, that account. Defendant also pointed to evidence showing that appellant controlled the finances of the family businesses that held plaintiff's assets. In response, appellant submitted an affidavit stating that she did not pay, either personally or as CFO of the businesses, any of plaintiff's personal expenses. In light of this factual dispute, a hearing was necessary on these issues. It was true that appellant had no obligation to use her own personal funds to make support payments to defendant. However, an issue of fact existed as to whether appellant was acting as plaintiff's agent, or was otherwise in control of plaintiff's finances, including his share of funds or loan payments due from the family businesses. Having been properly joined in this action, to the extent appellant controls plaintiff's finances, or possesses assets that can be imputed to plaintiff, she can be directed, in that capacity, to satisfy plaintiff's pendente lite obligations.

The Appellate Division held that there was no basis for ordering appellant to surrender her passports. While plaintiff had fled the country, there was no evidence that appellant presented a similar flight risk.

Appellate Division, Second Department

Right to Counsel - Family Ct Act §262[a] - Waiver - Court must Determine First That Waiver Made Knowingly, Intelligently, and Voluntarily and must Be a Showing That the Party 'Was Aware of the Dangers and Disadvantages of Proceeding Without Counsel

In re Stephen D.A.,--- N.Y.S.2d ----, 2012 WL 6684732 (N.Y.A.D. 2 Dept.) the Appellate Division held that a parent in a proceeding pursuant to Social Services Law § 384-b to terminate parental rights has the right to the assistance of counsel (Family Ct Act §262[a][iv]). Although a party to such a proceeding may waive that right and proceed without counsel, the court must first determine that the decision to do so is made knowingly, intelligently, and voluntarily (People v. Arroyo, 98 N.Y.2d 101, 103). In determining whether the waiver of the right to counsel meets this requirement, the court must conduct a " 'searching inquiry' " of the party (Matter of Stephen D.A. [Sandra M.],

87 AD3d at 736, quoting *Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 385). "Although there is no 'rigid formula' as to the questions the court needs to ask for counsel waivers, there must be a showing that the party 'was aware of the dangers and disadvantages of proceeding without counsel' " (*Matter of Jetter v. Jetter*, 43 AD3d at 822, quoting *People v. Providence*, 2 NY3d 579, 582).

In light of the Court's determination on the prior appeals that the Family Court failed to conduct the requisite "searching inquiry" at the proceeding conducted on June 9, 2009, it reversed the order of fact-finding and disposition and remitted to Family Court, for a new fact-finding hearing and a new determination thereafter.

Child Support - Modification - Downward - Inability to Work - Burden of Proof - Modification Denied for Failure to Prove Loss of Employment Not Father's Fault and He Diligently Sought Re-employment Commensurate With Earning Capacity.

In *Matter of DaVolio v. DaVolio*, --- N.Y.S.2d ----, 2012 WL 6684758 (N.Y.A.D. 2 Dept.) the Appellate Division observed that the child support provisions contained in a stipulation of settlement incorporated but not merged into a judgment of divorce should not be disturbed unless there has been a substantial and unanticipated change in circumstances since the entry of the judgment of divorce. A parent's loss of employment may constitute a substantial and unanticipated change in circumstances justifying a downward modification of child support where the termination occurred through no fault of the parent and the parent has diligently sought re-employment commensurate with his or her earning capacity. It held that the Family Court properly denied the father's objections to the Support Magistrate's finding that the father was not entitled to a downward modification of his child support obligation. The father did not testify credibly regarding the reasons and circumstances surrounding his departure from his former employment and he failed to adduce sufficient credible evidence to satisfy his burden of establishing that he lost his employment through no fault of his own and that he diligently sought re-employment commensurate with his earning capacity.

Grandparent Visitation - DRL §72 - Merits of Case - Although "Animosity Coupled with Family Dysfunction May Provide Basis for Denying Visitation Rights," the "Existence of Animosity Between the Parties Alone" Cannot Provide Such a Basis.

In *Matter of Gray v Varone*, --- N.Y.S.2d ----, 2012 WL 6684763 (N.Y.A.D. 2 Dept.), in reversing an order which determined that the grandmother did not have standing to seek visitation with her grandchild, the Appellate Division pointed out that when a grandparent

seeks visitation pursuant to Domestic Relations Law § 72(1) , the court must make a two-part inquiry. First, it must find that the grandparent has standing, based on, inter alia, equitable considerations. If it concludes that the grandparent has established standing to petition for visitation, then the court must determine if visitation is in the best interests of the child. Here, the petitioner established a prima facie case of standing to seek visitation with the child and demonstrated, prima facie, that the parents' objection to contact between the child and the petitioner was based solely on animosity between the parties. Although "animosity coupled with family dysfunction may provide a basis for denying visitation rights," the "existence of animosity between the parties alone" cannot provide such a basis.

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Where Criminal Court Order of Protection Barring Contact Between Parent and a Child Includes Provides Order Is Subject to Subsequent Family Court Orders of Custody and Visitation, Family Court Permitted to Release Child to Custody of That Parent.

In re Brianna L., --- N.Y.S.2d ----, 2012 WL 6684767 (N.Y.A.D. 2 Dept.) the mother was arrested and later charged with assault in the second degree for allegedly beating her son Elijah L., who was then six years old. Thereafter, the Administration for Children's Services commenced neglect proceedings against the mother, alleging that she had neglected Elijah by inflicting excessive corporal punishment on him and, as a result, had derivatively neglected her daughter, Brianna L., who was then eight years old. On February 14, 2012, in Criminal Court, Queens County, the mother entered a plea of guilty to endangering the welfare of a child, and was sentenced to a conditional discharge, with the requirement that she complete ACS's service plan, which included completion of a parenting skills course and an anger management program. A final order of protection was issued by the Criminal Court, barring the mother from any contact with Elijah until February 13, 2017. On March 12, 2012, a finding of neglect was entered with respect to the children. At a dispositional hearing ACS provided the Family Court with an Investigation and Report which stated that the mother had cooperated with all services, completed a parenting skills course and an anger management program, and "was capable of caring for the children." The matter was adjourned to allow the parties to seek an amendment of the order of protection. On May 8, 2012, during the continued dispositional hearing, the parties presented the Family Court with an amended order of protection dated May 7, 2012. Although the amended order of protection continued to bar the mother from having any contact with Elijah, it included the words "Subject to Family Court." In response, the Family Court stated that, since the Criminal Court had issued a "full stay away order of protection," it was "the Criminal Court's intention" that the mother could not have unsupervised contact with Elijah until 2017. ACS recommended releasing Elijah to his father, and releasing Brianna to the mother. However, the attorney for the children objected to limiting the mother's contact with Elijah to supervised visitation and advocated

against separating the children. In addition, the attorney for the children stated "perhaps we do need the clarification . . . of what exactly . . . the language in the Criminal Court order of protection is saying, [what] subject to Family Court' actually means." In a decision dated May 21, 2012, the Family Court stated that the phrase, " Subject to Family Court' as handwritten onto the [amended order of protection] is shorthand for subject to subsequent Family Court orders of custody and visitation'" (Matter of B.L. [M.A.], 36 Misc 3d 578, 582). However, the Family Court concluded that the language " subject to subsequent Family Court orders of custody and visitation'" did not give the court "jurisdiction to, in essence, overrule the Criminal Court, and return custody of the protected party to the [mother]" . Family Court held that it could only impose additional prohibitions against the mother, not less.

The Appellate Division reversed. It observed that Criminal Procedure Law provides the Criminal Court with the power to issue orders of protection in family offense matters and to include various conditions in such orders of protection. Included within this power is the authority to permit a parent to visit with a child (CPL 530.12[5][b]). Generally, if a Criminal Court order of protection bars all contact between a parent and a child, the parent may not obtain custody or visitation unless the order of protection is vacated or modified in the Criminal Court (Matter of Secrist v Brown, 83 AD3d 1399, 1400). The Criminal Court also has the authority to modify its orders of protection (People v Nieves, 2 NY3d at 317) and to determine whether its order of protection will be subject to Family Court orders, and can decline to amend an order of protection to so provide (Matter of Marqekah B., 16 Misc 3d 1109[A], 2007 NY Slip Op 51361[U], affd sub nom. Matter of Marqekah Lillias B., 63 AD3d 1057).

Following a determination that a parent has neglected or abused a child, the Family Court Act directs that a dispositional hearing be held as a condition precedent to the entry of a dispositional order such as an order of protection (Matter of Suffolk County Dept. of Social Servs. v James M., 83 NY2d 178, 183). A dispositional hearing is required so as to permit the Family Court to make an informed determination, from amongst the dispositional alternatives, which is consistent with the best interests of the subject child or children. The dispositional alternatives available to the Family Court include, but are not limited to, suspending judgment, releasing a child to the custody of his or her parent or parents, placing a child with a relative or the local commissioner of social services, placing a respondent under supervision, or issuing an order of protection (Family Ct Act §§ 1052, 1053, 1054, 1055, 1055-b, 1056, 1057). As pertinent here, a Family Court order of protection issued against a child's parent shall expire no later than the expiration date of any other orders of the court (Family Ct Act § 1056[1], [4]).

The Appellate Division held that it is the Family Court, not the Criminal Court, which is both empowered and best suited, following a dispositional hearing in a child protective proceeding, to select the dispositional alternative which is most consistent with the best interests of the children before it. The Family Court has the unique resources to effectuate and determine the best interests of the children, and its authority to do so should not be circumscribed by a Criminal Court order of protection which expressly contemplates

future amendment of its terms by a subsequent Family Court order pertaining to custody and visitation. Accordingly, it held that where, as here, a Criminal Court order of protection barring contact between a parent and a child includes a provision indicating that the order is subject to subsequent Family Court orders of custody and visitation, the Family Court is permitted to release the child to the custody of that parent.

Child Support - Award - Imputed Income - Court May Impute Income Based on Defendant's Earning History, His Current Employment, and His Other Income from His Associations.

Child Support - Award - DRL § 240(1-b)(c)(7) - College Expenses - Child Support Obligation Should Be Decreased by the Amount of College Room and Board Expenses Incurred While Child Attends College.

Child Support - Award - Life Insurance - Party Should Be Allowed to Secure Child Support Obligations by Maintaining Declining Term Policy of Life Insurance

In *Sotnik v. Zavilyansky*, --- N.Y.S.2d ----, 2012 WL 6685478 (N.Y.A.D. 2 Dept.) the defendant appealed from those parts of a judgment of divorce which imputed to him an annual income of \$135,000 for the purpose of calculating his child support obligation, awarded the plaintiff an attorney's fee of \$75,000, awarded the plaintiff exclusive occupancy of the former marital residence until the parties' child attains the age of 21 years, failed to direct that his child support obligation shall be decreased by the amount of any college room and board expenses he incurs while the parties' child attends college, credited the plaintiff \$124,876 based on the defendant's wasteful dissipation of marital property, failed to award him a portion of the plaintiff's enhanced earning capacity from her medical license, and failed to provide that the life insurance policy which he was required to provide and maintain to secure his obligations to pay the award of child support may be a declining term policy that would permit him to reduce the amount of coverage by the amount of the child support actually paid.

The Appellate Division modified the judgment holding that Supreme Court should have awarded the plaintiff exclusive occupancy of the former marital residence only until the parties' son attained the age of 18 years, rather than until he turns 21 years old. It agreed with defendant that the Supreme Court should have directed that his child support obligation be decreased by the amount of any college room and board expenses he incurs while the parties' child attends college. It also agreed that Supreme Court should have allowed the defendant to secure his child support obligations by maintaining a declining term policy of life insurance rather than requiring him to maintain the existing policy coverage of \$1,400,000.

The Appellate Division noted that in making its equitable distribution award, the Supreme Court credited the plaintiff the sum of \$124,876 based on what it termed the defendant's "wasteful dissipation" of marital property. This included \$50,000 that the

defendant used to retain an attorney in connection with his medical license, which license constituted separate property since he obtained it prior to the marriage. Since the \$50,000 was marital property, the plaintiff should have been credited only one-half of that sum, or \$25,000. The \$124,876 credit also included \$11,645 representing the amount the defendant had withdrawn from a joint business account, and \$1,231 representing marital funds used by the defendant to pay for an application for a Florida medical license. Since these were marital funds, the Supreme Court should have credited the plaintiff with only one-half of these amounts as well

The Court noted 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 his or her employment history, future earning capacity, educational background, or money received from friends and relatives. Here, given the defendant's earning history from his private medical corporations, his current employment as a medical doctor, and his other income from his associations with Kingsbrook Medical Center, the Supreme Court providently exercised its discretion in imputing an annual income to the defendant of \$135,000 for the purpose of calculating his child support obligation.

The Appellate Division also held that under the circumstances of this case, where the defendant's contribution to the plaintiff's attainment of her medical license was de minimis, the Supreme Court providently exercised its discretion in determining that the defendant was not entitled to any distributive share of the plaintiff's enhanced earning capacity from her medical license.

Appellate Division, Fourth Department

Child Custody - Award - Improper to Alter Custodial Arrangement Automatically upon Happening of Specified Future Event

In *Matter of Grant v Grant*, --- N.Y.S.2d ----, 2012 WL 6720739 (N.Y.A.D. 4 Dept.) Plaintiff mother moved, inter alia, to modify the parties' custody arrangement by permitting her to relocate to Ohio with the parties' three children. Pursuant to their custody arrangement, the parties shared joint custody of the children, but the mother had primary physical custody and defendant father had visitation. Additionally, the parties had agreed that the children would not be removed from Erie County without the father's consent or in the absence of a court order. The father opposed the mother's motion and cross-moved for custody in the event that the mother relocated. Following a hearing regarding only the

issue of relocation, Supreme Court denied that part of the mother's motion seeking permission to relocate with the children and further ordered that, "if the [mother] relocates to Ohio, notwithstanding this Court's Decision, the [father] shall be granted custody of the parties' three (3) minor children with an appropriate access schedule to be arranged between the children and the [mother]." The Appellate Division affirmed. However, it modified the order by vacating the provision that custody of the children will be transferred to the father in the event that the mother relocates to Ohio. That provision, 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 children's best interests at that time.

Family Court - Support - Enforcement - Family Ct Act § 454 - Wilful Violation of Order - Respondent Failed to Meet Burden of Proof Inasmuch as He Failed to Introduce "Evidence Establishing That He Made Reasonable Efforts to Obtain Gainful Employment and Did Not Sell His Assets to Enable Him to Make Support Payments.

In *Matter of Bushnell v Bushnell*, --- N.Y.S.2d ----, 2012 WL 6720871 (N.Y.A.D. 4 Dept.) the Appellate Division affirmed an order finding that respondent had willfully violated a prior order of child support and sentencing him to six months of weekends in jail. It concluded that Family Court properly found that respondent willfully violated the prior order of support. Respondent claimed that his business failed in the economic downturn, rendering him unable to make the required support payments. After his business deteriorated, however, respondent did not actively pursue other employment options. Thus, respondent failed to meet his burden inasmuch as he failed to introduce "evidence establishing that he made reasonable efforts to obtain gainful employment to meet his support obligations. Additionally, it noted that respondent did not sell his assets to enable him to make support payments.

Maintenance - Award - Durational - Supreme Court Improvidently Exercised its Discretion in Directing Defendant to Pay Maintenance in Sums That, Combined with Plaintiff's Disability Income, Left Her at an Income Level Where She Could Become a Public Charge

In *Perry v Perry*, --- N.Y.S.2d ----, 2012 WL 6721007 (N.Y.A.D. 4 Dept.) Supreme Court awarded plaintiff maintenance of \$500 per month for four years and thereafter \$440 per month for four years. On appeal Plaintiff contended that the award of maintenance was unreasonably low and should have been nondurational or, at a minimum, extended beyond eight years. The Appellate Division held that Supreme Court improvidently exercised its discretion in directing defendant to pay maintenance for a period of eight years and in

sums that, combined with plaintiff's disability income, left her at an income level where she could become a public charge. Considering all of the evidence presented in this case, including the uncontroverted testimony of plaintiff concerning her disability, her receipt of Social Security disability benefits, the disparity in the parties' incomes, plaintiff's health, her lack of work history during the marriage, the distribution of marital debts and assets, and defendant's waiver of child support from plaintiff, the correct sum which was \$300 annually pursuant to the Child Support Standards Act, it concluded that defendant's obligation to pay maintenance should continue for a period of 10 years rather than eight years. It also concluded that an award of \$1,000 per month comported with the intended purpose of durational maintenance, i.e., to provide the economically-disadvantaged spouse with an opportunity to achieve independence and modified the judgment accordingly noting that that, at the conclusion of the period of maintenance, plaintiff was not precluded from making an application to modify the judgment to continue maintenance if she has not become self-supporting.

January 1, 2013

Appellate Division, First Department

Agreements - Construction - Termination of Maintenance Upon Remarriage of Recipient - Where Agreement Expressly or Impliedly Provides That Spousal Support Is to Continue after the Payee's Remarriage, Such Obligation Will Be Enforced

In *Burn v. Burn*, --- N.Y.S.2d ---, 2012 WL 6199947 (N.Y.A.D. 1 Dept.) the parties' 2003 separation agreement, which was incorporated by reference but not merged into their 2004 judgment of divorce provided that in exchange for waiving her interest in certain distributable property, including defendant's retirement accounts and his interests in real property worth millions of dollars, plaintiff was to receive maintenance payments from defendant "until the death of the Wife or the death of the Husband." The Plaintiff remarried in July 2011. The Appellate Division observed that a separation agreement that provides for spousal support to be paid for life or some other fixed period manifests the parties' intent that the support obligation is to continue despite the payee's remarriage. Although the separation agreement did not expressly address the effect of remarriage on the maintenance obligation, the language of the maintenance clause, as well as consideration of the entire agreement, including plaintiff's waiver of a share of assets worth millions of dollars, evinced the intent of the parties that the maintenance payments would continue until plaintiff's death or the death of defendant, regardless of plaintiff's marital status. In

the absence of an agreement to the contrary, spousal support ordered in a judgment of divorce must terminate upon the remarriage of the payee (Domestic Relations Law § 248). However, where, as here, the parties' separation agreement expressly or impliedly provides that spousal support is to continue after the payee's remarriage, such obligation will be enforced. Furthermore, the commencement of a plenary action was not required because the judgment of divorce incorporated the parties' agreement by reference, and plaintiff could enforce the provisions of the separation agreement in this action pursuant to Domestic Relations Law § 244 .

The Appellate Division also held that defendant should have been found in civil contempt. In a June 2011 order, Supreme Court, having found that defendant willfully disobeyed a prior order, directed defendant to immediately pay his May 2011 maintenance obligation and to pay all future maintenance by automatic transfer. Plaintiff established that defendant was aware of this clear and unequivocal order, and failed to make the maintenance payments as directed, thus prejudicing plaintiff's rights.

Orders - Contempt - Criminal - Criminal Contempt must Be Proven Beyond a Reasonable Doubt.

In *Simens v. Darwish*, 100 A.D.3d 527, 954 N.Y.S.2d 80 (1 Dept 2012) the Appellate Division held that the fact that a party does not comply with a court order does not, in and of itself, constitute criminal contempt. Where, as here, defendant asserts that he did not wilfully disobey the court order in that he believed, in good faith, that the order did not prohibit him from taking the challenged actions, the court must hold a hearing to determine whether the disobedience was wilful. Moreover, Supreme Court failed to apply the correct standard of proof when it held that criminal contempt had been demonstrated by "clear and convincing evidence." Criminal contempt must be proven beyond a reasonable doubt.

Appellate Division, Second Department

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Adequacy of Petition - Petition Adequately Alleged Family Offense

In *Matter of Clark v. Ormiston*,--- N.Y.S.2d ----, 2012 WL 6177020 (N.Y.A.D. 2 Dept.) petitioner commenced a family offense proceeding alleging, inter alia, that during a court proceeding, the respondent became irate and threw his chair violently while shouting at the judge. The petition further alleged that while being escorted out of the courtroom, the respondent stopped in front of the petitioner while waving his hand and pointing at her and twice shouted "You better watch out, I'm going to get you!" During previous proceedings,

the respondent had "muttered things toward [the petitioner] and made motions towards her." The Appellate Division held that the Family Court should have denied respondent's motion pursuant to CPLR 3211(a)(7) to dismiss the petition for failure to state a cause of action. Liberally construing the petition, and giving it the benefit of every possible favorable inference, the petition adequately alleged that the respondent had committed the family offenses of harassment in the first and second degrees and disorderly conduct.

Evidence - Admissibility - Medical Records - If Any Portion of a Record Is Deemed Illegible, the Medical Record as a Whole Is Not Inadmissible. Only Those Entries That Are Illegible Should Be Deemed Inadmissible

In *Matter of Fortunato v. Murray*,--- N.Y.S.2d ----, 2012 WL 6177044 (N.Y.A.D. 2 Dept.), the father filed a petition seeking a downward modification of his child support obligations based upon an alleged injury which hindered his ability to work. During a hearing of the matter before Support Magistrate Kathleen Walsh, the father sought to admit certain medical documents, which the Support Magistrate declined to admit into evidence on the basis that the documents constituted hearsay. The Support Magistrate dismissed the father's petition, with prejudice. The father filed an objection to the Support Magistrate's order and Family Court denied the objection, determining that the medical documents did not fall under the business records exception to the hearsay rule. The father appealed and the Appellate Division held that a physician's office records consisting of day-to-day business entries, supported by a proper foundation, are admissible as an exception to the hearsay rule, as opposed to medical reports containing a physician's opinion, which are not admissible (see *Matter of Fortunato v. Murray*, 72 AD3d 817). However, since the father did not reproduce the medical documents in the record on appeal, the Court could not make a determination as to whether the medical documents in dispute were of the type which are admissible as business records. As a result, the Court, inter alia, remitted the matter to the Support Magistrate for a review of the subject medical documents in light of this Court's discussion of admissibility.

In July 2010, the father was notified that the Clerk's Office of the Family Court had destroyed the medical documentation which had been subpoenaed by the father for the first hearing. Consequently, the father subpoenaed the medical documentation again from the same physician and sought to admit it into evidence at a hearing before Support Magistrate Penelope B. Cahn. The Support Magistrate determined that, since it was impossible to review the exact medical documentation which was the subject of the April 2010 order from the Appellate Division because that documentation had been destroyed and she could not discern whether the re-subpoenaed documentation was a duplicate of the documentation originally offered into evidence during the first hearing before the previous Support Magistrate, she could not determine the admissibility of the documentation in accordance with this Court's April 2010 order. The father filed an objection to the order and Family Court granted the father's objection and remitted the

matter to Support Magistrate Neil T. Miller for disposition, inter alia, in accordance with the Appellate Divisions' April 2010 order.

Support Magistrate Miller reviewed the medical documentation which had been produced by the father's physician in response to another subpoena. By order dated March 21, 2011, the Support Magistrate determined the medical documentation to be inadmissible, on the basis that the accompanying certification did not make it clear that these documents were the same documents that had been previously produced in response to the first subpoena. In addition, the Support Magistrate determined, inter alia, that the documents received from the father's physician in response to the father's subpoena were inadmissible because certain entries were illegible, some documents post-dated the date of the original hearing, and some documents were from other medical service providers. The Support Magistrate dismissed the petition, without prejudice. The father filed an objection to so much of the Support Magistrate's March 2011 order as, after a hearing, determined the subject medical documentation to be inadmissible and, thereupon, dismissed the petition and Family Court denied the father's objection to the Support Magistrate's March 21, 2011, order.

The Appellate Division held that since the original documents were destroyed by the Family Court through no fault of the father, and since the father subpoenaed the documents from the same physician, there was no basis to exclude the documents on the ground that the attached certification failed to clarify whether the newly subpoenaed documents were exact duplicates of those previously offered into evidence. The issue to be decided by the Support Magistrate was not whether the father could prove that the documents produced by his physician pursuant to the most recent subpoena were exactly the same documents which had initially been subpoenaed for the first hearing, but whether the documents currently before the Family Court were admissible, in whole or in part. There may, however, be other valid bases for excluding or redacting portions of those newly subpoenaed medical documents, such as some of the documents being medical reports and not medical records, certain medical records pre-dating the accident referred to in the petition, or certain medical records post-dating the original hearing. With respect to those documents which are found to be medical records, if any portion of a record is deemed illegible, the medical record as a whole is not inadmissible. Rather, only those entries or notations within the record that are illegible should be deemed inadmissible. It reversed the order dated August 11, 2011, vacated the order dated March 21, 2011, reinstated the petition, granted the father's objection, and remitted the matter to the Family Court for a new determination of the admissibility of the medical documents and, thereafter, a new determination of the petition.

Child Support - Enforcement - UIFSA - Although UIFSA Does Not Expressly Apply to Foreign Country Order, Principles Embodied Therein, as Well as Principles of Comity, Require New York Courts to Enforce a Foreign Child Support Absent Fraud or Where Contrary to Public Policy.

In Matter of Jasen v. Karassik, --- N.Y.S.2d ----, 2012 WL 6177070 (N.Y.A.D. 2 Dept.)
In an order dated April 24, 2007, the Superior Court of Justice of the Province of Ontario, Canada, awarded the mother child support, and directed that any unpaid child support obligation was to accrue interest at the rate of 6% per annum. The father failed to pay his child support obligation from April 13, 2010, to June 13, 2011, in the sum of \$16,642.15, and the mother petitioned the Family Court to enforce the Canadian order. Although the Family Court directed the father to pay that principal sum, it declined to include an award of interest on that sum. The Appellate Division held that the award of child support arrears should have included an award of interest at the rate of 6% per annum.

Under the Uniform Interstate Family Support Act (UIFSA), which New York adopted as article 5-B of the Family Court Act a state may not modify an issuing state's order of child support unless the issuing state has lost continuing, exclusive jurisdiction, or the parties consent to a modification. Although the UIFSA does not expressly apply to the Canadian order, since Ontario is not a "state" within the meaning of that statute (Family Ct Act § 580-101 [19]), the equitable principles embodied therein, as well as traditional common-law principles of comity, require New York courts to enforce the terms of a child support order or judgment entered in the courts of a foreign nation, "absent some showing of fraud in the procurement of the judgment or that recognition of the judgment would do violence to some strong public policy of this State" (Matter of Fickling v. Fickling, 210 A.D.2d 223, 223-224).

The Appellate Division held that Family Court, in effect, improperly modified the Canadian order, notwithstanding the facts that the courts of Ontario had not lost continuing, exclusive jurisdiction over the matter, the parties did not consent to the modification, and there was no showing that the Canadian order was procured by fraud or that recognition of that order would do violence to some strong public policy of New York. Since the mother's request for an award of interest at the rate of 6% per annum on these arrears should have been granted, the arrears in the amount of \$16,642.15 that were awarded by the Family Court must bear interest at a rate of 6% per annum, as directed in the Canadian order.

Child Custody - Jurisdiction - Modification - Domestic Relations Law 76-b[1] - New York May Not Exercise Jurisdiction Where Sister State Courts Have Not Relinquished Jurisdiction by Determining That They No Longer Had Continuing, Exclusive Jurisdiction, or That New York Would Be a More Convenient Forum .

In Matter of Ozdemir v. Riley,--- N.Y.S.2d ----, 2012 WL 6177130 (N.Y.A.D. 2 Dept.) the Appellate Division held that the Family Court properly granted the father's motion to dismiss the mother's petition to modify an out-of-state custody order. The State of Delaware asserted home-state jurisdiction over the custody proceeding commenced there

by the father (Domestic Relations Law § 75-a[7]. A New York court may not exercise jurisdiction over a custody proceeding involving the parties' children, since the pending Delaware proceeding had not been terminated or stayed by the Delaware courts (Domestic Relations Law §76-e[1]). Moreover, Delaware courts had not relinquished jurisdiction over the matter by determining that they no longer had continuing, exclusive jurisdiction, or that New York would be a more convenient forum (Domestic Relations Law 76-b[1]). Therefore, the Family Court could not modify the Delaware custody order, which had been registered here. Accordingly, the Family Court properly dismissed the mother's petition to modify the Delaware order.

Disclosure - CPLR 3121 - Psychiatric records - Where Psychiatric Records Might Contain Embarrassing or Potentially Damaging Material Irrelevant to Issue of Fitness as a Parent Court Should Conduct in Camera Inspection to Determine the Portions, If Any, Material and Relevant on Issue of Fitness.

In Matter of Worysz v. Ratel, --- N.Y.S.2d ----, 2012 WL 6177850 (N.Y.A.D. 2 Dept.) the Appellate Division observed that when a party's mental or physical condition is placed "in controversy" within the meaning of CPLR 3121(a), a notice may be served requiring that the party submit to a medical examination or make available for inspection relevant hospital and medical records (CPLR 3121[a]; Dillenbeck v. Hess, 73 N.Y.2d 278). While parties to a contested custody proceeding place their physical and mental condition at issue, the potential for abuse in matrimonial and custody cases is great, and the court has broad discretionary power to limit disclosure and grant protective orders (Wegman v. Wegman, 37 N.Y.2d 940, 941; Torelli v. Torelli, 50 AD3d at 1125; Garvin v. Garvin, 162 A.D.2d 497, 499). It noted that in this case, the mother's psychiatric records might contain embarrassing or potentially damaging material that was irrelevant to the issue of the mother's fitness as a parent. Under the circumstances of this case, it concluded that, before determining the father's motion to compel disclosure of the mother's psychiatric records from November 2007, the Family Court should have conducted an in camera inspection of the records to determine the portions thereof, if any, that were material and relevant on the issue of the mother's fitness as a parent.

Equitable Distribution - Property Distribution - 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.

In Elias v. Elias, --- N.Y.S.2d ----, 2012 WL 6603660 (N.Y.A.D. 2 Dept.) the Appellate Division held that Supreme Court providently exercised its discretion in awarding the plaintiff 25% of the value of the defendant's interest in Ben Elias Industries Corp. It stated that 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. Here, the 25% share took into account the plaintiff's minimal direct and indirect involvement in the defendant's company, while not ignoring her contributions as the primary caretaker for the parties children, which allowed the defendant to focus on his business". It also that the Supreme Court failed to properly calculate child support pursuant to the Child Support Standards Act (Domestic Relations Law § 240[1-b]. In determining child support, the Supreme Court failed to set forth the manner in which the defendant's income was calculated. The Court also improperly deducted the distributive award from the defendant's income, a deduction that is not recognized in the CSSA (Domestic Relations Law §240[1-b][b][5][vii][A]-[H]; *Holterman v. Holterman*, 3 NY3d 1, 10-11). Also, the Supreme Court improperly capped the defendant's income at \$125,000, which was below the statutory ceiling of \$130,000 that became effective on January 31, 2010. It remitted the matter to the Supreme Court for a recalculation of the defendant's child support obligation.

Appellate Division, Third Department

Equitable Distribution - Property Distribution - Denial of Credit for Contribution of Separate Property to Marital Property - While a Credit Is Often Given for the Value of the Former Separate Property, Such Credit Is Not Strictly Mandated since the Property Is No Longer Separate, but Is Part of the Total Marital Property.

Maintenance - Award - Future Increases - inappropriate to provide for future increases or decreases in maintenance except when a judgment provides for an imminent and measurable change.

Child Support - Award - Where Divorce Follows Separation Judgment or Support Order- De Novo Determination Denied

In *Murray v Murray*, --- N.Y.S.2d ----, 2012 WL 6199932 (N.Y.A.D. 3 Dept.) the parties were married in 1986 and had four children (born in 1987, 1989, 1992 and 1994). Approximately 15 months before the marriage, plaintiff (husband) purchased a residence in Queens County. Following their marriage and some renovations to this property, the parties lived there together for several years. In 1991, the husband conveyed this property to himself and defendant (wife) jointly. The parties refinanced the Queens County property and used the proceeds to purchase a second residence in the Town of Callicoon, Sullivan County (the marital residence). They resided there together and rented out the Queens County property, until 2003, when the husband left the marital residence. In 2004, a Support Magistrate ordered the husband to pay child support and directed that he pay 75% of any unreimbursed medical expenses.

The husband commenced the divorce action in 2005. Following a trial, Supreme Court granted exclusive possession of the marital residence to the wife until the

emancipation of the youngest child, ordered the equitable distribution of a motorcycle and the rental income from the Queens County property, and directed the husband to pay weekly child support and—beginning upon the youngest child's emancipation—monthly maintenance to the wife for 10 years or until she remarries. The court continued the prior order directing the husband to pay 75% of the unreimbursed medical expenses, and also required him to pay the wife a lump sum representing one half of certain wasted marital assets, to maintain life insurance policies and to provide college funds for the unemancipated children.

The Appellate Division found that denying the husband a credit for the premarital value of the Queens County property was within Supreme Court's discretion. While a credit is often given for the value of the former separate property, such credit is not strictly mandated since the property is no longer separate, but is part of the total marital property. "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" (*Fields v. Fields*, 15 NY3d 158, 167 [2010]). For similar reasons, Supreme Court did not err in ordering the liquidation and equal division of the parties' Verizon stock.

In reviewing the pertinent factors in making the maintenance award Supreme Court placed particular emphasis on the persistent significant disparity in the parties' incomes, the wife's limited prospects for increased earnings, and the lost income, earning capacity and retirement savings that she incurred by remaining out of the paid work force to raise the parties' children for approximately 17 years during the marriage. The husband demanded that she stay at home with the children during this time. Thus, given that the marriage was of long duration, the recipient spouse had been out of the work force for a number of years and has sacrificed her own career development or had made substantial noneconomic contributions to the household or to the career of the payor Supreme Court's decision to render an award of maintenance was well supported by the record. Nonetheless, the structure of the award was inappropriate, as it was wholly deferred until the child support payments ceased. Because the interrelated factors upon which awards of support and maintenance are based may change in unanticipated ways, it is inappropriate to provide for future increases or decreases in maintenance "[e]xcept when a judgment provides for an imminent and measurable change" (*Majauskas v. Majauskas*, 61 N.Y.2d 481, 494 [1984]). Thus, Supreme Court erred in delaying the commencement of the maintenance obligation until the child support payments terminate, and remittal was required for reconsideration of the appropriate amount and duration of the award, and for recalculation of the child support award if required by any resulting adjustments in the parties' income for this purpose.

The Appellate Division held that Supreme Court did not err in basing the child support on the parties' incomes in 2004, rather than as revealed in the most recent tax returns. The husband bore the burden of establishing a substantial change in circumstances requiring downward modification of the prior order, and emancipation was the only change in circumstances that he alleged. A child support obligation turns on a

parent's ability to provide support, rather than the parent's current financial situation". The husband made no showing of "an unexpected and unreasonable change in circumstances" that altered his ability to provide support after 2004 (*Matter of Kelly v. Schoonbeck*, 34 AD3d 1094, 1096 [2006]). Accordingly, it found no error in Supreme Court's choice to continue the terms of the existing child support order, with limited modifications to reflect the emancipated children. For the same reasons, it rejected the husband's contention that Supreme Court erred in continuing the prior direction relative to unreimbursed medical expenses rather than recalculating his pro rata share based on more recent figures. It agreed with the husband that, as he made substantial child support payments and met a significant portion of the unemancipated children's financial needs, Supreme Court's determination regarding tax exemptions should be modified to permit him to claim one child annually as an exemption on his tax returns.

The Appellate Division held that Supreme Court did not err in deferring the sale of the marital residence until the emancipation of the parties' youngest child. The wife was the custodial parent, the husband did not establish that he was in immediate need of his share of the proceeds of such a sale, and the record revealed that the husband was best able to find an alternate residence and the wife was financially able to manage the costs of the marital residence, having done so without assistance from the husband throughout the pendency of the divorce.

The Appellate Division held that Supreme Court properly directed the husband to pay the wife one half of the value of certain wastefully dissipated marital assets. The husband admitted that he cashed some of the parties' United States savings bonds while the divorce was pending, and the issues posed by his inconsistent testimony as to the value of these bonds, as well as his claim that the wife cashed additional bonds by forging his signature, were for Supreme Court to resolve.

The Appellate Division affirmed the Supreme Court's direction that the husband pay \$2,500 each semester toward college costs for the unemancipated children. A court may require a parent to make payments toward college costs upon a finding of special circumstances, a determination that is based upon the payor spouse's financial status, the educational background of both parents and the academic ability of the children (*Domestic Relations Law* § 240[1-b][c][7]). Here, the Appellate Division found that the requisite special circumstances existed. At the time of trial, one of the parties' emancipated children was enrolled in college, and the older of the two unemancipated children, a high school senior, was planning to attend college after graduation. The parties' long-standing intention to assist their children with college costs was revealed by the husband's testimony that their original purpose in buying the savings bonds, which were purchased over a period of many years, was to establish college funds for the children. The husband's income was substantially greater than the wife's income. Given her limited resources and the parties' mutual commitment to their children's education, there was no abuse of discretion in ordering the husband to contribute to college costs

Supreme Court did not abuse its discretion by ordering the husband to pay one half of the rental income from the Queens County property to the wife until the sale of the property, without deducting therefrom any expenses or carrying charges. The husband's sole responsibility for expenses related to the Queens County property was balanced by the wife's sole responsibility for the expenses of the marital residence, which, unlike the Queens County property, produced no income.

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Hearing - Motion to Amend Pleadings to Conform to Proof - Absent surprise or Undue Prejudice, Motion Should be Freely Granted

In Matter of Jeff M. v. Christine N., --- N.Y.S.2d ----, 2012 WL 6621167 (N.Y.A.D. 3 Dept.), in June 2010, petitioner and his wife communicated to respondent, petitioner's mother, that they no longer wanted respondent or respondent's husband to contact them or their three children (born in 2003, 2005 and 2008). Nevertheless, over the course of the next nine months, respondent repeatedly disregarded this request by sending letters, packages and gifts to petitioner and his family. During that same time period, respondent also filed a petition seeking visitation with the children. On March 16, 2011, the parties negotiated an agreement whereby respondent withdrew the petition and agreed to communicate with petitioner's family only through petitioner and his wife. Three days later, on March 19, 2011, petitioner received three cards in the mail from respondent, one addressed to each of his children. Based upon that conduct, petitioner commenced this proceeding alleging that respondent had committed the family offenses of aggravated harassment in the second degree and stalking. After a hearing. Family Court found that respondent committed the offense and issued a two-year order of protection requiring her to stay away from petitioner, his wife and their children.

The Appellate Division found that petitioner proved by a preponderance of the evidence (Family Ct Act § 832) that respondent committed the family offense of aggravated harassment in the second degree. Petitioner testified that in June 2010, as a result of a longstanding strained relationship with respondent, he and his wife sent an email to respondent advising her that, until she sought psychiatric help for "serious mental health issues," they would "no longer accept packages, letters, cards, calls, or any other type of communication" from her or her husband. Petitioner explained that, following this email, respondent nonetheless continued to send packages and letters, culminating in the three cards which formed the basis of the proceeding. He testified that, upon retrieving the cards from the mail, he was offended and "beyond devastated." Petitioner's wife added that petitioner was "very angry" and "had tears in his eyes" upon receipt of the cards. Notably, respondent admitted that on numerous occasions after the June 2010 email she disregarded petitioner and his wife's requests for her to cease communication, including causing the cards to be sent. Her intent to annoy or alarm petitioner could be inferred from the circumstances. While respondent claimed to have sent the cards under the belief

that a prior letter from petitioner's wife permitting her to send cards and gifts "[took] precedent" over the subsequent June 2010 email prohibiting contact and based upon the advice of professionals that it was important that she continue to have contact with her grandchildren, Family Court rejected those explanations.

The Appellate Division held that Family Court did not abuse its discretion by permitting petitioner to conform the pleadings to reflect the proof adduced at the hearing to the effect that respondent was aware as early as June 2010 that she was to have no further contact with petitioner or his family. A motion to conform the pleadings to the proof is committed to the sound discretion of the court and, absent surprise or undue prejudice, should be freely granted (*Murray v. City of New York*, 43 N.Y.2d 400, 404-405 [1977]). The affidavits submitted by petitioner and his counsel in opposition to the motion to dismiss specifically alleged that respondent had been advised long before the March 16, 2011 agreement that she was not to have any contact with petitioner, his wife or their children. Thus, respondent was aware of this proof well before the hearing. Furthermore, respondent's own counsel questioned her at the hearing as to whether she had notice, prior to March 16, 2011, that petitioner did not want her to contact his family, and specifically referenced the June 2010 email. There being no showing that respondent was surprised or prejudiced by this proof, there was no error.

The Appellate Division rejected respondents challenges to the provision in the order of protection barring her from having any contact with petitioner's children. Reasonableness is the guiding consideration in determining what conditions to impose in an order of protection, and the major criterion of the reasonableness of conditions imposed is whether they are likely to be helpful in eradicating the root of family disturbance. Under the particular circumstances of this case, we find that Family Court's decision to include the children in the order of protection was reasonable and necessary to end the source of the family disruption and, therefore, was a proper exercise of its discretion.

Equitable Distribution - Property Determination - Personal Injury Recovery - by Transferring His Unallocated Separate Property Portion of the Settlement into Joint Account, Husband Created Presumption That it Was Marital and Was Thus Required to Rebut this Presumption by Clear and Convincing Evidence That the Transfer Was Solely a Matter of Convenience Equitable Distribution - Factors Considered - (12) the Wasteful Dissipation of Assets by Either Spouse - Though Gambling May Be Considered an Addiction, this Does Not Excuse Gross Economic Misconduct in Wasting the Marital Assets.

In *Burnett v Burnett*, --- N.Y.S.2d ----, 2012 WL 6621175 (N.Y.A.D. 3 Dept.) the parties were married in 1974 and raised six grown children. During the course of the marriage, plaintiff (wife) worked within the home and defendant (husband) was the primary wage earner, excluding a period during the marriage-described by Supreme Court as

"significant" in duration-when the husband left the wife and children dependant upon public assistance benefits and charity from her family. In 2002, in the course of his employment, the husband suffered personal injuries in a fall from a scaffold. In 2006, the parties settled their claims for personal injury and loss of consortium in the combined net sum of \$1 million and deposited the funds into a joint investment account managed by their son, with the stated intention of drawing \$4,000 monthly from the account for their household expenses and support. In 2007, they jointly obtained a settlement payment upon a legal malpractice action (arising from the underlying personal injury and consortium claims) in the sum of roughly \$297,000. The husband deposited this check into his separate account. Thereafter, the husband engaged in extensive and habitual gambling, depleting the accounts. After learning of an adulterous affair in 2009, the wife withdrew the remaining balance of just under \$140,000 from the joint investment account. The husband never accounted for the funds from the malpractice settlement and Supreme Court found, based upon this failure and upon his "less than forthcoming testimony," that the possibility remained that he had secreted or transferred assets. Supreme Court awarded the wife title to the marital residence, the remaining balance of the investment account, and the household furnishings and farm equipment. The husband received his checking account, plumbing business and equipment, and a motor boat and trailer.

The Appellate Division rejected the husband's contention that Supreme Court erred in determining that the settlement funds were marital property. Although Domestic Relations Law § 236[B][1][d][2], the governing statute, provides that compensation for personal injury constitutes separate property, Supreme Court noted the complete lack of any evidence upon which the funds might have been allocated as between the husband's personal injury claim and the wife's consortium claim, and the substantial evidence supporting the legal presumption that the parties wished to treat the proceeds as joint assets of the marriage. The parties received the initial settlement funds by joint check and deposited the funds immediately into a joint investment account. Their son testified that he had offered professional advice regarding their holdings and that the account was set up to pay out a monthly sum for deposit into the parties' household account for payment of their living expenses. By transferring his unallocated separate property portion of the settlement into the joint account, the husband created a presumption that it was marital and was thus required to rebut this presumption by clear and convincing evidence that the transfer was solely a matter of convenience. This burden was not met. The husband retained the second settlement check from the malpractice claim separately (including the portion that may have been allocated to the consortium claim) and failed to offer any accounting for these funds. He was awarded any balance of his separate accounts, and could not be heard to complain regarding the distribution of this asset.

The Appellate Division found that the evidence of the husband's wasteful dissipation of marital assets was overwhelming. Records from the investment account and from several casinos were introduced into evidence. The documentation and testimony,

including the husband's own admissions, revealed that he engaged in extensive gambling over a period of several years, incurring significant debts and depleting the substantial assets that should otherwise have been sufficient to support the parties at their previous economic level and lifestyle indefinitely. There was no evidence whatsoever supporting the contention that his actions should be in some manner condoned or forgiven as a result of his head injury. Though the husband's gambling may be considered an addiction, this did not excuse his gross economic misconduct in wasting the marital assets.

Counsel Fees - Domestic Relations Law §237 - Award - Parties to a Civil Dispute Are Free to Chart Their Own Litigation Course and May Stipulate Away Statutory, and Constitutional Rights, and Agree to the Circumstances under Which a Counsel Fee Award May Be Made.

In *Matter of Kaczor v. Kaczor*,--- N.Y.S.2d ----, 2012 WL 6621286 (N.Y.A.D. 3 Dept.) Petitioner (mother) and respondent (father) were the parents of one child. Sole custody of the child was awarded to the father in 2002, with visitation to the mother. In 2006, the mother filed a petition for modification of the prior custody order. Upon consent of the parties at the conclusion of the proceeding, Family Court made multiple specific directives and continued the essential terms of custody and visitation. As relevant here, the order provided that, if the mother filed a petition in Family Court against the father and was "unsuccessful in prosecuting the petition for any reason whatsoever, including a withdrawal of said petition, the mother shall be responsible to reimburse to the father any and all attorney fees he incurs as a result of the petition." In November 2010, the mother commenced a proceeding by filing a modification petition seeking sole custody of the child. Following preliminary appearances, the mother withdrew the petition on the day that trial was scheduled to begin. The father thereafter sought an order directing the mother to reimburse his counsel fees incurred in defending the petition. Family Court directed a hearing relative to the reasonableness of the claim. The mother conceded that the amount claimed was appropriate based upon time expended and the rate charged, but otherwise contested the application. Family Court rendered a fee award.

The Appellate Division affirmed. It observed that counsel fees are generally regarded as incidents of litigation, with each party remaining responsible for his or her own fees, but an award of legal fees may be rendered where such is authorized by statute, court rule or, an agreement made by the parties. The stipulation was formally made in open court, with the assistance of counsel, and incorporated into a court order. No grounds were shown to vacate the parties' clearly expressed agreement. It noted that "parties to a civil dispute are free to chart their own litigation course and, in so doing, they may stipulate away statutory, and even constitutional rights. As the parties may fashion the basis upon which a particular controversy will be resolved it found that by her stipulation the mother effectively waived the requirement that her conduct be found frivolous prior to holding her responsible for the father's counsel fees, as well as any pertinent constitutional protection under both the New York and U.S. Constitutions.

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Granted - Not a Violation of Best Evidence Rule to Permit Party to Testify to the Contents of Text Messages Where Established That Messages Were Unavailable as a Result of an Innocent Mishap and Despite Due Diligence in Attempting to Recover Them.

In Matter of Robert AA. v. Colleen BB., --- N.Y.S.2d ----, 2012 WL 6621293 (N.Y.A.D. 3 Dept.) Petitioner (father) and respondent (mother) were the parents of a son (born in 2005). A December 2006 order of Family Court awarded sole custody of the child to the mother and parenting time to the father "at such times and places as the parents shall mutually agree." In June 2010, the father commenced a proceeding seeking to modify the prior order by establishing a visitation schedule. The following month, the mother filed a family offense petition. She subsequently filed a modification petition requesting that any parenting time between the father and the child be supervised due to the father's alleged alcohol and drug abuse. Following a hearing, Family Court dismissed the father's petitions, suspended his visitation rights and ordered that he engage in counseling and submit to a substance abuse evaluation. The court further found that the father had committed the family offense of aggravated harassment in the second degree and issued a one-year order of protection.

The Appellate Division affirmed. There was ample support in the record for Family Court's denial of visitation to the father. The mother's testimony, which Family Court credited in all respects established that the father rarely availed himself of the opportunity to visit the child despite her efforts to encourage a relationship between them and notwithstanding an order allowing essentially open access to the child upon agreement. She explained that the father did not see the child for nearly a year after the 2006 order and that, while arrangements for Thursday visitations were thereafter made at her insistence, these visits were seldom consistent. When the father did visit with the child, the mother observed that the child was swearing and exhibited aggressive behavior. According to the mother, the father again "disappeared from the picture" when the child entered preschool in September 2009, seeing his son only a handful of times thereafter, almost all of which she initiated. Moreover, on at least one occasion he conditioned visitation on having sex with the mother. Family Court was "disturbed" by the testimony regarding the extent of the father's preoccupation with having sexual relations with the mother, and specifically noted his inability to refrain from referencing sexual relations with the mother during his testimony. Family Court credited the mother's testimony regarding the father's alcohol and drug use, and found that his actions placed the child at risk of harm. The mother explained that the father admitted to having resumed drinking and drug use and that, on more than one occasion when dropping off the child, she could smell marijuana in the father's home. During his testimony, the father confirmed that he recently tested positive for cannabis. The mother also detailed incidents where the father drove or attempted to drive the child home from a visit while under the influence of alcohol. She testified further that, in June 2009, the father informed her that he had been convicted of rape. When questioned as to whether he had been convicted of raping a

90-year-old woman, the father invoked the Fifth Amendment. The record was replete with additional conduct by the father that raises serious concerns regarding his ability to care for and supervise the child, including allowing the then-three-year-old child to play violent video games and watch inappropriate television shows, transporting him in the front seat without a seat belt, and an incident, which the father found "funny", during which he lost the child in Wal-Mart, requiring the store to close all of its doors before the child was ultimately found nearly 45 minutes later.

The Appellate Division also found that the evidence was sufficient to establish that the father committed the family offense of aggravated harassment in the second degree. As relevant here, "[a] person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she ... communicates with a person ... in a manner likely to cause annoyance or alarm" (Penal Law § 240.30[1]). At the hearing, the mother testified that the father sent her more than 10 text messages over the course of a day in July 2010. In the first set of messages, the father repeatedly requested that the mother have the child call him and accused her of keeping the child from him, in response to which she informed him that she was at work and requested that he cease texting her. The mother explained that the messages became increasingly "disturbing," including repeated statements by the father that he was still in love with her and wanted to be together as a family. She testified further that, despite her requests that he stop, the father continued to send her similar text messages throughout the evening and as late as 2:00 a.m., and stated that she was afraid of the father and feared for her safety. It rejected the father's assertion that Family Court erroneously permitted the mother to testify to the contents of the text messages in violation of the best evidence rule. The mother sufficiently established that the messages were unavailable as a result of an innocent mishap and despite her due diligence in attempting to recover them (*Schozer v. William Penn Life Ins. Co. of N.Y.*, 84 N.Y.2d 639, 644 [1994]). According deference to Family Court's credibility determinations, and mindful that the requisite intent may be inferred from the surrounding circumstances it found that the family offense was proven by a preponderance of the evidence.

Child Custody - Relocation - Relocation in Children's Best Interests Where Children Would Benefit from Economic Stability and Security Move Would Bring.

In *Matter of Shirley v. Shirley*, --- N.Y.S.2d ---, 2012 WL 6621295 (N.Y.A.D. 3 Dept.) Petitioner (mother) and respondent (father) were the divorced parents of three boys, two of whom were twins and all of whom were born in 2007. In August 2009, and upon the parties' stipulation, the mother was awarded sole legal and primary physical custody of the children, and the father was granted unspecified periods of supervised visitation. Supreme Court also ordered that the father undergo a substance abuse evaluation and complete both a domestic violence and an anger management program and issued a stay-away

order of protection in favor of the mother, which remains in effect until 2014. In November 2010, the mother commenced a proceeding seeking permission to relocate with the children to Yuma, Arizona, where her fiancé was living and working. Following a fact-finding hearing, Supreme Court granted the mother's application

The Appellate Division found that it was apparent from the record that the children would benefit from the economic stability and security that such move would bring. At the time of the hearing, the mother was receiving public assistance and routinely had to turn to her relatives, friends and fiancé for additional funds in order to make ends meet. Although the mother sometimes babysat for additional pocket money, the children's needs and schedules effectively precluded outside employment. The mother's fiancé, on the other hand, was gainfully employed as an airframes mechanic for a well-established civilian contractor on the same military base where he previously was stationed. The fiancé testified that he had the financial wherewithal to support the mother and the children, all of whom would be covered under his health insurance once he and the mother married, and that this arrangement would allow the mother to remain at home and continue to work with the children-at least until all of them were in school full time.

As to the impact upon the father's relationship with the children, there was no question that he would see the children less frequently. However, both the mother and the fiancé had extended family in this state and indicated that they would return to the area in order to facilitate the father's visitations with the children. Although the mother wanted the father's visits to remain supervised, she also recognized that such visits necessarily would need to be for longer periods of time. The mother also expressed a willingness to allow the father to visit the children in Arizona, in addition to regular telephone and/or online contact. While it was true that the children's educational opportunities in Arizona essentially mirrored those available in New York and that the move would distance the children from their grandparents and other members of their extended families, the court was persuaded, having given due consideration to all of the relevant factors, including the feasibility of the father maintaining meaningful contact with the children, that relocation was in the children's best interests.

Fourth Department

Child Custody - Attorney for Child - Role - Must Zealously Advocate the Child's Position If Child Is Capable of Knowing, Voluntary and Considered Judgment

In *Matter of Swinson v. Dobson*,--- N.Y.S.2d ----, 2012 WL 6635016 (N.Y.A.D. 4 Dept.) a proceeding to modify a prior custody order, the Appellate Division observed the mother contended, inter alia, that the Attorney for the Child (AFC) should have substituted his own judgment for that of the child. Although the mother failed to preserve that contention for

review the Court stated that in any event, the mother's contention lacked merit. "An [AFC] must 'zealously advocate the child's position' ... and, if the child is 'capable of knowing, voluntary and considered judgment,' must follow the child's wishes 'even if the attorney for the child believes that what the child wants is not in the child's best interests' " (Matter of Gloria DD. [Brenda DD.], 99 AD3d 1044, 1046, quoting 22 NYCRR 7.2[d][2]; see Matter of Mark T. v. Joyanna U., 64 AD3d 1092, 1093-1094). There are only two circumstances in which an AFC is authorized to substitute his or her own judgment for that of the child: "[w]hen the [AFC] 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" (22 NYCRR 7.2[d][3]; see Mark T., 64 AD3d at 1094). Neither exception was implicated in this matter.

Supreme Court

Disclosure - CPLR 3121 - Mental Examination - Supreme Court Holds Husband Had No Right to Have His Attorney Present During Psychiatric Examination Where Sufficient Justification Exists to Bar the Husband's Attorney from Examination Room.

In *M.A.M. v M.R.M.*, 2012 WL 6554895 (N.Y.Sup.), 2012 N.Y. Slip Op. 52299(U), Unreported Disposition, the Supreme Court, upon request of the wife, ordered both parties to engage in a psychological evaluation. The court selected the evaluator, and signed an order confirming the evaluation. The Husband's counsel objected to the court's selection and further asserted that he wanted to be present when the evaluator interviewed his client. The husband moved for an order permitting him to have his counsel present during the evaluation. The wife submitted an affidavit from the court-appointed evaluator in which he asserted that he had a telephone conversation with husband's counsel, and that he insisted on being present for any interview portions of the evaluation, but not during the administration of formal psychological tests. He stated that the attorney told him that he wanted to be present to "protect his client from potentially self-incriminatory statements" and that husband's counsel "questioned the relevance of a history of drug use to a custodial evaluation." The evaluator's affidavit also stated that: "The husband's attorney made it clear that he would seek to prevent his client from providing spontaneous responses to open-ended or specific questions asked during the course of the interview, responses and information which are critical to an understanding of the individual. Clinical interviews, including the taking of the social history, are not solely for the purpose of gaining the asked about information, but also an assessment of the manner in which such information is presented, the fluidity and cogency of the thought process, observation of the manifest behavior, and other critical clinical nuances and manifestations which are likely to be significantly influenced by the presence of an attorney or any other third party. There is considerable professional literature in the field to support the practices of this office and which suggest that the presence of attorneys

(or other third parties) has significant potential for undesirable influence on the interactions, behavior, and statements of the individual being evaluated. Discussed is the potentially negative influence and consequences of an attorney's presence during an evaluation, as it changes the manner in which the patient/client interacts with the evaluator." The evaluator stated in a reply affidavit that "the presence of third parties in such evaluations was not permitted by [his] office due to the way in which it would change the interactions between a patient and an evaluator." It was the evaluator's belief that the presence of an attorney (or other third party) during a psychological evaluation had a significant likelihood of skewing the data obtained, and impacting the behavior and test results of the person being evaluated. The evaluator informed the court that he would not allow any attorney to be present during the examination. In his papers and during oral argument, the husband's counsel never suggested that he would ask questions or verbally interrupt the examination. He told the court that he would sit behind his client and say nothing.

Supreme Court denied the motion. It observed that while there is some conflict, New York courts have historically permitted an attorney to be present at a court-ordered psychological evaluation in a contested custody matter. The Court reviewed the case law on attorney access to examinations and its constitutional and statutory underpinnings before reaching any conclusions. It observed that the Court of Appeals considered the presence of counsel in a psychiatric examination in *Matter of Alexander L.*, 60 N.Y.2d 329 (1983). In that case, the court extended the right to counsel in the Family Court Act to require that counsel be present in an examination required as part of a termination of parental rights proceeding. The Court noted that subsequent New York courts took an expansive view of a litigant's request to have counsel present in medical and psychiatric examinations. It noted that a party is entitled to be examined in the presence of his or her attorney or other representative so long as that person does not interfere with the conduct of the examinations unless the defendant makes a positive showing of necessity for the exclusion of such an individual. Supreme Court pointed out that the party opposing the participation of the attorney has the burden of establishing that "the presence of the attorney or other representative will "impair the validity and effectiveness" of the neuropsychological examination. Before reviewing other aspects of this issue, the court noted that the reasoning of all of the cases seemed to rest on a judicial gloss in CPLR 3121. In *Jakubowski v. Lengen*, 86 A.D.2d 398, 400-401 (4th Dept.1982), a case cited as authority by husband's counsel, the court described the presence of attorneys at evaluations as "explained by the longstanding and seldom challenged practice of attorneys accompanying and being with their clients at physical examinations."The *Jakubowski* court cited *Milam v. Mitchell*, 51 Misc.2d 948 (Sup.Ct. Niagara Cty.1966), which referenced the same "practice" of lawyers being permitted to attend examinations. The court in *Jakubowski* noted that neither CPLR 3121 or the court rules expressly provide for an attorney's presence at medical or psychiatric examinations, but "more importantly, they do not provide for his exclusion." The Fourth Department acknowledged that even though CPLR 3121 says nothing about a client's right to have counsel present during a psychiatric examination, the absence of any express statute or rule prohibiting counsel's

attendance apparently condones the prior "practice" of permitting counsel to attend. On this slender reed of a "negative inference," found in the absence of language specifically excluding counsel in CPLR 3121, the Fourth Department held that a client was presumed to have a right to have counsel present at a physical examination. Supreme Court stated that despite this broad-reaching principle, the Fourth Department in *Jakubowski v. Lengen* acknowledged that the examining room should not be turned into a hearing room and held that, while the objectant failed to meet his burden of proof, the court had the power to prevent the attorney from intruding on the examination. In *Jakubowski*, the proof that disruption of the examination would occur by counsel's presence was insufficient to curtail the "practice" that the court said was inferred from the CPLR and the Fourth Department rules. However, the Supreme Court read *Jakubowski* for the proposition that there is no constitutional or statutory right to have counsel present in psychiatric examinations in civil cases in New York. The Fourth Department in *Jakubowski* described it solely as a "practice." While many of the other recent cases cited *Jakubowski* and described this "practice" into a "right," See e.g., *McNeil v. State*, 8 Misc23d 1028A (2005) (claimant has a "right" to have his counsel attend neuropsychological examination) none of them cited any broader authority for the proposition that an attorney may participate in a psychiatric examination. And all of these cases articulated the exception to the rule articulated in *Jakubowski*: if an objectant produces proof that an attorney's presence will impair the effectiveness and validity of the examination, the court may exclude counsel.

The husband's counsel relied, in significant part, on the *Jakubowski v. Lengen* holding. Citing only one case the court stated that there appeared to be an emerging body of New York cases which seemed to reject the *Jakubowski* presumption that the objecting party must demonstrate a valid reason to exclude the attorney from a psychiatric examination. In the alternative, these cases demonstrated what circumstances can justify excluding counsel from these examinations. In *Administration of Children Services v. Y.B.*, 2009 N.Y. Misc. Lexis 2560 (Sup.Ct. New York Cty.2009), the court, on consent, required the mother in a neglect proceeding to undergo a mental health evaluation. The subject demanded that her attorney attend. The court held that the pre-dispositional mental health evaluation was not a "critical stage" of the proceeding, and hence the subject had no right to have counsel present. The court noted that, unlike the circumstances in *In re Alexander L.*, there was no express statutory right to counsel at the proposed psychiatric examination. In searching for a constitutional right to have counsel attend, the court distinguished *Matter of Alexander L.*, noting that the Court of Appeals simply held that counsel's presence was only required at "critical stages" of litigation. The cases suggested New York authority on access to psychiatric examinations runs on several tracks: the *In re Alexander L.* track, which suggests that if the examination is at a critical stage, then counsel must be present; the *Jakubowski* track, which judicially codifies a practice that the attorney may be present unless the objecting party presents a sufficient justification to exclude counsel; and, the emerging psychiatric track, established in *Administration of Children Services v. Y.B.* and its predecessors, which indicate that because of the unique nature of psychiatric examinations, the party seeking access must present a justification to attend.

Given the current state of New York law, the court concluded that the husband had no right to have his attorney present during the examination. It then found that the *Jakubowski v. Lengen* test was met. The wife's attorney and the evaluator's affidavit provided a sufficient justification for excluding the attorney. In the court's view, the evaluator's objections, backed by the stream of federal court determinations and the guidance of other states, the evaluator's clinical recommendations and other mentioned periodicals, supported the conclusion that the attorney's mere presence alone in the examining room could interfere with the examination. Therefore, under the *Jakubowski v. Lengen* test, the wife's counsel and the evaluator demonstrated a sufficient justification to bar the husband's attorney from the examination room.

The court also concluded that the attorney may not be present during the testing portion of the examination. To balance his client's interests and as an exercise of the court's discretion to control disclosure under CPLR 3121, Supreme Court held that the attorney may attend the initial interview, where the process is explained and the informed consent obtained. But otherwise the examination would be supervised by the evaluator and the husband may not confer with his counsel during the conduct of the examination.

Divorce - Default Judgment - Affidavits - Judgment Vacated Sua Sponte Where Affidavit Stating There were no children was made to get expeditious judgment, rather than engage in protracted case in contested matrimonial parts

L.C.B.-T. v. T.L.T. 2012 WL 6621724 (N.Y.Sup.), 2012 N.Y. Slip Op. 52324(U) the plaintiff-former wife moved to amend the Judgment of Divorce to reflect that there was a son of the marriage.

The parties signed a Stipulation of Settlement, dated August 15, 2009, where the defendant-husband gave the plaintiff a lump sum payment of \$10,000. In the stipulation, the defendant-husband, who was the custodial parent of two unemancipated children from a prior relationship, together with the plaintiff-wife, L.C. B.-T. stated: "WHEREAS, there are no children of the marriage, and none are expected." This language appeared conspicuously on the first page of the stipulation, filed with the County Clerk. The defendant had his signature notarized on the stipulation, but the plaintiff-wife did not. The Court later learned that the parties to the matrimonial action had an unemancipated child of the marriage, as confirmed by the Court's review of the birth certificate. Nevertheless, in her affidavit in support of the uncontested divorce, the plaintiff-wife swore that there were no children of the marriage. Her proposed findings of fact clearly stated that there were no children of the marriage. The Court, based on the representations of the parties that there were no children of this marriage, granted a judgment of divorce on November 9, 2009, and entered by the Clerk of the Court on December 23, 2009, two years earlier. The plaintiff-wife and

her counsel-who did not represent the plaintiff in the actual divorce proceedings or participate in the drafting of the earlier questionable papers supplied to the Court-explained that the paperwork for the divorce was done by a "divorce mill" and plaintiff was negligent in reading the papers before signing. This Court did not accept that explanation. The Court observed that in Queens County, the distribution and assignment of uncontested matrimonial actions is made on the strength of the parties' representation as to whether or not there are any unemancipated children of the marriage. Cases involving unemancipated children are assigned to certain matrimonial parts and are subject to stringent review to protect the rights of the children. In this case it appeared that a false statement regarding no children was made by the plaintiff-wife to get a judgment of divorce by Supreme Court expeditiously, rather than engage in a protracted case with her husband in the contested matrimonial parts. The Court believed that the plaintiff-wife manipulatively hoped to bypass the Supreme Court on the issue of support payments and get the Family Court to order child support. Unfortunately, for the plaintiff-wife, the Clerk in the Family Court directed the plaintiff-wife to return to Supreme Court to amend the Judgment of Divorce.

Supreme Court referred to *Mestrovic v. Mestrovic*, 133 N.Y.S.2d 112 [Sup Ct Onondaga County 1953] [not officially reported], where the court vacated an annulment where it had been procured by false statements that were made to the Official Referee. In *Mestrovic v. Mestrovic*, the Court stated: [I]n the case of matrimonial actions ... the withholding of information from the court which, if disclosed, might cause the court to take a different view of the facts, is as much a fraud upon the court as actual misstatements of fact and in matrimonial actions, the People of the State of New York have an interest as a matter of public policy in addition to the rights of the plaintiff and defendant as between themselves.

Supreme Court denied the motion, vacated the Judgment of Divorce and dismissed the action with leave to file new papers, to be completed honestly, under a new index number, which shall disclose the attempt by the plaintiff to obtain a judgment of divorce.

See also the decision of the same court in *N.C. v. M.C.*, Slip Copy, 2012 WL 6621726 (N.Y.Sup.), 2012 N.Y. Slip Op. 52325(U).

Agreements - Stipulations - Set Aside - Fraud - Agreements - Stipulations - Set Aside - Fraud - Party with information which calls into question accuracy of opposing party's representations is charged with responsibility of using ordinary skill and intelligence to investigate such representations and failure to do so will result in dismissal of fraud claim based on such representations on ground he can not establish that he justifiably relied on them

In *FC v RB*, 2012 WL 6634558 (N.Y.Sup.), 2012 N.Y. Slip Op. 52342(U) parties entered into in open court stipulation before a Special Referee after both parties were fully

allocuted, which pertained, inter alia, to the responsibility for certain expenses incurred during the custody dispute. Pursuant to that portion of the Stipulation, F.C. agreed to waive his right to seek attorney fees incurred with respect to the custody dispute, and waived his right to seek reapportionment of fees charged for the Court-appointed forensic evaluation and for the attorney for the child up to the date of the Stipulation. In March 2009, in the midst of a Hearing, F.C. made the a motion to vacate the Stipulation, claiming that his agreement to it was induced by fraud.

Supreme Court held that in order to prevail on a fraud claim, F. C. Had to prove each of the following elements: that the other party intentionally made a misstatement or omission of a material fact, upon which the moving party justifiably relied, to his detriment. *Shultis v. Reichel-Shultis*, 1 AD3d 876, 877 (3d Dept.2003) ("As with any fraud claim, the proponent must establish (1) misrepresentation of a material fact, (2) scienter, (3) justifiable reliance and (4) injury or damages.").

F.C. based his claim primarily upon R. B.'s alleged intentional concealment from F.C. of her husband's income and assets at the time. F. C.'s claim of concealment was predicated in turn upon the purported understatement of R. B.s' income and assets in the body of the Net Worth Statement prepared by R.B. in 2004 in the context of the proceeding before the Referee that ultimately resulted in the Stipulation at issue. The Court held, based upon the testimony and documentary evidence adduced at the hearing revealed, that F.C. failed to sustain his burden of proof with respect to two essential elements of the alleged fraud: namely, that R.B. possessed the requisite intent to deceive him, or that under the circumstances that then obtained, F.C. had a right to rely upon any misstatements or omissions that R.B. may have made in the body of the Net Worth Statement with respect to the Bs' 2004 income and assets. F. C.'s fraud claim was belied by the Net Worth Statement itself. The Statement, including its attachments revealed, Mr. B.'s and the Bs' salary income at the time for all to see. F.C. then he had a duty to investigate the accuracy of the income and asset items listed in the body of the Statement, a duty which he either failed or refused to properly discharge. This alone doomed F. C.'s claim of fraud; the law will not protect those who purport to be so blind to facts presented to them that they refuse to see what has been faithfully revealed, or to investigate when so prompted.

Supreme Court found that the law is clear that a party may not permissibly maintain that he or she relied on an allegedly false document when, at once, other information, including, here, another portion of that same document, contradicts or calls into question the purportedly false term, thereby putting that party on notice and placing upon him the burden to investigate and inquire into the discrepancies. Numerous courts have held that a party with information at his disposal which calls into question the accuracy of an opposing party's representations may not sit idly by and then scream fraud. Rather, that party is charged with the responsibility of using his ordinary skill and intelligence to investigate such representations; his failure to do so will relegate to dismissal any fraud claim based on such representations on that ground that he could

not establish that he justifiably relied on them. *Stuart Silver Associates, Inc. v. Baco Development Corp.*, 245 A.D.2d 96 (1st Dept.1997); *Global Minerals and Metals Corp. v. James W. Holme*, 35 AD3d 93 (1st Dept.2006); *Rodas v. Manitaras*, 159 A.D.2d 341, 343 (1st Dept.1990); *New York City School Construction Auth. v. Koren-DiResta Construction Co., Inc.* 249 A.D.2d 205 (1st Dept.1998); *Travelers Indemity Company v. Flushing National Bank*, 90 Misc.2d 964, 973 (Sup.Ct. Queens Co.1977); *Cohen v. Colistra*, 233 A.D.2d 542, 543 (3d Dept.1996); *McGovern v. T.J. Best Building and Remodeling, Inc.* 245 A.D.2d 925, 927-928 (3d Dept.1997) (plaintiffs cannot justifiably rely upon representations made with respect to these or any other matters that, through the exercise of ordinary intelligence, they could have ascertained the veracity of on their own); In *Monahan v. Monahan*, 2 Misc.3d 1011(A), 2004 WL 869592, 2004 N.Y. Slip op. 50296(U) (Sup. Ct ., Nassau Co.2004) the Court held that even if the defendant's attorney made misrepresentations to plaintiff's attorney during the course of courthouse negotiations, concerning the value of the annuity or the amount of the disability benefits, the plaintiff was not justified in relying on the representations. The defendant did not conceal the annuity or his disability income, The plaintiff contended only that their values were misrepresented. If the plaintiff believed the misrepresentations were so material such that she would not have entered into the stipulation but for said representations, she had the option of seeking an adjournment to afford her the opportunity to confirm said values, or she could have required a representation on the record with regard to same.

In light of the Attachment to the Net Worth Statement with which he was admittedly provided by R. B., F.C. clearly failed to establish an essential element of his claim that he was fraudulently induced to enter into the Stipulation, the element of justifiable reliance. Thus, Plaintiff's motion was denied in all respects.

December 17, 2012

Appellate Division, First Department

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Hearing - No Right to Dispositional Hearing

In *Marisela N. v. Lacy M.S.* --- N.Y.S.2d ----, 2012 WL 6013079 (N.Y.A.D. 1 Dept.) the Appellate Division held that an order of protection is valid despite the lack of a dispositional hearing. There is no explicit statutory mandate that a dispositional hearing be conducted in proceedings under Family Court Act article 8 (*Matter of Hazel P.R. v. Paul J.P.*, 34 AD3d 307, 308 [1st Dept 2006]).

Juvenile Delinquency - Family Court - Jurisdiction - Family Court Was Not Authorized to Initiate a Motion under FCA § 355.1(1) to Modify a Prior Dispositional Order

In *re Rayshawn P.*, --- N.Y.S.2d ----, 2012 WL 5950511 (N.Y.A.D. 1 Dept.) the Appellate Division considered two questions left open by the Court of Appeals' decision in *Matter of Jazmin A.* (15 NY3d 439, 443 n * [2010]): (1) "whether a properly made motion under Family Court Act § 355.1 to stay, modify or terminate an order of probation based on change of circumstances would provide an alternative means of initiating proceedings to revoke probation, and (2) whether detention would be authorized pending resolution of such a motion", and answered both questions in the negative.

By a final order of disposition entered April 7, 2011, (the 2010 case), Family Court adjudicated appellant Rayshawn P. a juvenile delinquent, placed him on probation for 18 months, and ordered him to perform 50 hours of community service. On June 29, 2011, appellant was arrested for resisting arrest after he was apprehended for allegedly punching someone in the face. On June 30, 2011, upon the application of the detention center holding appellant based on his arrest the previous day, Family Court conducted a pre-petition hearing pursuant to Family Court Act §307.4. The police witness, testified that she placed appellant under arrest after he was brought to the precinct station. The Officer stated that she arrested appellant based on information provided to her by her lieutenant, who told her that he had seen appellant "engaging in an assault," and that as he tried to arrest him, appellant had "started to kick, punch, and throw in the direction of the officers ." The Officer acknowledged that she had no personal knowledge of the events on which the arrest was based. At the conclusion of the hearing, the court determined that it had jurisdiction over the matter arising from the June 29 arrest. However, the court did not grant the pre-petition detention application before it, which, under Family Court Act § 307.4(7), would have entitled appellant to the filing of a petition and a probable-cause hearing within four days. Instead, the court, at its own instance, and over the objection of appellant's counsel, reactivated appellant's 2010 case for which he was already on probation, and stated that it was "remanding the respondent, open remand, pending modification of that disposition." The court then dismissed the pre-petition application, without prejudice to the filing of a petition, and adjourned the matter to July 18, 2011.

The case file contained two written orders of the Family Court bearing the date of June 30, 2011, both under the docket number of the 2010 case, which had already been

finally adjudicated. One was an order to show cause, which, "[u]pon the Court's own motion pursuant to Family Court Act § 355.1(1)," directed appellant to show cause, at a hearing to be held on July 18, 2011, "(1) why the Court should not make a determination that there has been a substantial change of circumstances since the entry of the order of disposition, in that respondent's arrest for the commission of one or more acts of juvenile delinquency on 6/30/11, constitutes a violation of the order which placed him under probation supervision in this case; (2) why the Court should not enter an order in accordance with Family Court Act § 355.1(1)(b) vacating, modifying or terminating the order of disposition based upon such substantial change of circumstances; and (3) why the Court should not enter such interim orders as may be necessary to protect the best interests of the respondent and the safety of the community ."

Appellant's counsel objected on the grounds that, under Family Court Act § 307.4, the purpose of the June 30, 2011, pre-petition hearing was only to determine whether the court had jurisdiction, and did not provide a basis for remanding appellant to detention or revoking his probation. Counsel also maintained that no order to show cause had been served on the Legal Aid Society. Counsel argued that the court had unlawfully remanded Rayshawn to detention because no petition alleging a violation of probation (VOP) (Family Court Act § 360.2[1]) had been filed, and that, under Matter of Jazmin A. (15 NY3d 439 [2010]), the court did not have authority to remand a juvenile to detention during the period of probation in the absence of a pending VOP petition. Counsel further asserted that the court could not use § 355.1 to revoke probation, and that, in any event, the court had not complied with that section's procedural requirements. The judge responded, "I did not revoke probation. I remanded your client pending a determination as to whether or not probation was to be revoked, that is, pursuant to the statute [§ 355.1]." The court added that the order to show cause was "to get the parties into court to be heard," and that the parties had an opportunity to be heard at the pre-petition hearing. The June 30 order to show cause was never served either upon appellant's counsel personally or upon the offices of the Legal Aid Society before Family Court issued the remand order.

The Appellate Division held that Family Court was not authorized to initiate a motion under § 355.1(1) to modify a prior dispositional order based on alleged conduct by appellant that, if proven, would constitute a VOP. The modification order, because it was rendered pursuant to such an unauthorized motion, had to be vacated as invalid.

The remand order of June 30, 2011, pursuant to which appellant was placed in detention pending determination of Family Court's §355.1(1) motion was reviewed by the court although moot. In reviewing the modification order, the Court had already determined that Family Court was without authority to address appellant's alleged VOP by initiating a § 355.1(1) motion to modify the preexisting dispositional order. Because the remand order was issued as an adjunct to the § 355.1(1) motion, and the § 355.1(1) motion was itself unauthorized, the remand order would be invalid even if § 355.1 or §

355.2 (which sets forth the procedures to be followed on a § 355.1 motion) provided authority for an order detaining a juvenile pending the determination of a § 355.1 motion. Even if Family Court did have the authority to initiate the § 355.1(1) motion, the remand order would still be unauthorized because nothing in § 355.1 or § 355.2 authorized the court to remand appellant to custody pending determination of a motion under § 355.1.

The Appellate Division pointed out that in Matter of Jazmin A. (15 NY3d 439 [2010]), the Court of Appeals held that a juvenile may be remanded to detention only at "specific junctures in a delinquency proceeding" spelled out in the Family Court Act. Thus, in Jazmin A., Family Court was held to lack authority to order the detention of the respondent probationer when she appeared in court for a monitoring hearing, before any VOP petition had been filed. As the Court of Appeals explained: "Because the Legislature did not ... empower Family Court to order detention of a juvenile probationer before the filing of a VOP petition, we are unwilling to imply such authority in the absence of a statutory peg". The Court of Appeals further noted that Family Court's "continuing jurisdiction [over a juvenile probationer] does not vest [the court] with the power to take actions not authorized by article 3 [of the Family Court Act]". In Jazmin A. the Court noted that the points at which the Family Court Act authorizes detention are the pre-petition hearing (§ 307.4[4][c]), the initial post-petition appearance or an adjournment thereof (§§ 320.1, 320.4[2]), the probable cause hearing (§ 325.3[3]), and "after a VOP petition is filed" (§ 360.3[2][b]). Although the question of "whether detention would be authorized pending resolution of [a § 355.1] motion" was not presented in Jazmin A., the Appellate Division held that implication of the decision for that question was clear. Given that neither § 355.1 nor § 355.2 offers any "statutory peg" on which to hang authority for remanding appellant to detention, the remand order in this case was invalid, even if Family Court's § 355.1 motion were itself authorized. Accordingly, the remand order was vacated.

Appellate Division, Second Department

Appeals - Inadequate Record on Appeal - Effect upon Determination - Appeal Dismissed for Failure to Assemble Proper Record.

In Rubio-Modica v. Modica,--- N.Y.S.2d ----, 2012 WL 5935928 (N.Y.A.D. 2 Dept.) the Appellate Division pointed out that it is an appellant's obligation to assemble a proper record on appeal. The record must contain all of the relevant papers that were before the Supreme Court. Plaintiff sought review, inter alia, of the portion of the Supreme Court's order which denied her motion to vacate a previous order in a separate action. However, the record did not contain the papers constituting the plaintiff's separate motion to vacate that previous order. Where, as here, meaningful appellate review of the Supreme Court's

determination is made "virtually impossible" because of the incomplete nature of the record submitted, dismissal of that portion of the appeal is the appropriate disposition. Thus, the plaintiff's appeal from so much of the order as denied her motion to vacate the previous order was dismissed.

With respect to the part of the record that was sufficient to decide the appeal from other parts of the order appealed from, the Appellate Division observed that defendant in this action "is not available or refuses to comply" with a Florida judgment of divorce directing him to transfer, to the plaintiff, title to certain real property situated in Queens County. As such, pursuant to the judgment of divorce, the Supreme Court should have appointed a receiver and directed him to transfer the defendant's interest in the property to the plaintiff. The plaintiff demonstrated the defendant's refusal or unavailability to comply by establishing that he opposed the transfer of title and left the country.

Attorneys - Disqualification of Counsel - Disqualification Denied for Failure to Show That the Prior Representation Was Substantially Related to the Current Representation.

In *Gabel v Gabel*, --- N.Y.S.2d ----, 2012 WL 6028922 (N.Y.A.D. 2 Dept.) defendant moved to disqualify the plaintiff's counsel on the ground that counsel had previously represented the defendant in connection with her formation of a corporation. The Supreme Court granted the motion.

The Appellate Division reversed. It observed that a party seeking disqualification of its adversary's lawyer must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse" (*Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 131) Due to the significant competing interests inherent in attorney disqualification cases, the Court of Appeals has advised against "mechanical application of blanket rules," in favor of a "careful appraisal of the interests involved". The defendant failed to show that the prior representation was substantially related to the current representation. Specifically, the defendant did not argue, and there were no facts in the record to support a finding, that the prior representation concerned any confidential information regarding the value of the corporation or that the attorney was provided with any information that is not contained in the corporate filing itself. Further, the defendant refused to provide the plaintiff with discovery concerning the corporation, contending that the corporation was "closed" and that the defendant never realized any profits from it. Under the particular circumstances of this case, there was nothing to suggest an appearance of impropriety concerning the attorney's representation of the plaintiff in the divorce action and, therefore, the defendant's motion for disqualification should have been denied.

Paternity - Defense of Equitable Estoppel - Applied to Deny Biological Father Right to Assert Paternity Claim

In *Matter of Rason S.B. v. Alexis H.*, --- N.Y.S.2d ----, 2012 WL 6028962 (N.Y.A.D. 2 Dept.) the issue on appeal was who should be legally recognized as the father of the subject child. Two persons claimed to be the father: the appellant, Marquis B., also known as Marquis H. B., and Rason S.B. Following the birth of the child on January 16, 2005, the mother, Alexis H., and Rason S. B., signed an acknowledgment of paternity. According to the appellant's testimony at the hearing, he and the mother maintained a boyfriend-girlfriend relationship before the child's birth, but that relationship ended shortly after the child was born. The appellant testified that he interacted with the child and introduced the child to his family. In February 2007, the appellant learned that he was the child's biological father. However, the evidence adduced at the hearing demonstrated that the child spent most of her time with Rason S. B., who had assumed the role of father of the child. In February 2009, the appellant and Rason S.B. met for the first time, and learned of their competing claims with respect to the child. Thereafter, the appellant commenced a proceeding pursuant to Family Court Act article 5 to establish his paternity of the child. Family Court, after a hearing, *inter alia*, denied the paternity petition based upon equitable estoppel, dismissed that proceeding, and dismissed a related visitation proceeding .

The Appellate Division held that the Family Court properly applied the doctrine of equitable estoppel (Family Ct Act § 532[a]) to preclude the appellant from asserting his paternity claim with respect to the child. The paramount concern in applying equitable estoppel in paternity cases is the best interests of the child (see *Matter of Juanita A. v. Kenneth Mark N.*, 15 NY3d 1, 5; *Matter of Shondel J. v. Mark D .*, 7 NY3d 320, 326), not the equities between the adult parties. Although the mother concealed from the appellant the role that Rason S.B. occupied in the child's life, during the period in which the appellant delayed in asserting his paternity claim, the child developed a close relationship with Rason S.B. The Family Court correctly determined that the application of equitable estoppel served the best interests of the child by preserving her close relationship with Rason S. B., whom she identified as her father.

Agreements - Postnuptial - Validity - Domestic Relations Law § 236 (B) (3) - Manifestly Unfair - Post Nuptial Set Aside Where Manifestly Unfair.

In *Petracca v. Petracca*, --- N.Y.S.2d ----, 2012 WL 6030894 (N.Y.A.D. 2 Dept.), the parties were married on December 16, 1995. In March 1996, the parties entered into a postnuptial agreement. The agreement provided that the jointly-owned marital residence,

which had been purchased for approximately \$3.1 million after the parties were married, and which was subsequently renovated at a cost of between \$3 million and \$5 million, was the defendant's separate property. It further provided that if the parties divorced, the plaintiff, who had not been employed other than as a homemaker since October 1995, would waive her interest in any business in which the defendant had an interest, including any appreciation in the value of such interests accruing during the marriage. At the time the agreement was entered into, the defendant valued his interests in these business entities at over \$10 million. The plaintiff also waived any and all rights she had to the defendant's estate, including her right to an elective share. At the time the agreement was entered into, the defendant valued his net worth at more than \$22 million. Finally, the agreement provided that if the parties divorced, the plaintiff would waive any right to maintenance except as provided in schedule "C" of the agreement, which indicated that the plaintiff could receive maintenance of between \$24,000 and \$36,000 per year, for varying lengths of time, depending on the duration of the marriage. The defendant's obligation to pay the limited maintenance enumerated in the agreement was contingent upon his receipt of certain visitation with any children that the parties might have, and upon certain residency requirements imposed upon the plaintiff.

In 2008, the plaintiff commenced this action for a divorce. In his answer, the defendant sought enforcement of the postnuptial agreement. A hearing was held at which both parties testified. The plaintiff testified that the defendant had presented the postnuptial agreement to her for signature days after her 42nd birthday, and shortly after she had suffered a miscarriage. She testified that the defendant had "bullied" her into signing the agreement by threatening that they would not have any children and that the marriage would be over if she did not consent to the postnuptial agreement. The plaintiff testified that she and the defendant had agreed to have children prior to the marriage, and that their agreement to have children had been an important factor in her decision to marry him. She signed the agreement within days of receiving it and, although she reviewed some portions of it, she did not understand its terms and did not consult an attorney. The plaintiff also adduced evidence demonstrating that the statement of the defendant's net worth contained in the agreement was inaccurate at the time it was made in that it was undervalued by at least \$11 million.

When the defendant testified, he denied any knowledge of the plaintiff's miscarriage and stated that he had wanted the postnuptial agreement in order to protect his son from a prior marriage. The defendant testified that the parties had discussed the issue of entering into a postnuptial agreement prior to the marriage and that they had negotiated the postnuptial agreement over the course of many weeks. The defendant testified that his attorney had drafted the agreement and that he believed that the plaintiff had consulted with her own attorney, although she had not disclosed her attorney's name to him. The defendant explained that the marital residence had been purchased in both parties' names because the plaintiff said she wanted to have her name on it "for perception purposes, for other people," but that she had been willing to sign the agreement converting it into the defendant's separate property shortly after its purchase.

In a decision made after the hearing, the Supreme Court expressed doubts as to the defendant's veracity and credited the plaintiff's testimony over conflicting portions of the defendant's testimony. The court found that the plaintiff had not been represented by counsel and had been precluded from effectively analyzing the financial impact of the postnuptial agreement due to the inaccuracies contained in the financial disclosures that had been incorporated into the agreement. The court determined that the terms of the agreement were "wholly unfair" and, after examining the totality of the circumstances, concluded that it was unenforceable. In a subsequent order, made upon the decision, the court granted the plaintiff's cross motion to set aside the postnuptial agreement.

The Appellate Division affirmed. It observed that in general, a postnuptial agreement which is regular on its face will be recognized and enforced by the courts in much the same manner as an ordinary contract. Because of the fiduciary relationship between spouses, postnuptial agreements "are closely scrutinized by the courts, and such agreements are more readily set aside in equity under circumstances that would be insufficient to nullify an ordinary contract. To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the [agreement] is manifestly unfair to a spouse because of the other's overreaching" (*Christian v. Christian*, 42 N.Y.2d at 72-73). In determining whether a postnuptial agreement is invalid, "courts may look at the terms of the agreement to see if there is an inference, or even a negative inference, of overreaching in its execution. A spouse seeking to set aside a postnuptial agreement initially bears the burden to establish a fact-based, particularized inequality. Where this initial burden is satisfied, a proponent of a postnuptial agreement "suffers the shift in burden to disprove fraud or overreaching.

Here, the plaintiff demonstrated that the terms of the postnuptial agreement were manifestly unfair given the nature and magnitude of the rights she waived, particularly the relinquishment of her property rights in the marital residence and her waiver of all of her inheritance rights, in light of the vast disparity in the parties' net worth and earnings. Inasmuch as the terms of the agreement were manifestly unfair to the plaintiff and were unfair when the agreement was executed, they give rise to an inference of overreaching. This inference of overreaching was bolstered by the evidence submitted by the plaintiff, including her testimony, regarding the circumstances which led her to give her assent to the postnuptial agreement. The defendant's testimony which tended to show that he did not engage in overreaching raised an issue of credibility, and it declined to disturb the Supreme Court's determination with respect thereto.

Appellate Division, Third Department

Child Support - Modification - Downward - Inability to Work - Burden of Proof - Modification Denied for Failure to Prove Medical Inability to Work

In Matter of St. Lawrence County Support Collection Unit ex rel. Streetman v. Laneuville, --- N.Y.S.2d ----, 2012 WL 6049717 (N.Y.A.D. 3 Dept.) pursuant to a January 2008 order, respondent was required to pay over \$26,000 in child support arrears in monthly payments of \$100, with the monthly amount increasing to \$160 in August 2008. In August 2011, petitioner commenced a proceeding on behalf of the child's mother, alleging that respondent had not made any payments since June 2009. A Support Magistrate found respondent to be in willful violation of the prior order, and Family Court confirmed that finding, sentencing respondent to a 60-day jail term, suspended on the condition that he pay at least \$130 monthly toward the arrears.

The Appellate Division affirmed. The respondent testified that medical issues prohibited him from working. In support, he presented various medical records from 2011 and the testimony of his treating physician. Although the physician testified that respondent was unable to work due to neck discomfort and an inability to perform repetitive motions without fatiguing, she admitted that her opinion was based on respondent's subjective complaints, with no evidence of objective testing. There was no indication in the medical records submitted by respondent that he was unable to work. Accordingly, respondent failed to meet his burden of demonstrating an inability to make his required support payments and, therefore, the finding of a willful violation was warranted.

Child Custody - Jurisdiction - Home State - Domestic Relations Law §76 - Family Court Lacks Subject Matter Jurisdiction Where New York Not Child's Home State

In Matter of Boivin v. Gonzalez, --- N.Y.S.2d ----, 2012 WL 6049775 (N.Y.A.D. 3 Dept.) the parties were the parents of a child born in July 2010 in Puerto Rico. The child and respondent (mother) continued to reside in Puerto Rico until May 2011, when petitioner (father) transported them, together with the mother's child from another relationship, to his home in Schenectady County. In October 2011, following a domestic dispute, the mother and the children sought temporary housing assistance from the Schenectady County Department of Social Services and, three weeks later, they returned to Puerto Rico. After the mother and child left the father's residence, the father commenced this proceeding seeking custody of the child. The mother sought dismissal of the proceeding on the ground that Family Court lacked subject matter jurisdiction because New York was not the child's home state pursuant to Domestic Relations Law § 76. Following a hearing, Family Court determined that it did not have jurisdiction over the matter and dismissed the petition.

The father argued on appeal that the mother wrongfully removed the child from New York and, therefore, the period of time that she had spent in Puerto Rico since leaving New York should count toward the six-month period required to establish New York as her home state for jurisdictional purposes. The Appellate Division observed that the father did not raise the issue of wrongful removal before Family Court and, therefore, it was not preserved for appellate review. In any event, the record did not support the contention that the mother's return to Puerto Rico with the child was wrongful, and it was clear from the father's own testimony that the child did not reside in New York for a period of six months at any time prior to the commencement of this proceeding. Therefore, the basic requirements for jurisdiction were not present and the proceeding was properly dismissed.

Supreme Court

Equitable Distribution - Property Distribution - Evidence - Burden of Proof - Failure of Parties to Present Sufficient Evidence Warrants Denial of Relief

In *C.M.S. v. W.T.S.*, 2012 WL 6062535 (N.Y.Sup.), 2012 N.Y. Slip Op. 52221(U) Unreported Disposition the husband and wife each testified at trial. Neither side introduced any pertinent documents, not even statements of net worth. The wife, as plaintiff, called her husband to testify and the husband called the wife. The wife's counsel called the wife again as a rebuttal witness, but the testimony was short and uncomplicated, consisting of less than a dozen questions.

The facts established that the couple had one unemancipated college-aged daughter. There was no direct testimony that the child was spending time with either parent. There was no evidence of where she spent her time prior to leaving for college or where she resided when home from college. The husband acknowledged having paid child support to his wife, which raised an inference that he conceded that the wife was the primary residential parent. In addition, the husband admitted that he had virtually no communication with his unemancipated daughter. The court concluded, based on these circumstantial facts, that the wife was the primary residential parent for the unemancipated daughter, triggering the husband's obligation to pay child support. The husband was apparently self-employed and testified that he received no benefits. The proof of the husband's income was sparse: no tax returns were produced, no W-2 wage forms, or federal tax Form 1099 for any time during the last five years were offered at trial. The husband testified that he was a contract engineer for an area software design firm and paid \$75,000 over an 18-month period from January 2010 to May 2012 (a \$50,000 annual salary). There was no evidence that he paid social security taxes or medicare taxes from that amount. *Mojdeh M. v. Jamshid A.*, 36 Misc.3d 1209A (Sup.Ct. Kings Cty 2012) (no reduction of income for payment of FICA unless proof it was paid). The court declined to

infer that such taxes were paid. Based on this evidence, the court concluded that the husband had an annual income of \$50,000 during most of the past two years and given his experience, his past income, his lengthy history of employment at a local college, his testimony regarding his skills while working for family business during the period of his marriage, and as his possession of two advanced degrees, this court imputed an annual income of \$50,000 to the husband. The husband testified that he was currently unemployed and seeking work. He testified that he suffered a heart attack in May 2012, which delayed his active return to seeking employment. He testified that he had sent out "numerous resumes" in the last three months, but had done nothing else to obtain employment. He testified that he was currently living on accrued savings. However, the trial proof failed to substantiate a reduction in the imputed income. The husband failed to produce a copy of his current resume. There was no evidence of any distribution of the resume, no letters from employers acknowledging receipt of the resume, or any other corroborative evidence of the husband's employment search. Consistent with the Child Support Standards Act ("CSSA"), the husband's annual child support for a single child, based on the \$50,000 in imputed annual income, was \$8,500 or \$163.46 per week. Neither party testified to the criteria set forth in the CSSA to establish the appropriate support for the child. Even though this testimony was not before the court, the court found that this amount was consistent with the CSSA. Since neither party objected to this "by-the-book" calculation, the court, mindful of its obligations under the CSSA to provide adequate support for the child, awarded child support in the amount of \$163.46 per week.

The court considered contributions to college expenses but there was very little proof on which to make a determination. As a result, this court declined to require either parent to contribute any sums for the college expenses for their daughter. There was no proof of the cost of health insurance for the unemancipated daughter or who provided such insurance currently. In the absence of such proof, the court ordered the wife, who worked as a teacher, to procure health insurance for the unemancipated daughter to the extent permitted by federal or state law. Because there was no substantiated proof of the wife's income to establish respective pro rata contributions by the parents and no documentary evidence of the cost of insuring the child, this court declined to award the wife any proportionate contribution from the husband for the cost of the daughter's health insurance. Neither party introduced any competent evidence to justify any distribution of their assets and retirement accounts other than an award of the assets to the currently titled holder of those assets. The factors set forth in the Domestic Relations Law which the court should consider before awarding equitable distribution to this couple were not seriously referenced during the testimony. While the statute requires the court to consider these factors, and others, there was insufficient proof before the court to accord any weight to any of these factors in resolving equitable distribution of this couple's marital assets. The parties approach in this case appeared to mirror that of the couple in *N.H. v. S.H.*, 28 Misc.3d 1217A (Sup.Ct. Nassau Cty 2010). The same lack of proof in *N.H. v. S.H.*, compelled the same conclusion here: there was insufficient proof to require distribution of any of the couple's assets, and the assets titled

in their respective names remained their property, freed from claims of equitable distribution.

Editors Comment: The inference that the wife was the primary residential parent, triggering the husband's obligation to pay child support, is questionable.

Surrogates Court

Adoption - Access to Adoption Records - Drl § 114(2) - Showing of "Good Cause" - Religion of Birth Parents Is Non-identifying Information Which May Be Provided to Petitioner

In re Application of Alice, L.L.T., --- N.Y.S.2d ----, 2012 WL 6097581 (N.Y.Sur.) an adult who was born on March 2, 1953 and adopted on June 2, 1955, applied for access to her adoption records. The record reflected that in 1998 non-identifying information from petitioner's adoption records was furnished to her through the New York State Department of Health Adoption Information Registry. Petitioner now sought to unseal her adoption file in order to ascertain whether her birth mother was of the Jewish faith, as that would be determinative of petitioner's religion under Jewish law. The petition expressed a heartfelt and sincere desire to know the religion of her biological mother, but provided no other reason for unsealing the records.

The Court observed adoption records are sealed pursuant to DRL § 114, to protect and ensure confidentiality which is "vital to the adoption process". As expressed by the Court of Appeals, the purpose is to provide anonymity to the natural parents, enable the adoptive parents to form a close bond with their adopted child, protect the adopted child from possibly disturbing information that might be found in his records, and allow the state to foster an orderly and supervised adoption system (Matter of Linda F.M., 52 N.Y.2d 236, 239 [1981]. At the same time, the courts and the Legislature have recognized that circumstances may exist in which it is vital that an adopted child be provided with information regarding his background (Matter of Peter B., 12 Misc.3d 1184[A] [Sur Ct, Nassau County 2006]). When serious health issues arise, an adopted child or his adoptive parents may seek the medical history of the child's biological family pursuant to DRL § 114(4). This statute permits interested parties seeking medical information to establish a prima facie case of good cause. It is also possible to petition the court for access to adoption records for other reasons pursuant to DRL § 114(2). This section provides that adoption records may be unsealed upon a showing of "good cause." It further directs that there must be "due notice to the adoptive parents and to such additional persons as the court may direct." While it is unusual for adoption records to be unsealed for a non-medical reason, exceptions to the medical requirement are rare but do occur

occasionally. In weighing the opposing interests, courts may deny an adoptee's request to unseal her adoption record for lack of good cause.

The Court found that the facts presented did not contain sufficient information on which the court might order the unsealing of petitioner's adoption records on the basis of good cause or dispense with the due notice requirement of DRL § 114(2). At the same time, the information sought by the petitioner was specifically included under the definition of non-identifying information which may be provided to petitioner (Public Health Law 4138-c [3][e]). Thus, the court denied the application to unseal the records for lack of good cause, but advised the petitioner that her biological mother listed her religion as Protestant (Lutheran).

December 3, 2012

Court of Appeals

Evidence - Admissibility - Tape Recordings - The Predicate for Admission of Tape Recordings in Evidence Is Clear and Convincing Proof That the Tapes Are Genuine and That They Have Not Been Altered

In *Grucci v Grucci*, --- N.E.2d ----, 2012 WL 5845008 (N.Y.), 2012 N.Y. Slip Op. 07856 Plaintiff Michael Grucci and defendant Christine Grucci were married in 1988 and had two children. In 1998, Christine sued Michael for divorce. A few months later, Michael was charged with harassing Christine, and the District Court issued an order of protection directing him to stay away from her. In January 2000, Michael was accused of violating the order. The matter was presented to a grand jury, which returned an indictment charging Michael with two counts of first-degree criminal contempt for placing Christine in fear of death or injury by telephone, and harassing her by repeated telephone calls with no purpose of legitimate communication (Penal Law § 215.51[b][iii], [iv], respectively). After a bench trial in August 2001, County Court acquitted Michael. The court concluded that Christine's testimony was not credible because of "discrepanc[ies]" in the way she described Michael's alleged threat to the police, the grand jury and at trial. In March 2002, Michael brought a civil action against Christine to recover damages for malicious prosecution. At trial Michael sought, through the testimony of his brother, Anthony Grucci, to play for the jury an audiotope of a telephone conversation in which Christine purportedly made clear to Anthony, at some point after she went to the police, that she was not afraid of Michael. Christine's attorney successfully objected, inter alia, to admission of the audiotope.

Michael's attorney sought to play the audiotape during Anthony's testimony "as part of [his] presentation of [the telephone] conversation" with Christine that Anthony was recounting. Christine's attorney objected to the audiotape's admission on the grounds it was unreliable, "pieced together from a number of things" and "unintelligible"; that no chain of custody had been established; and generally that "no foundation [had been] laid for it at [that] point." In response, Michael's attorney offered only to have Anthony identify the voices on the tape and state "whether or not the tape recording [was] fair and accurate." When the judge asked if the tape had been authenticated, Michael's attorney responded "Not yet; this witness will authenticate." The judge then sustained the objection, and Michael's attorney stated that he had no further questions for Anthony.

The Court of Appeals affirmed. In an unsigned memorandum, it observed that while a party to a taped conversation can identify the speakers, "identity and authenticity are separate facets of the required foundation, both of which must be established" (*People v. Ely*, 68 N.Y.2d 520, 528 [1986]). The Court of Appeals stated: "The predicate for admission of tape recordings in evidence is clear and convincing proof that the tapes are genuine and that they have not been altered" (*People v Ely*, supra, at 522). Here, there was no attempt to offer proof about who recorded the conversation, how it was recorded (e.g., the equipment used) or the chain of custody during the nearly nine years that elapsed between early 2000, when the conversation allegedly took place, and the trial in late 2008. Given the facts and circumstances of this case, the judge did not abuse his discretion by requiring more than Anthony's representation that the tape was "fair and accurate" to establish a sufficient "predicate" before playing the tape for the jury.

Appellate Division, First Department

Agreements - Construction - Ambiguity - Where Agreement Provision Is Ambiguous, the Construction of the Provision Is for the Trier of Fact.

In *Kang v Kim*, --- N.Y.S.2d ---, 2012 WL 5845666 (N.Y.A.D. 1 Dept.) the parties entered into an agreement in connection with their divorce, which provided, as relevant here, that the wife shall have exclusive possession of the marital residence,, until the occurrence of specified events upon which the residence would be sold. The agreement also stated that after January 1, 2011, the wife shall have the right to purchase the husband's interest in the apartment. The clause at issue provided: "If the parties are unable to agree as to the terms for such purchase within 30 days of the day that the Wife gave notice to the Husband then the value of the Husband's interest (the 'buy-out price') shall be one half of the value of the apartment as determined by a Real Estate Appraisers [sic] agreed to by the parties less the outstanding amount owed upon the First Mortgage."

The motion court held that this provision was unambiguous and that the buyout price was one half of the value of the apartment less the entire outstanding amount of the mortgage. The husband asserted on appeal that the buyout price was half the value of the apartment less the wife's share of the mortgage, which is one-half of the outstanding amount of the mortgage, i.e., one half of the equity in the apartment.

The Appellate Division affirmed. It held that upon examination of the settlement agreement in its entirety, and considering the relation of the parties and the circumstances under which it was executed, the agreement was ambiguous because the provision was reasonably susceptible of more than one interpretation. Notably, the agreement also provided that all marital property is to be divided 50/50 and that if the premises is sold to a third party, the "net proceeds of sale" shall be divided equally. In light of the ambiguity, the construction of the provision was for the trier of fact.

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Fact-finding Hearing Was Procedurally Flawed and Unfair to Respondent Where the Petitioner Was Allowed to Respond to Respondent's Version of Events.

In Matter of Melissa H. v. Shameer S., --- N.Y.S.2d ----, 2012 WL 5846356 (N.Y.A.D. 1 Dept.) after a fact-finding hearing, Family Court determined that respondent father had committed acts constituting the family offenses of aggravated harassment in the second degree and assault in the second degree against petitioner mother, and, after a finding of aggravated circumstances, issued a five-year order of protection against him.

The Appellate Division reversed, on the law, without costs, vacated the orders vacated, and remitted for a new hearing. It held that the fact-finding hearing was procedurally flawed and unfair to respondent. The court failed to conduct a "searching inquiry" to ensure that respondent knowingly, intelligently, and voluntarily waived his statutory right to counsel (Family Ct Act § 262[a][ii]). The court concluded, without reviewing any financial documentation, that respondent was ineligible for assigned counsel. The court asked him only if he wished to have the matter adjourned so that he could retain counsel at his own expense. When respondent answered in the negative, the court proceeded to ask him questions relevant to the then-pending competing petitions for custody of the parties' children. There was no indication that respondent understood that from this point on the preliminary hearing would become the fact-finding hearing with respect to the family offense petition. Although respondent had asked to make a statement in response to allegations made by petitioner, there was no indication that he understood that upon doing so, the court would then transform his statements into his testimony for purposes of the fact-finding hearing on the family offense petition. The court had cautioned respondent that what he said could be used against him in the pending

criminal case, but assured him that the court would not hold what he said against him in this proceeding. However, the court did just that. In addition, rather than having to first present a prima facie case in support of the allegations in her petition, the petitioner was allowed to respond only to respondent's version of events.

Appellate Division, Second Department

Agreements - Construction - Retirement Benefits - Where Stipulation Did Not Include Survivorship Benefits Provision but Survivorship Benefits Were Incorporated into Judgment of Divorce, Supreme Court Properly Denied the Plaintiff's Motion to Vacate or Modify it since He Never Moved to Resettle the Judgment.

In *DeEttore v. DeEttore*, --- N.Y.S.2d ----, 2012 WL 5503574 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order of the Supreme Court which denied the plaintiff former husbands motion to vacate or modify a "Court Order Acceptable for Processing". The plaintiff contended on appeal that stated portions of a "Court Order Acceptable for Processing" dated February 10, 2011, directing the equitable distribution of his benefits under the Federal Civil Service Retirement System, gave the defendant survivorship benefits that were not agreed upon by the parties in their stipulation of settlement made in open court. The term "court order acceptable for processing" is a term used under the Federal Civil Service Retirement System for an order dividing pension assets (5 CFR 838.302). It is similar in effect to a Qualified Domestic Relations Order (see *Elwell v. Elwell*, 34 AD3d 1337, 1338). The Appellate Division agreed with the plaintiff that the parties' stipulation of settlement was silent as to the contested survivorship benefits, and therefore could not be read to include them (see *Kazel v. Kazel*, 3 NY3d 331, 334-335; *McCoy v. Feinman*, 99 N.Y.2d 295, 302-303). However, the contested survivorship benefits were incorporated into the judgment of divorce, and the husband never moved to resettle the judgment. The purpose of a retirement benefits order such as the COAP is to distribute benefits in accordance with the underlying stipulation or judgment of divorce. Since the COAP reflected the terms of the divorce judgment, the Supreme Court properly denied the plaintiff's motion to vacate or modify it.

Agreements - Construction - Definiteness - Stipulation must Be "Definite and Complete. Court Properly Refused to Enforce Stipulation Which Was Not Definite and Complete.

In *Feltman v. Feltman*, --- N.Y.S.2d ----, 2012 WL 5503640 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order which denied the mothers petition to enforce so much of a stipulation between the parties as related to summer camp expenses. It observed that

absent the formalities required by statute, a stipulation of settlement is not enforceable (see CPLR 2104). Pursuant to CPLR 2104, "[a]n agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered". The stipulation must be "definite and complete" (Town of Warwick v. Black Bear Campgrounds, 95 AD3d 1002, 1003; Matter of Dolgin Eldert Corp., 31 N.Y.2d 1, 8-9), and all material terms must be presented (see Bonnette v. Long Is. Coll. Hosp., 3 NY3d 281, 283). Here, the stipulation contained so many factual errors, ambiguities, cross-outs, and handwritten alterations which were never initialed by the parties, that it could not be said to be definite and complete. The Family Court therefore properly denied the mother's objections.

Child Custody - UCCJEA - Domestic Relations Law §76-f [1] - Second Department Holds That Family Offense Proceeding Did Not Constitute a "Child Custody Proceeding" Within the Meaning of the UCCJEA Where it Did Not Raise an Issue of Legal Custody, Physical Custody, or Visitation with Respect to the Children

In Matter of Hassan v. Silva, --- N.Y.S.2d ----, 2012 WL 5503641 (N.Y.A.D. 2 Dept.) the father appealed from orders of the Family Court as, upon finding that the Court of Common Pleas, Monroe County, Pennsylvania, was the more appropriate forum for the father to seek custody of the subject children, or obtain any other related relief, declined jurisdiction over the matters and dismissed his child custody and family offense petitions upon the ground that New York is an inconvenient forum.

The Appellate Division pointed out that a court of this state which has jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, may decline to exercise it if it finds that New York is an inconvenient forum and that a court of another state is a more appropriate forum (Domestic Relations Law §76-f[1]) The factors to be considered in making this determination include the length of time the child has resided outside the state, the distance between the court in this state and the court in the state or country that would assume jurisdiction, the nature and location of the evidence required to resolve the pending litigation, the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence, and the familiarity of the court of each state with the facts and issues in the pending litigation (Domestic Relations Law § 76-f[2]). Family Court providently exercised its discretion in adhering to so much of its original determination as declined jurisdiction over the father's custody petitions and dismissed those petitions on the ground that New York is an inconvenient forum. The children, who were now five and three years old, lived in Pennsylvania since August 2010 with the father's permission and, therefore, evidence regarding their care, well-being, and personal relationships was more readily available in Pennsylvania. There was no evidence that the children retained substantial connections with New York or that

significant evidence was in this State. The Court of Common Pleas, Monroe County, Pennsylvania, was familiar with the family and the pending issues, having issued a final order of protection against the father in favor of the mother and children and an interim custody order in the mother's custody proceeding. Furthermore, the travel time between the courts was only 2 ½ hours, and the Pennsylvania court is willing to exercise jurisdiction. Accordingly, the Family Court properly determined that the Pennsylvania court was a more appropriate forum to determine the issues of custody and visitation.

However, the father's family offense proceeding did not constitute a "child custody proceeding" within the meaning of the UCCJEA since it did not raise an issue of legal custody, physical custody, or visitation with respect to the children (Domestic Relations Law §75-a[4]). Accordingly, the Family Court erred in dismissing it pursuant to Domestic Relations Law §76-f. All of the acts complained of in the petition occurred in New York (Family Ct Act § 818).

Spousal Support - Family Court Act § 412 - No Basis for the Determination to Direct the Wife to Pay Support to the Husband Where Wife Did Not Possess Sufficient Means to Support the Husband.

In *Matter of Jacobi v Jacobi*, --- N.Y.S.2d ----, 2012 WL 5503642 (N.Y.A.D. 2 Dept.) the Appellate Division observed that pursuant to Family Court Act § 412, "[a] married person is chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, may be required to pay for his or her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties. This requires "a delicate balancing of each party's needs and means. Thus, the determination of a wife's spousal support obligation rests on the particular circumstances of the case, involving a balancing of factors such as her financial means, her need to have money on which to live after payments are made, the duration of the marriage, and the husband's ability to support himself. Under the circumstances presented here, there was no basis for the Support Magistrate's determination to direct the wife to pay support to the husband. The wife did not possess sufficient means to support the husband.

Equitable Distribution - Factors Considered - (13) Any Transfer or Encumbrance Made in Contemplation of a Matrimonial Action Without Fair Consideration - Proper to Equitably Distribute Husbands Interest in a Business Started During Marriage, and Purportedly Transferred to His Partner Before Commencement of Action for No Consideration

In *Shah v Shah*, --- N.Y.S.2d ----, 2012 WL 5503849 (N.Y.A.D. 2 Dept.), the Appellate Division affirmed a judgment of the Supreme Court, which, inter alia, awarded the

defendant 30% of his interest in Hi-Tech Trading (USA), Inc., and spousal maintenance in the sum of \$4,000 per month for a period of four years. It pointed out that in determining the equitable distribution of marital property, the court may consider "any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration" (Domestic Relations Law § 236[B][5][d] [13]. In equitably distributing the parties' assets, the Supreme Court properly considered the husbands interest in a business, known as Hi-Tech Trading (USA), Inc. which was started by the plaintiff and a partner during the marriage, and was purportedly transferred by the plaintiff to his partner shortly before commencement of the action for no consideration, There was no showing or finding that funds he allegedly invested in High Tech were his separate property, and, thus, his interest in Hi-Tech was properly equitably distributed. Under the circumstances of the case, the plaintiff's contention that the Supreme Court engaged in "double counting" with respect to the award of maintenance was without merit, as the plaintiff's businesses constituted tangible, income-producing assets, rather than intangible assets.

Maintenance - Award - Factors Considered - (1) the Income and Property of the Respective Parties Including Marital Property Distributed Pursuant to Subdivision Five of this Part - Proper to Average Defendants Income over Period of Years to Determine His Income for Purposes of Awarding Maintenance - Child Support Properly Denied During Pendency of Action Where, Plaintiff Did Not Allege, or Establish, That Daughter's Reasonable Needs Were Not Being Met.

In *Weinheimer v. Weinheimer*, --- N.Y.S.2d ----, 2012 WL 5696371 (N.Y.A.D. 4 Dept.) Supreme Court's judgment, inter alia, ordered defendant to pay maintenance to plaintiff in the amount of \$600 per month. The Appellate Division observed that in determining the income of defendant husband for purposes of awarding maintenance, the court averaged defendant's income over a period of years. Although the court did not abuse its discretion in determining defendant's income for maintenance purposes in that manner it found no basis in the record for the court's finding that defendant's average income was approximately \$48,000 per year. The court admitted in evidence defendant's pay stubs showing that his year-to-date earnings in 2010 were \$55,068. Defendant's tax records for the four prior years reflected gross incomes of \$58,999, \$63,580, \$53,981, and \$63,370. No evidence was admitted concerning defendant's income for any other years. Not including 2010 due to incomplete data, defendant's average income was \$59,982. Because the court, in determining defendant's maintenance obligation, understated his income by 20%, it concluded that, based on all of the factors enumerated in Domestic Relations Law § 236(B)(6)(a), the maintenance award should be increased to \$725 per month, and modified accordingly.

The Appellate Division rejected plaintiff's contention that the court erred in denying her request for an award of child support. During the pendency of this action, the parties resided together in the marital residence. The parties' only unemancipated child was a 17-year-old daughter who attended community college and did not live at home. The daughter worked part-time while attending college, and her tuition was paid by student loans. Although the daughter returned home for holidays, she remained in her apartment during the summer and worked full-time. The fact that the parties continue to reside together does not bar an award of child support, where there has been a showing that the award is necessary to maintain the reasonable needs of the child during the litigation (*Koerner v. Koerner*, 170 A.D.2d 297, 298;see *Harari v. Davis*, 59 AD3d 182, 182;see also *Salerno v. Salerno*, 142 A.D.2d 670, 672). Here, however, plaintiff did not allege, much less establish, that the daughter's reasonable needs were not being met. The evidence demonstrated that, with a little financial assistance from both parents, all of the daughter's bills were being paid while she attended college and lived on her own.

The Appellate Division also rejected plaintiff's contention that the court erred in failing to award her attorney's fees at the conclusion of the case . Because plaintiff did not submit documentation identifying the services rendered by her attorney or the fees incurred, the court was precluded from awarding attorney's fees to her. In any event, it would have been within the court's discretion to deny plaintiff's request. Although plaintiff earned only \$20,000 annually, she had previously been awarded interim attorney's fees, and the court's award of maintenance reduced the disparity in the parties' incomes.

Supreme Court

Counsel Fees - Domestic Relations Law §237 - Award - Required Disclosures - Supreme Court Directs Both Counsel to Provide Time Records and Amount of Payments Received on Counsel Fee Application.

In *Merrick v Merrick*, 2012 WL 5682145 (N.Y.Sup.), 2012 N.Y. Slip Op. 52132(U) a contested action for divorce, the court heard the testimony and accepted the evidence of the parties. The matter was pending submission of counsels' post-trial memoranda. In addition, defendant's counsel was ordered to submit her time records relative to her client's demand for counsel fees. As of the last date of trial, plaintiff had reserved as to whether defendant's counsel would be required to testify as to her services rendered, or whether plaintiff would accept defendant's counsel's affidavit of services. The court ordered plaintiff's counsel to provide the court and defendant's counsel with his time records and the payments he received, or any balance due. The plaintiff's counsel wrote to the court requesting the court rescind its order for the production of his billing records, citing *Match v. Match*, 168 A.D.2d 226 (1st Dept.1990). He stated his client would agree

that the demand for counsel fees by defendant's counsel may be considered on written papers and requested a briefing schedule. Defendant's counsel opposed the application of plaintiff's counsel to rescind the court's order directing submission of the billing records of plaintiff's counsel.

The court adhered to its prior order that billing records of plaintiff's counsel be produced. It pointed out that DRL § 237(a) now requires "(B)oth parties to the action or proceeding and their respective attorneys file shall an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amounts charged by the attorney, the amounts paid, or be paid, any experts, and any additional costs, disbursements or expenses." *Match v. Match*, supra, predated the 2010 statutory amendment. The Court in *Match* held on those particular facts, it was an abuse of discretion to "shift the burden of proving plaintiff's counsel's fee to the defendant's counsel, by utilizing defendant's counsel's time records to assist in determining the reasonableness of plaintiff's counsel's request for attorney's fees, given what the trial court described as the "deplorable" records of plaintiff's counsel. It was the court's opinion that the amount of attorney's fees that each attorney had billed and received, or was owed from his/her client, was relevant to the prospective award of counsel fees. Such information assists the court in determining the extent and appropriateness of the work claimed to have been done, and provides a measure of the ability of each party to pay for his/her attorney's labor and services. The 2010 Amendment to DRL §237 requires mutual disclosure in such applications.

November 16, 2012

Appellate Division, First Department

Maintenance - Award - Imputed Income - Evidence Established Plaintiff Earning More than He Reported.

In *Maldonado v Maldonado*, --- N.Y.S.2d ----, 2012 WL 5476102 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed a judgment which, inter alia, awarded defendant 35% of the appreciation in value of plaintiff's Manhattan apartment, imputing tip income to plaintiff for the purpose of calculating child support, and directing plaintiff to pay defendant \$15,000 in counsel fees. It held that defendant was properly awarded a portion of the appreciation of plaintiff's cooperative apartment. The record supported the court's findings that defendant played a role in the upkeep and maintenance of the apartment, contributed financially to the payments of the mortgage and maintenance, and contributed indirectly by acting as homemaker and mother. The court also providently exercised its discretion in imputing tip

income to plaintiff since the evidence established that plaintiff was earning more than he reported on his tax returns. Plaintiff had not reported any tip income except in 2007 and the evidence showed that his cash expenditures greatly exceeded the sum of his cash withdrawals. The award of counsel fees to defendant was based upon a proper consideration of the financial circumstances of both parties together with all the other circumstances of the case. Plaintiff prolonged the trial by providing false and misleading information to his financial expert, with the result being that the expert's testimony had no value.

Appellate Division, Second Department

Family Court - Support - Family Ct Act § 439(e) - Objections to Order - Waiver of Appellate Review by failure to file proof of service of copy of objections

In *Matter of Lawrence v Bernier*, --- N.Y.S.2d ----, 2012 WL 5416575 (N.Y.A.D. 2 Dept.) the Appellate Division held that the issues raised by the father on this appeal from a family court order were not reviewable. The Family Court properly denied the father's objections to the Support Magistrate's order on the procedural ground that he failed to file proof of service of a copy of the objections upon 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 upon the mother, the father failed to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order and, thus, failed to exhaust the Family Court procedure for review of his objections. Consequently, the father waived his right to appellate review of the merits of his objections.

Child Custody - Default Order - Review - Habeas Corpus Is Not the Proper Procedure for Seeking Review

In *Matter of Palmiotti v. Piscitelli*, --- N.Y.S.2d ----, 2012 WL 5416577 (N.Y.A.D. 2 Dept.) the Appellate Division held that a writ of habeas corpus is not the proper procedure for seeking review of the Family Court's order of custody and visitation entered upon the mother's default (CPLR 7002[a]; *People ex rel. Karen FF. v. Ulster County Dept. of Social Servs.*, 79 A.D.3d 1187, 911 N.Y.S.2d 679; *Matter of Conchita J. v. Scopetta*, 273 A.D.2d 238, 709 N.Y.S.2d 834; *Matter of Minella v. Amhreim*, 131 A.D.2d 578, 579, 516 N.Y.S.2d 494). The proper procedure is to move to vacate the order of custody and visitation, and, if the motion is denied, to appeal from the order denying the motion (see *Matter of Johnson v.*

Lee, 89 A.D.3d 733, 931 N.Y.S.2d 901; Matter of Lorraine D. v. Widmack C., 79 A.D.3d 745, 912 N.Y.S.2d 633).

**Child Custody - Modification - Evidence - Error to Admit into Evidence Mental Health Report Whee
Not Submitted under Oath and Expert Not Present**

In Matter of Rodriguez v. Bello, --- N.Y.S.2d ----, 2012 WL 5416579 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order of the Family Court, which, after a hearing, granted the father's petition to modify a prior order of the same court dated September 8, 2009, awarding the mother primary physical custody of the parties' child, so as to award him primary physical custody of the child. It held that the Family Court erred in admitting into evidence the report of the Mental Health Assessment Team, since the report was not submitted under oath and the expert was not "present and available for cross-examination" (22 NYCRR 202.16 [g][2]; Matter of D'Esposito v. Kepler, 14 A.D.3d 509, 510, 788 N.Y.S.2d 169). Nevertheless, without consideration of the report, a sound and substantial basis existed in the record to support the Family Court's determination to award primary physical custody of the parties' child to the father.

**Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Jurisdiction - Maternal
Grandmother and Father Not an "Intimate Relationship"**

In Matter of Welch v. Lyman, --- N.Y.S.2d ----, 2012 WL 5416583 (N.Y.A.D. 2 Dept.), the Petitioner sought an order of protection against the maternal grandmother of his newborn son, based on incidents in which the grandmother allegedly assaulted and harassed the petitioner. At the close of the petitioner's evidence the Family Court granted the grandmother's motion to dismiss the petition for lack of subject matter jurisdiction, on the ground that the petitioner had failed to establish that the parties had an "intimate relationship" pursuant to Family Court Act § 812(1)(e).

The Appellate Division affirmed. It observed that the Family Court is a court of limited jurisdiction and cannot exercise powers beyond those granted to it by statute (Matter of Johna M.S. v. Russell E.S., 10 NY3d 364, 366; NY Const., art VI, s 13; Family Ct Act § 115). Pursuant to Family Court Act § 812, the Family Court has concurrent jurisdiction with the criminal courts over proceedings concerning certain criminal acts occurring "between spouses or former spouses, or between parent and child or between members of the same family or household" (Family Ct Act § 812[1][e]). Insofar as relevant ,

"members of the same family or household" includes "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". Expressly excluded from the definition of "intimate relationship" are a "casual acquaintance" and "ordinary fraternization between two individuals in business or social contexts". Beyond those exclusions, the Legislature left it to the courts to determine on a case-by-case-basis what qualifies as an intimate relationship within the meaning of Family Court Act § 812(1)(e), based upon consideration of factors such as "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". The parties had no direct relationship and were connected only through the child. According to the petitioner's testimony at the hearing, contact between the parties prior to the alleged incidents was minimal and, following the alleged incidents, was nonexistent. The petitioner testified that he "didn't believe [they] had any kind of relationship." Accordingly, the Family Court properly concluded that the parties did not have an "intimate relationship" within the meaning of the statute, and properly granted the motion to dismiss the petition for lack of subject matter jurisdiction

Child Abuse or Neglect - Dispositional Order - Family Court Act §1053 - Suspended Judgment Granted

In re Eric Z., --- N.Y.S.2d ----, 2012 WL 5416585 (N.Y.A.D. 2 Dept.) the petitioner commenced a

proceeding alleging that the appellants, who attended medical school in China before emigrating to the United States in 2003, abused and neglected their second child, born on October 27, 2008. The petition alleged that on or about May 7, 2009, the subject child was presented to Elmhurst Hospital with a "left fronto-parietal subdural hematoma and a few bilateral retinal hemorrhages," and that the mother informed medical personnel at Elmhurst Hospital that the child had sustained these injuries by falling off a bed. The petition further alleged that on July 2, 2009, Dr. Mark M. Souweidane, a pediatric neurosurgeon at Weill Cornell Medical Center, informed the petitioner that the child's injuries were not consistent with the explanation provided by the mother.

On June 14, 2010, the appellants consented to a finding of abuse as to the mother and neglect as to the father; during a conference the Family Court agreed to consider a suspended judgment pursuant to Family Court Act §1053. The appellants then made separate motions for a suspended judgment. In support of their motions they submitted letters from three doctors who treated the subject child after his alleged fall from his bed, all of whom stated that, based on their examination of the child and their interactions with the appellants, they did not believe that the child's injuries resulted from abuse. The appellants also submitted a letter from Dr. Mark S. Diaz, a Professor of Neurosurgery at the Penn State University School of Medicine and the Director of Pediatric Neurosurgery at the Penn State Milton S. Hershey Medical Center, who reviewed the subject child's medical

records and opined that the subject child had a condition called benign external hydrocephalus, which rendered him susceptible to subdural bleeding from minor trauma, such as a fall from a bed. Dr. Diaz opined that there was "absolutely no necessity to conclude in this case that there was evidence of abusive head trauma." The appellants submitted a letter from Dr. Souweidane, who stated that he had reviewed the letter submitted by Dr. Diaz and agreed that the subject child may have suffered from benign external hydrocephalus, though he noted that the condition was impossible to document without image studies from before the accident. The Family Court in effect, denied the appellants' separate motions for a suspended judgment and, pursuant to Family Court Act § 1054, released the child to their custody under the supervision of the petitioner for a period of 12 months.

The Appellate Division modified the order. It observed that a suspended judgment is one of the permissible dispositions in a child protective proceeding pursuant to Family Court Act article 10. Judgment may be suspended for up to one year, or up to two years under "exceptional circumstances" (Family Ct Act § 1053 [b]), during which time the parents must comply with terms and conditions that relate to the adjudicated acts or omissions of the parents which led to the finding of abuse or neglect (Family Ct Act § 1053[a],[b]; 22 NYCRR 205.83[a]). If the terms and conditions are complied with, the petition is dismissed at the conclusion of the suspended judgment period, despite the fact that a finding of neglect or abuse has been made. The paramount concern in a dispositional hearing is the best interests of the child. The factors to be considered in making the determination include the parent or caretaker's capacity to properly supervise the child, based on current information and the potential threat of future abuse and neglect. The appellants had no prior criminal or child protective history, and that the appellants had complied with all court-ordered services. Under the circumstances, it held that a suspended judgment would be in the child's best interests, and reversed the order of disposition granted the motions for a suspended judgment and remitted the matter to the Family Court for the entry of a suspended judgment, the duration and conditions of which to be determined by the Family Court.

Supreme Court

Evidence - Spoilation of Evidence - CPLR 3126 - Responsibility to Preserve Evidence Extends to Items Not in the Possession of Party - Mother and Witness Precluded From Testifying As to Contents of Destroyed Diary

In S.B. v. U.B. ,--- N.Y.S.2d ----, 2012 WL 5381232 (N.Y.Sup.) the mother filed an Order to Show Cause modifying the father's visitation to supervised visitation between the father and the children, based on allegations made by mother's sister, S., recently revealed, that in 2002,

when she was ten (10) years old, the father sexually abused her and that the abuse continued for a period of three (3) years. The mother proffered that her sister, S., would testify that from 2002, when she was ten (10) years old, through 2005, the father touched her in a sexually inappropriate manner. The father denied the allegations. The sister submitted two affidavits that contain these allegations. In S.'s Affidavit, dated April 11, 2012, she asserted that "for a period of approximately three years beginning when I was ten years old and continuing until I was thirteen years old, my older sister's husband, defendant [U.B.], sexually abused me." S. stated that the defendant initially engaged the ten-year-old in a process by which defendant would ask S. if she wanted to play a game and then "tap [her] at various parts of [her] body and ask [her] to tell him where [she] felt it". The Mother's sister further asserted that the father would try to pick up her shirt and rub her bare back and exposed breasts, despite her attempts to keep her shirt down and prevent the touching. S. also stated in her Affidavit that "on one occasion, I awoke in my bed to Defendant placing his hands in my pants." The mother annexed heavily redacted excerpts of her sister's childhood diary to her Order to Show Cause, which sought supervision for all of the father's contact with the children. In the diary, the mother's sister allegedly memorialized her feelings concerning her interactions with the father during the time that the alleged sexual abuse took place. In her Affidavit, dated September 7, 2012, S. stated that she was asked by mother's counsel to provide him with diary entries relating to the father's abuse. S. stated in the same Affidavit, dated September 7, 2012, that upon reviewing the diary she was embarrassed by the private childhood thoughts that it contained. After reviewing the diary, S. instead provided heavily redacted excerpts of her diary to mother's counsel. S. stated that she did not want the mother's counsel to review her diary in its entirety and that the redacted portions were unrelated to the father's alleged abuse of her. In her Affidavit, dated September 7, 2012, S. stated that since providing the excerpts of her diary to the mother's counsel, she "decided that [she] did not want anyone else to review it", that she "discarded it in the trash," and that she no longer possessed the diary. She stated that she believed that she would not be asked to submit the diary after providing the excerpts to mother's counsel. She also stated that she was not instructed to discard the diary and that she did not tell anyone that she discarded the diary until several months after she threw it away.

The father moved for, inter alia, an order directing witness S. to turn over her complete and un-redacted diary covering the period of time from when she first met the defendant-father through September 30, 2012, including the period of time from January 1, 2002 to December 31, 2007; (2) or, in the alternative, precluding witness S. from testifying in the instant matter if she disposed of her diary. Supreme Court pointed out that it has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence. When a party negligently loses or intentionally destroys key evidence, depriving the non-responsible party from being able to prove its claim or defense, the court may punish the responsible party by the striking of its pleading" (*Baglio v. St. John's Queens Hosp.*, 303 A.D.2d 341, 342, 755 N.Y.S.2d 427 [2 Dept 2003]). A less severe sanction, such as preclusion of evidence or testimony, is appropriate when the missing evidence does not deprive the moving party of the ability to establish his or her defense, and when the

responsible party did not lose evidence intentionally or in bad faith. Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126. The court may, under the appropriate circumstances impose a sanction even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation. In situations of negligent destruction of evidence, the Court must consider the prejudice resulting from spoliation in determining what type of sanctions are warranted. If one party loses evidence and the loss leaves the other party prejudicially bereft, then the Court may punish the responsible party by the striking of its pleadings. The mother contended that she should not be punished for the loss of the diary because it was the S. who disposed of the diary. However, a party is responsible for preserving evidence when they are on notice that it may be needed for litigation (see *Thornhill v. A.B. Volvo*, 304 A.D.2d 651 [2 Dept 2003]). This responsibility to preserve evidence may extend to items that are not in the possession of a party when that party negligently fails to take steps to assure its preservation (*Amaris v. Sharp Electronic Corp.*, 304 A.D.2d 457 [1 Dept 2003]). As she submitted the excerpts of the diary, the mother was the party responsible for preserving it, and should have taken steps to ensure the diary's preservation. The Court found that destruction of the diary severely prejudiced to the father and directed that the plaintiff-mother and the witness S. were precluded from testifying as to the existence, or contents, of the diary at any hearing.

November 1, 2012

Court of Appeals

Crimes - Burglary - Effect of Order of Protection - Court of Appeals Hold Burglary Conviction May Be Premised on Intent to Engage in Conduct That Would Be Legal If it Was Not Outlawed by an Order of Protection

In *People v. Norman Cajigas*, --- N.E.2d ----, 2012 WL 5199395 (N.Y.) in 2005, defendant Norman Cajigas moved into the apartment where his paramour, Maria, resided with her teenage daughter. He eventually became physically abusive toward the woman and moved out of the dwelling in October 2006. Defendant soon began to stalk Maria on a virtually daily basis. This behavior escalated to a physical assault in November 2006. After that incident, Maria obtained an order of protection that required defendant to refrain from contacting her in any manner and to stay away from her, her residence and place of work. In April 2007, defendant violated the order by going to Maria's home. He was charged with criminal contempt in the second degree and another order of protection was issued. In July 2007, Maria's daughter was home alone when she heard someone trying to

open the front door of the apartment. She saw defendant through the peephole and asked him what he wanted. After defendant backed away, the girl telephoned her mother and the police were summoned. Defendant then tried to put something into the lock to open the door. He fled after the girl spoke to him a second time. Based on this incident, defendant was indicted for attempted burglary in the second degree and several counts of criminal contempt in the first degree.

Defendant was convicted on all counts and adjudicated a second violent felony offender. He was sentenced to 6 ½ years in prison, along with 5 years of post release supervision. The Appellate Division affirmed. (82 AD3d 544, 546 [1st Dept 2011]). The Court of Appeals, in an opinion by Judge Graffeo, affirmed. She observed that burglary, in its simplest form, is a trespass into a building coupled with the intent to commit a crime therein (Penal Law 140.20). Trespass occurs when the entry is knowingly unlawful (Penal Law 140.05). An order of protection, which typically requires a person to stay away from a victim's home or place of employment and to refrain from any contact, can be used to establish a knowing and unlawful entry since going to a protected person's home, even by invitation or permission, contravenes the terms of the order of protection. The issue here was whether the intent to do something inside the residence that would be legal in the absence of the order of protection established the requisite criminal state of mind to elevate the trespass to a burglary. Defendant asked the Court to adopt the Fourth Department's rule that the intent element of burglary "cannot be satisfied by intended conduct that would be innocuous if the order of protection did not prohibit it" (People v. VanDeWalle, 46 AD3d 1351, 1352 [4th Dept 2007]. The People, relied on decisions by the First and Third Departments that held that a burglary conviction may be premised on an intent to engage in conduct that would be legal if it was not outlawed by an order of protection (see People v. Carpio, 39 AD3d 433 [1st Dept 2007]; People v. Gilbo, 28 AD3d 945 [3d Dept 2006]). The Court of Appeals concluded that the principle articulated by the First and Third Departments was more consistent with the text of the burglary statutes and the rationale in Lewis. Actions that violate aspects of an order of protection may be prosecuted as criminal contempt in the second degree (Penal Law § 215.50[3] [a class A misdemeanor]), criminal contempt in the first degree (Penal Law § 215.51[b] [a class E felony]) or aggravated criminal contempt (Penal Law § 215.52 [a class D felony]). The precise charge depends on the nature and severity of the violation. But the fact that the defendant's actions would have been legal but for the issuance of the order of protection does not immunize such conduct from prosecution under these statutes.

Appellate Division, First Department

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection - Default Order Granted based upon Respondents disrespect for the Court

In re Nyree S., Petitioner-Respondent, v. Gregory C., --- N.Y.S.2d ----, 2012 WL 4868209 (N.Y.A.D. 1 Dept.) the Appellate Division dismissed an appeal from an order of the Family Court which granted the petition seeking a five-year order of protection in favor of petitioner mother and the parties' child upon a determination that respondent father had committed the family offenses of harassment and stalking. The incarcerated respondent appeared telephonically at a hearing and was grossly disrespectful to the court. When the court admonished respondent, he responded in a manner indicating that he had no respect for the court's authority. The Appellate Division held that the court acted properly in excluding respondent from the proceedings by disconnecting his telephone connection, and his conduct constituted a knowing and willful default. Since no appeal lies from an order entered upon the aggrieved party's default, the appeal was dismissed

Appellate Division, Second Department

Declaration of Nullity of Void Marriage - Bigamy - Equitable Distribution - Mahoney-Buntzman v. Buntzman Distinguished - Spouse Entitled to a Credit for Marital Funds Paid to Former Spouse or a Child Pursuant to an Order of Maintenance or Child Support

In Levenstein v. Levenstein, --- N.Y.S.2d ----, 2012 WL 5233497 (N.Y.A.D. 2 Dept.) on June 13, 1995, judgment was entered against the defendant in a criminal action in the United States District Court convicting him of failure to pay legal child support obligations and directing him to pay restitution of \$132,718.49, representing arrears in child support for periods between October 1992 and the date of the criminal judgment. The criminal judgment required that the entire amount of restitution be paid to the defendant's first wife by July 13, 1995, one month after the entry of the criminal judgment. The defendant failed to fully satisfy the restitution component of the criminal judgment by the deadline. The defendant thereafter remarried. Despite the defendant's failure to secure a divorce from his second wife, the defendant and the plaintiff purportedly married four years after the criminal judgment was entered. During the purported marriage, the restitution component of the criminal judgment was satisfied. The defendant and the plaintiff also made support payments to the defendant's first wife that became due during the purported marriage. In 2006, the plaintiff sought an annulment of her purported marriage to the defendant, alleging that the defendant committed bigamy because he had never divorced his second wife.

In 2008, the Supreme Court awarded the plaintiff an annulment, and a trial was held to determine the issue of apportionment of the putative marital debt. The Supreme Court explained in its decision that the plaintiff was entitled to a 50% credit for the marital funds used to satisfy certain premarital maintenance and child support obligations that the

defendant had paid to his former wife, including the amounts due under the criminal judgment. A judgment of annulment was entered in April 2009. One month later, in May 2009, the Court of Appeals held, in *Mahoney-Buntzman v. Buntzman* (12 NY3d 415, 421), that a spouse is not entitled to a credit for marital funds paid to a former spouse or a child pursuant to an order of maintenance or child support. Based on *Mahoney-Buntzman*, and upon motion pursuant to CPLR 4404, Supreme Court set aside the portion of the decision reciting that the plaintiff was entitled to a credit equal to 50% of the payments made during the purported marriage to satisfy the restitution component of the criminal judgment, and it reapportioned the putative marital debt accordingly.

The Appellate Division reversed. It observed that in *Mahoney-Buntzman*, the wife sought credit for maintenance payments made to the husband's former spouse that had become due and were paid during the wife's marriage to the husband. In holding that such payments were not subject to recoupment by the wife, the Court of Appeals reasoned that maintenance obligations to a former spouse and to children pursuant to a support order "are obligations that do not enure solely to the benefit of one spouse". Nevertheless, the Court cautioned, "[t]his 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 § 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". The Court concluded that payment of maintenance to a former spouse was not one of those circumstances.

The Appellate Division found that the payments made here were significantly different from those at issue in *Mahoney-Buntzman*. In that case, as here, the wife sought credit for payments made from putative marital funds during the purported marriage. Here, however, the plaintiff sought credit for amounts that were due and attributable to periods of time that elapsed long before the beginning of the purported marriage. It held that under the circumstances of this action for an annulment, which is based on the defendant's bigamy, it would be inequitable for the plaintiff to be required to bear any part of the financial burden brought about by the defendant's criminal conduct. Consequently, the plaintiff was entitled to a credit of 50% of the payments made during the purported marriage toward satisfaction of the criminal judgment.

Equitable Distribution - Property Distribution - QDRO Cases

In *McVeigh v. Curry*, --- N.Y.S.2d ----, 2012 WL 5233499 (N.Y.A.D. 2 Dept.) the parties' marriage was terminated in a judgment of divorce dated December 15, 2010. In accordance with a stipulation of the parties and an order dated May 25, 2010, the judgment

of divorce provided, in essence, that the plaintiff was entitled to a 50% share of the marital portion of the defendant's pension, and that share had to be distributed pursuant to the equitable distribution formula established in *Majauskas v. Majauskas* (61 N.Y.2d 481). The judgment of divorce, in accordance with the order dated May 25, 2010, also provided that, if the defendant elected a pension option that did not have any survivor benefits, he must obtain appropriate life insurance. The defendant moved in effect, to direct the plaintiff to furnish him with a copy of her birth certificate to enable him to elect the annuity option of his pension fund. Under the annuity option, the defendant would specify the annual amount the plaintiff would receive for the rest of her life upon his death. The plaintiff opposed the defendant's motion and cross-moved, in effect, to direct the defendant to elect the 100% joint and survivor option of his pension or obtain life insurance to cover her 50% share of the marital portion of the defendant's pension. The Supreme Court directed the plaintiff to furnish a copy of her birth certificate only for the purposes of the defendant's electing the 100% joint and survivor option of his pension fund, or his obtaining life insurance. In addition, the Supreme Court determined that the annuity option was not a joint and survivor option.

The Appellate Division modified. It held that under the circumstances of this case, where the parties never discussed the annuity option prior to the judgment of divorce, the Supreme Court properly declined to direct the plaintiff to furnish the defendant with a copy of her birth certificate to enable him to elect the annuity option of his pension fund. However, it agreed with the defendant that the Supreme Court erred in directing the plaintiff to furnish the defendant with a copy of her birth certificate only for the purposes of his electing the 100% joint and survivor option of his pension fund or his obtaining appropriate life insurance, as that option could potentially result in an award to the plaintiff that was more than she was entitled to under the equitable distribution formula enunciated in *Majauskas v. Majauskas*. The 100% joint and survivor option would, upon the defendant's death, provide the plaintiff with the full monthly retirement allowance of the defendant's pension for the rest of her life. In contrast, Option 3 of the defendant's pension fund, the 50% joint and survivor option, would, upon the defendant's death, provide the plaintiff with 50% of the original monthly retirement allowance for the rest of her life. The 50% joint and survivor option was closer to the equitable distribution formula set forth in *Majauskas*.

Family Court - Support - Family Ct Act § 439(e) - Objections to Order - Waiver of Appellate Review by failure to file proof of service of copy of objections

In *Matter of DiFede v. DiFede*, --- N.Y.S.2d ----, 2012 WL 5233511 (N.Y.A.D. 2 Dept.) the father appealed from an order of the Family Court which denied his objections to an order of the court, which, after a hearing, granted his petition for downward modification of his child support obligation only to the extent of reducing his obligation to the sum of \$865 biweekly. The Appellate Division affirmed. It held that the issues raised

by the father on appeal were not reviewable. The Family Court properly denied the father's objections on the ground that 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 and, thus, failed to exhaust the Family Court procedure for review of his objection. Consequently, the father waived his right to appellate review of the merits of his objections.

Child Custody - Modification - Hearing - Due Process - Mother's Due Process Rights Violated When Hearing Concluded Without Her Being Permitted to Present Any Evidence, Call the Father or Any Other Witnesses, or Properly Answer the Allegations Asserted Against Her.

In *Matter of Thomson v Battle*, --- N.Y.S.2d ----, 2012 WL 4800966 (N.Y.A.D. 2 Dept.) pursuant to a July 19, 2006 order entered on consent, the mother was awarded custody of the child, with visitation to the father. In May 2007, the father filed a petition alleging that the mother had violated the July 19, 2006, order by cancelling and otherwise interfering with visitation. In August 2007, the father filed additional petitions seeking custody of the child and alleged that the mother had moved with the child from Queens County to Greene County and had informed him that he would have to travel to Greene County for visitation, that the child, was six years old at the time and was not yet enrolled in school, and that the mother had demonstrated patterns of neglect and abuse.

The mother appeared before a Court Attorney Referee on December 21, 2007, and acknowledged that she and the child were living in Greene County. The Court Attorney Referee, describing the mother's conduct as "very distressing," and noting that the mother had a history of interfering with visitation and moving residences, issued a temporary order awarding custody of the child to the father, with unsupervised visitation to the mother. Thereafter, citing a forensic evaluation, the father moved to suspend unsupervised visitation between the mother and the child. After a limited hearing on this motion, the Court Attorney Referee issued a temporary order directing that the mother's visitation be supervised.

The hearing on the father's petitions commenced in December 2008, and the father called the mother as his first witness. The direct examination of the mother continued for four days over the course of three months, during which time the father's attorney, often over objection, questioned the mother on topics including her experience in parochial school, her employment and educational history, her teenage years touring with the band The Grateful Dead, her study of herbal medicine and thoughts on "Western medicine," the

condition of various residences she had maintained since 1999, her religious and dietary preferences, and the manner in which she cared for her dog. During the course of this wide-ranging examination, the mother displayed hostility towards the father's attorney, her own attorney, and the referee. She had also failed to appear on more than one occasion, citing, among other things, medical issues and transportation problems. Eventually, the mother's attorney, moved for leave to withdraw as counsel. The attorney's motion was granted and the mother was assigned a new attorney. After the mother's assigned attorney moved for leave to withdraw as counsel, the father's attorney urged the court to conclude the hearing and issue a final order in his favor and the Court Attorney Referee issued a recommendation to that effect which . Family Court adopted. It issued an order concluding the hearing without the need for further testimony, awarding the father sole custody of the child, and awarding the mother only supervised visitation.

The Appellate Division held that Family Court erred in concluding the hearing without allowing her an opportunity call any witnesses or introduce any evidence. In a proceeding seeking modification of a prior custody order, a full and comprehensive hearing is required. At the hearing, due process requires that a parent be afforded a full and fair opportunity to be heard. The mother's due process rights were violated when the hearing was concluded without her being permitted to present any evidence, call the father or any other witnesses, or properly answer the allegations asserted against her. It observed that a person's right to due process is not violated when she is afforded the opportunity to be heard but chooses not to avail herself of that opportunity (see *Matter of Anita L. v. Damon N.*, 54 AD3d 630). Here, while the mother's disruptive behavior could not be condoned or excused, her conduct was not the sole cause of the abrupt termination of the hearing. A review of the record revealed that the father sought, through his attorney, to prolong the hearing, inflame the situation, and interfere with the mother's right to be heard by engaging in an extended direct examination filled with irrelevant details and unsubstantiated accusations, primarily focused on incidents and behaviors that long preceded the prior order of custody and visitation. Under these circumstances, the Court Attorney Referee, by repeatedly refusing to appropriately limit the father's inquiry and by abruptly concluding the hearing without allowing the mother to present her case, failed to ensure that the mother was afforded a full and fair opportunity to be heard.

The order was reversed insofar as appealed from, and the matter remitted to the Family Court for a full hearing on the merits before a different Court Attorney Referee.

Family Court - Support - Family Ct Act § 439(e) - Objections to Order of Support Magistrate- Documentary Evidence Submitted to Family Court in Support of Objections Properly Disregarded Where Not Offered at the Hearing Before Support Magistrate Agreements - Construction - College Education Provision - in Absence of Provision to Contrary, in Determining Parents' Respective Obligations Court Should Not Take into Account College Loans for Which Student Responsible

In *Korosh v. Korosh*, --- N.Y.S.2d ----, 2012 WL 4900972 (N.Y.A.D. 2 Dept.) the Appellate Division held that the evidence adduced at the hearing before the Support Magistrate did not establish that the father violated the child support provisions of the parties' stipulation of settlement, which was incorporated but not merged into their judgment of divorce, by failing to pay certain college expenses other than the father's share of student loans obtained by the parties' oldest son to finance that son's college education. Although the mother's attorney made certain factual allegations at the hearing, these allegations did not constitute evidence. Contrary to the mother's contention, the documentary evidence submitted in support of her objections, allegedly establishing various college expenses owed by the father, was properly disregarded since she did not establish that it was offered at the hearing before the Support Magistrate. Accordingly, the Family Court properly denied the mother's objection to the Support Magistrate's order dated June 17, 2011, as denied that branch of her petition which sought compensation for these expenses.

The Appellate Division held that Family Court improperly denied the mother's objection to that part of the order which denied her request to require the father to reimburse the parties' oldest son for the father's share of loans that were obtained by that son in connection with that son's college education, based on provisions of the parties' stipulation of settlement. The Appellate Division found that the stipulation of settlement was ambiguous with regard to the father's obligation to, in effect, reimburse the parties' oldest son for the father's share of the expense of student loans. It held that in the absence of a clear and unambiguous provision to the contrary in the stipulation of settlement concerning the matter, 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 (citing *Matter of Yorke v. Yorke*, 83 AD3d 951, 952; *Matter of Kent v. Kent*, 29 AD3d 123, 133-134). Therefore, it held that these loans should not be deducted before calculating the father's share of the son's college costs. The matter was remitted to the Family Court for a calculation of the respective shares of the father and the parties' oldest son of the expenses of obtaining student loans to pay for the son's college education, and a new determination on the request to require the father to reimburse the son for the father's share of loans obtained by the son in connection with the son's college education.

Appellate Division, Third Department

Child Custody - UCCJEA - Domestic Relations Law §§ 76[1][b]; 76-f [2] - Family Court Judge violated doctrine of the law of the case by overruling prior finding of another judge of the court that New York had subject matter jurisdiction, but Appellate Division not bound or restricted by that doctrine, and Finds Jurisdiction in Washington More Appropriate.

In *Matter of Joy v. Kutzuk*, --- N.Y.S.2d ----, 2012 WL 4933288 (N.Y.A.D. 3 Dept.), the parties were the parents of the child (born in 2007) and separated prior to the child's birth. Respondent (mother) relocated with the child from Sullivan County to the state of Washington when the child was four months old. In March 2010, the child returned to Sullivan County to reside temporarily with petitioner (father). After the child had been in the father's custody for approximately three weeks, the father commenced a custody proceeding alleging, that the mother, a recovering alcoholic, had relapsed and failed to enter a rehabilitation program. By order entered in August 2010, upon the mother's default, Family Court (Ledina, J.) granted the father custody of the child. The mother then moved to vacate the order, alleging that she had never received notice of the proceeding prior to entry of the order, and that New York lacked subject matter jurisdiction over the proceeding under the Uniform Child Custody Jurisdiction and Enforcement Act. She also filed petitions in Washington to establish paternity and guardianship of the child. Finding that it had neither subject matter nor "emergency" jurisdiction, Family Court, by order entered September 17, 2010, vacated the custody order that had been entered upon the mother's default.

On October 1, 2010, the father commenced this custody proceeding. Following an ex parte telephone conference with the judge presiding over the mother's proceeding in Washington, Family Court (Ledina, J.) issued an order, entered in December 2010, finding that New York had gained subject matter jurisdiction due to the child's presence in New York for six consecutive months and that New York was the appropriate venue given the location of witnesses and relevant evidence. The court then awarded the father temporary custody of the child. Following a fact-finding hearing, Family Court (Meddaugh, J.) dismissed the petition in May 2011, finding that, contrary to the prior order, New York did not have subject matter jurisdiction over the matter. The father appealed and the Appellate Division affirmed.

The Appellate Division agreed with the father that Family Court (Meddaugh, J.) violated the doctrine of the law of the case by overruling the prior finding of the court (Ledina, J.) that New York had subject matter jurisdiction, but stated that it was not bound or restricted by that doctrine. Upon its review of the order from which the appeal was taken, "in the interest of achieving substantial justice", it affirmed.

The Appellate Division observed that pursuant to the UCCJEA, a child's "'home state' [is] the state in which [the] child lived with a parent ... for at least six consecutive months immediately before the commencement of a child custody proceeding" (Domestic Relations Law § 75-a [7]). However, a parent may not wrongfully remove or withhold a child from the other parent for the purpose of establishing a "home state" for that child. When a child resides in New York as a result of being wrongfully removed or withheld from his or her home state, the child will be considered to be temporarily absent from the home state (Domestic Relations Law § 75-a [7]), and such time will not be counted toward

establishing New York as the home state for purposes of deciding custody issues. Family Court (Meddaugh, J.) properly determined that the child had not lived with the father for the six-month period required to establish subject matter jurisdiction in New York. There was no dispute that the father was supposed to return the child to the mother after approximately one month. However, after approximately three weeks, the father unilaterally decided to keep the child in New York and commenced a custody proceeding, thereby wrongfully withholding the child from the mother. His actions in that regard could not result in New York acquiring home state jurisdiction over the child for the purposes of making a custody determination. The Court agreed with Family Court (Meddaugh, J.) that the court's (Ledina, J.) prior finding that New York was a more appropriate forum than Washington (see Domestic Relations Law §§ 76[1][b]; 76-f [2]) was not proper. Although the court (Ledina, J.) allegedly came to an agreement with a judge in Washington that New York was the more appropriate forum in which to decide the issue of custody, no record of that communication between the courts was in the record (Domestic Relations Law § 75-i[4], [5]). Further, a review of the record did not support the court's (Ledina, J.) conclusion that "the most significant issues relating to the case presented [were] provable by witnesses resident in New York, and the issues of the ... [m]other [were] capable of proof largely in documentary form." It was apparent that more relevant evidence in the form of both witness testimony and documents existed in Washington.

Child Support - Award - Family Ct Act § 416[d][2], [3] - Availability of Health Insurance - Reasonable in Cost - Whether Health Insurance Benefits Are "Available" Within the Meaning of the Statute Is Not Always Discernible by a Simple Mathematical Calculation.

In Chemung County Com'r of Social Services ex rel. Rafferty v. Beard, --- N.Y.S.2d ----, 2012 WL 4936081 (N.Y.A.D. 3 Dept.) Respondent's son (born in 2001) began receiving public assistance in July 2010. Thereafter, petitioner commenced a support proceeding on behalf of the person (an aunt of the child's mother) who had custody of the child. At a hearing before a Support Magistrate, the parties agreed to the amount of respondent's weekly child support payment and further agreed that, although family health insurance benefits were offered by respondent's employer, such benefits were not "available" within the meaning of Family Ct Act § 416 because at nearly 14% of his gross income the benefits were not "reasonable in cost" (Family Ct Act § 416[d][2], [3]). The Support Magistrate, while verbally directing respondent to notify the Support Collection Unit of any changes in his health insurance benefits, nonetheless refused petitioner's request that the order contain language directing respondent to enroll his son for health insurance benefits in the future if such benefits became available at a reasonable cost. Family Court modified the Support Magistrate's order by directing respondent to notify petitioner in writing if there is any change in health insurance benefits available to him, and directing petitioner to refrain from issuing a medical execution before obtaining a judicial determination of availability. Petitioner's objection was otherwise denied.

The Appellate Division affirmed. It rejected petitioner's argument on appeal that Family Court's order did not go far enough and that it should have also included language requiring respondent to immediately enroll his child in health insurance "should it become available." Petitioner asserted that the statute requires that such language be included in the support order and that such language would ensure that the burden to act regarding a child's possible health insurance benefits would be on the parent rather than the support collection unit.

The Appellate Division pointed out that the issue of whether health insurance benefits are "available" within the meaning of the statute is not always discernible by a simple mathematical calculation, and the statute implicates judicial involvement in that determination. For health insurance benefits to be considered "available," the benefits must be both "reasonable in cost" and "reasonably accessible" (Family Ct Act 416[d][2]). As for the cost element, "cost" in this context is "the cost of the premium and deductible attributable to adding the child or children to existing coverage or the difference between such costs for self-only and family coverage". There is a presumption that the cost as so-defined is reasonable if it does not exceed five percent of the combined parental gross income. The presumption can be rebutted upon a finding that the cost is "unjust or inappropriate" in light of, among other things, "the circumstances of the case" and "the best interests of the child"; a finding that requires a judicial determination. Further, cost is not reasonable if it "would reduce the income of th[e] parent below the self-support reserve" (Family Ct Act § 416[d][3]). The second element in establishing that health insurance benefits are "available" is that the benefits are "reasonably accessible to the person on whose behalf the petition is brought" (Family Ct Act § 416[d][2]). While there is a presumption of accessibility based upon distance and travel time, this may be rebutted "for good cause shown including, but not limited to, the special health needs of the child". Varying from this presumption must be based on a judicial finding that is set forth in the support order (Family Ct Act § 416[d][3]).

The Appellate Division stated that Petitioner's position that a parent should be obligated to navigate these statutory provisions and determine whether any change in his or her health insurance benefits results in such benefits becoming "available" is unrealistic. Including the language requested by petitioner routinely causes confusion to those enforcing the support order because the word "available" is read broadly, resulting in a medical execution being sent because health insurance benefits are offered (available) by a parent's employer even though the benefits are not "available" as that term is used in the statute. On the other hand, Family Court's approach of requiring that any change in health insurance benefits be immediately reported by respondent provides a workable framework that ensures that once "available"-within the meaning of the statute-health insurance benefits will be extended to the child. This provision complies with the statutory requirement that the support order provide for, among other things, future health insurance benefits for the child when "available" (see Family Ct Act § 416[c]).

Supreme Court

Pendente Lite Maintenance - Domestic Relations Law § 236(B)(5-a) - Where Insufficient Evidence to Determine Gross Income, Award Based upon Needs of the Payee or the Standard of Living of Parties, Whichever Is Greater.

In *Salaman v Salaman*, 2012 WL 5048190 (N.Y.Sup.), 2012 N.Y. Slip Op. 51964(U) the Defendant-wife moved, among other things, for pendente lite maintenance and child support of \$5,354.78, retroactive to the date of commencement of the action; and order appointing a neutral forensic evaluator to value the businesses held by the husband and his father and granting her an interim award of counsel fees in the sum of \$25,000.00.

The parties were married in Florida on June 1, 2008. The wife was 28 years of age and the husband was 30 years of age. There was one child of this marriage who was born in August 2009. The wife commenced an action for divorce in Palm Beach County, Florida in March, 2011. The husband commenced an action for divorce in Kings County, New York on June 14, 2011. The Court granted the wife's application that the issues of custody and visitation be heard by the Florida Court in a written decision dated September 12, 2011 (*Salman v. Salman*, 32 Misc.3d 1242(A), 2011 WL 4056895). It retained jurisdiction over the financial matters in the divorce, including the issues of maintenance, child support and equitable distribution.

The Courts lengthy opinion discussed the opposing positions of the parties. The wife alleged that the parties lived a luxurious lifestyle and that the court should impute more than \$100,000 in income to the husband based upon the cash he had been receiving from his father and his businesses. The husband denied these allegations and claimed poverty. The Court concluded that his affidavits were incredible. It observed that the husband had repeated opportunities to be candid and forthright with the Court regarding his financial circumstances and annual income but he had repeatedly chosen to attempt to obscure his income. At different times and often in quick succession-sometimes during the same court appearance-the husband made vastly inconsistent representations regarding his income which he later attempted to reconcile when confronted with financial records and documentation discrepant with his representations. Based on the husband's own representations, through counsel, both on the record in open court during court appearances and in sworn documents filed with the Court, it appeared that the husband grossly under-reported his income on his individual 2010 tax returns. The Court noted that the husband failed to offer any credible explanation for deposits into his checking account totaling \$30,000.00 in 2010 when he only reported \$4,250.00 annual income on his 2010 tax returns. The husband also failed to credibly trace whether the \$30,000.00 in deposits included some or all of the monthly cash gifts he acknowledged that

he received from his family in 2010. The husband did not indicate whether or not those deposits included the cash income he allegedly earned selling items at a flea market in 2010. According to the husband's representations, he earned \$1,000.00, \$7,000.00 or \$8,000.00, depending on which representation the Court considered, in cash income from sales at a flea market in 2010. The husband did not report any of this cash income in his 2010 tax returns. Additionally, the husband initially denied that he received any cash gifts from his family, including his business-partner father, during the marriage; however, as the proceeding continued, he eventually conceded that he received \$1,650.00 monthly in cash gifts from his family throughout the marriage, including 2010 and 2011, but that he did not report this cash as income or produce a gift tax return. The husband offered no explanation for why this income was omitted from his 2010 tax returns and his Affidavit of Net Worth, dated November 11, 2011. The Court noted that it was undisputed that the husband also received many financial benefits, such as rent-free use of apartments and automobiles owned by his father and business partner, payment of credit card bills and utilities and purchase of groceries throughout the marriage and that he continued to enjoy these financial benefits. Based on the vast number of inconsistencies and self-contradictory statements, the Court could not rely on the husband's last filed tax return in determining his interim support obligation. The Court also found that the husband's Affidavit of Net Worth was wholly incredible. The Court considered the parties' representations regarding their lifestyle during the marriage and the supporting documentation annexed to their papers. The Court found that, based on the lifestyle of the parties during the marriage and their reasonable needs, that the wife and the parties' child's reasonable annual expenses required \$80,000.00 annually. The wife was employed earning approximately \$33,017.76 annually (\$35,000.00, less \$1,982.24 for FICA, Social Security and Medicare). As such, the reasonable needs of the wife and the parties' child required support of \$46,982.24 annually.

The Court noted that DRL §236[B] (5-a)(g) provides: ... when a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order the temporary maintenance award based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater. Furthermore, DRL § 240(1-b)(b)(5)(iv)(D) gives the Court discretion to attribute and/or impute income to a party on the basis of "money, goods, or services provided by relatives and friends". It was clear that the husband received substantial and consistent financial assistance from his family, including rent-free living accommodations and monthly infusions of cash.

The Court found that under the facts and circumstances presented, including the husband's complete lack of candor with the Court and his incredible and inconsistent sworn financial affidavits, tax returns and deposition testimony it could not calculate the presumptively correct sum of temporary maintenance utilizing the temporary maintenance guidelines. Therefore, it found it an appropriate situation for the Court, under the authority in DRL 236[B] (5-a)(g), to deviate from awarding a presumptively correct sum of temporary support under the guidelines and to award pendente lite maintenance based on

the needs of the payee or the standard of living of the parties prior to commencement of the divorce action.

According to the wife's sworn Affidavit of Net Worth her monthly expenses for herself and the parties' child would be \$7,210.41, monthly (\$86,524.92 annually.) The husband's declarations of poverty were incompatible with the parties' lifestyle during the marriage and the husband's lifestyle following commencement of the proceeding. The Court noted that the wife represented that the parties enjoyed a very comfortable lifestyle during the marriage. The wife presented documentation, including credit card receipts, in support of her representations. The wife's itemized expenses in her Affidavit of Net Worth appeared consistent with the lifestyle she and the child would have enjoyed had the marriage continued.

The Court found that an award of pendente lite spousal support to the wife of \$1,305.06 was appropriate based on the prior lifestyle and the needs of the wife. There were many open questions regarding the husband's tax returns. The husband conceded that he did not disclose the vast majority of his annual income anywhere in his 2010 tax returns. The husband enjoyed the tax-free benefit of certain sums of income. The Court found that there was a clear rationale for not permitting the husband to use any payments of pendente lite maintenance as tax deductions.

The Court noted that where a party presents "insufficient and incredible evidence" to establish his or her income that the Supreme Court may properly award child support based on the needs of the child (DRL § 240[1-b][k]). The Court found that the husband presented insufficient and incredible information regarding his income and, therefore, the Court did not have the ability to impute a specific sum of income to the husband at this time for the purposes of determining his interim child support. The Court awarded pendente lite child support based on the pre-commencement standard of living the child would have enjoyed had the marriage continued and the child's current needs.

In determining this award of pendente lite child support, the court considered the pre-commencement standard of living the child would have enjoyed had the marriage continued and found that the needs of the child required that the husband pay \$2,610.12 monthly for pendente lite child support. The Court noted that the wife included statutory add-ons, such as the cost of child care and private tuition for the parties' young child. The Court did not direct the husband to pay an additional percentage for add-ons as it would result in a double-dipping situation. Given the husband's refusal to be forthright and candid regarding his finances, the Court was unable to adequately determine any pro rata interim payment of statutory add-ons. Payment of interim statutory add-ons was included in the child support sum based on the needs and expenses of the child and the prior lifestyle.

The wife's application for appointment of a neutral forensic expert to appraise Salman Sons, the linens and household items store co-owned by the husband and his

father was granted. The business was started during the marriage on or about March 2010 and he was a fifty (50%) percent owner. He contended that the business had no value. The wife alleged that the business generated significant sums of cash income which the husband and his father did not report. The husband conceded that he and his father did not maintain inventory logs and that they routinely deleted and destroyed sales and order logs and it was likely that the forensic evaluator will require random on site audits of the business. As it was the husband's failure to be forthright with the Court and his business practice not to maintain business records, the court directed that the husband be solely (100%) responsible for the payment of the neutral forensic appraisal of the retail business, subject to reallocation at time of final determination of the financial issues.

The Court found that it was an appropriate exercise of the Court's discretion to award the wife \$10,000.00 in interim counsel fees. The husband was the monied spouse.

Divorce - Voluntary Discontinuance - CPLR 3217(a)(1) - Notice of Discontinuance - Motion to Vacate Notice of Discontinuance Granted based upon Estoppel.

In Hammer v Hammer, --- N.Y.S.2d ----, 2012 WL 4857023 (N.Y.Sup.) the matter was commenced by the filing of a summons with notice in November 2009. In January 2010 the plaintiff served and filed an amended summons with notice. The defendant served and filed a notice of appearance and demand for a complaint that month. On June 17, 2010 the parties entered into an Interim Stipulation.

The Interim Stipulation provided that grounds for divorce were resolved, and that the plaintiff husband would serve a verified complaint on the ground of constructive abandonment of the husband by the wife. The wife waived her time to answer the complaint and agreed to sign an affidavit neither admitting nor denying the allegations set forth in the complaint and consenting to placing the matter on the uncontested matrimonial calendar. The parties agreed that upon the signing of the Interim Stipulation the mortgage on the marital residence would be satisfied by certain funds originally held in the plaintiff's investment account. The plaintiff was to purchase another home, and then transfer title to the marital residence to the defendant wife. The parties agreed that \$92,000 would be used to pay off the mortgage, and the plaintiff was to take an additional sum of \$56,000 to aid in purchasing another residence. The parties acknowledged that they would determine credits due as a result of the mortgage pay-off and transfer at a later date, "once the parties determine how the remaining assets shall be divided, the amount of which shall be determined by the parties or by a Court of competent jurisdiction ."The Interim Stipulation concluded with a paragraph stating that "The parties agree that all other aspects of the division of property shall be determined upon the completion of certain appraisals and valuations that are in the process of being prepared. Both parties executed an affidavit In Lieu of Oral Allocution in support of the Interim Stipulation.

In a December, 2010 Preliminary Conference order the parties agreed that the issue of grounds for divorce was resolved. The case was certified as ready for trial by order issued in June, 2011. Defendant alleged that in August, 2011 she commenced her own action because of plaintiff's default under the Interim Stipulation. In September 2011 the defendant moved to enforce the Interim Stipulation in this (2009) action. On October 21, 2011 the plaintiff filed and then served the Notice of Discontinuance of the 2009 action, under which the Interim Stipulation had been made. In November, 2011 the defendant moved to vacate the Notice.

The defendant claimed in her affidavit that the plaintiff exercised his right under the Interim Stipulation and withdrew and used the \$56,000 for a new home. He paid off the mortgage. However, he did not transfer the marital residence to the defendant. The plaintiff submitted no opposing affidavit. He relied entirely on the law regarding discontinuance of actions.

Supreme Court observed that CPLR 3217(a)(1) permits any party asserting a claim to discontinue it without a court order by serving upon all parties a notice of discontinuance "at any time before a responsive pleading is served or within twenty days after service of the pleading asserting the claim, whichever is earlier, and filing the notice with proof of service with the clerk of the court. No complaint was served, and thus there was no responsive pleading. Where no pleadings have been served, a plaintiff has the "absolute and unconditional right" to discontinue an action without seeking judicial permission by serving a notice upon the defendant. (*Tutt v. Tutt*, 61 A.D.3d 967, 878 N.Y.S.2d 760 (2d Dept.2009), citing *Battaglia v. Battaglia*, 59 N.Y.2d 778, 464 N.Y.S.2d 725, 451 N.E.2d 472 (1988))

The Court noted that the right may be waived if there is a voluntary and knowing relinquishment of such right, which may arise by express agreement or by conduct, either by actions or by a failure to claim the advantage given by the right. Since service of the complaint was contemplated by the parties, there could be no finding of a waiver of the statutory right to discontinue the action before the complaint was served.

However, the Court held that the defendant set forth undisputed evidence that should lead to an estoppel. A court's power to invoke equitable jurisdiction to vacate a notice must be limited to instances where the conduct is particularly egregious and amounts to more than just an altering of the respective rights of the parties. The Court found the requisite conduct here. The defendant permitted plaintiff to take \$56,000 in marital funds based upon an express promise to pay off the mortgage on the marital home and then to transfer the home to her. He did not transfer the property to her. Even assuming that the Interim Stipulation was unenforceable under principles of contract law, he induced her by his conduct in signing this agreement to permit him to do something he otherwise would have been barred from doing under the Automatic Orders (DRL 236-B (2)(b)); i.e, taking the money to purchase his own home. Seeking now to wipe out the action and, as plaintiff's counsel asserted, with it any further obligation under the Interim Stipulation, smacked of deviousness and unfair conduct and met the threshold for vacating the Notice of Discontinuance on equitable grounds.

The Court agreed with the defendant regarding the enforcement of the Interim Agreement as it applied to transfer to her of the marital residence. The mortgage was to be paid off, and the wife was then to receive the house, free of the mortgage. In exchange, the husband was to receive the funds needed to purchase a separate residence. While it is true that final division of assets was left to a further and final agreement, such a later agreement was not stated to be a condition to performance of the foregoing, and both behaved accordingly. The defendant's motion to vacate the Notice of Discontinuance was granted, the 2009 action was reinstated, and the two actions were consolidated for purposes of joint trial. The Court directed the plaintiff to serve and file a complaint within 20 days of the date of the order.

United States Court of Appeals, Second Circuit

Second Circuit Holds Defense of Marriage Act Unconstitutional

In *Windsor v U.S.*--- F.3d ----, 2012 WL 4937310 (C.A.2 (N.Y.)) Plaintiff Edith Windsor sued as surviving spouse of a same-sex couple that was married in Canada in 2007 and was resident in New York at the time of her spouse's death in 2009. Windsor was denied the benefit of the spousal deduction for federal estate taxes under 26 U.S.C. 2056(A) solely because Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. 7, defines the words "marriage" and "spouse" in federal law in a way that bars the Internal Revenue Service from recognizing Windsor as a spouse or the couple as married. The text of section 3 is as follows: In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. 1 U.S.C. 7. At issue was Windsor's claim for a refund in the amount of \$363,053, which turned on the constitutionality of that section of federal law.

The United States District Court for the Southern District of New York, Jones, J., 833 F.Supp.2d 394, granted summary judgment for the taxpayer. The United States, as nominal defendant, and the congressional group appealed. The Court of Appeals for the Second Circuit affirmed. It held, among other things, that Windsor's suit was not foreclosed by *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1971), which held that the use of the traditional definition of marriage for a state's own regulation of marriage status did not violate equal protection, and that Section 3 of DOMA is subject to intermediate scrutiny under the factors enumerated in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), and other cases. It concluded that the statute did not withstand that review and was unconstitutional.

October 16, 2012

Appellate Division, First Department

Child Custody - Conditions on Visitation - Family Court Properly Suspended Petitioner's Visitation until He Revealed to Mother Where He Took the Children During Visitation.

In Matter of Samuel A. v. Aidarina S., --- N.Y.S.2d ----, 2012 WL 4490973 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order of the Family Court which dismissed petitioner father's petition to modify custody and visitation, and an order which suspended petitioner's visitation with the children until he disclosed to the mother where the children were being taken during weekend visitation. It held, inter alia, that Family Court properly suspended petitioner's visitation until he revealed to the mother where he took the children during visitation, as petitioner disregarded the court's direct order to reveal that information during the hearing on his petition. Under these exceptional circumstances, petitioner forfeited his right to visitation.

Appellate Division, Second Department

Equitable Distribution - Marital Residence - Exclusive Occupancy - Exclusive Possession of the Marital Residence Usually Granted to Spouse Who Has Custody of Children. Imputed Income - Where a Party's Account Is Not Believable, the Court May Impute a True or Potential Income Higher than Alleged. Neutral Expert Properly Calculated Value of Plaintiff's Enhanced Earning Capacity

In Greisman v Greisman, --- N.Y.S.2d ----, 2012 WL 4372994 (N.Y.A.D. 2 Dept.), the plaintiff husband appealed from portions of a judgment which awarded the defendant wife exclusive occupancy of the marital residence until the parties' youngest child reaches the age of 18 or was otherwise emancipated; imputed to the husband an annual income of \$93,570.00; awarded the defendant \$10,665.60 representing one-third of the value of the plaintiff's enhanced earning capacity derived from his certification as a certified public accountant, \$31,663.50 representing one-third of the value of plaintiff's accounting

practice, and \$204,701.01 representing one-third of the value of the plaintiff's interest in an investment property located on Carroll Street in Brooklyn.

The Appellate Division held that Supreme Court did not improvidently exercise its discretion in making the award of exclusive occupancy. Exclusive possession of the marital residence is usually granted to the spouse who has custody of the minor children of the marriage. In making such a 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 the plaintiff failed to establish an immediate need for his portion of the proceeds of the sale of the marital residence and failed to demonstrate that suitable comparable housing could be obtained at a cost less than that necessary to maintain the marital residence. In addition it would be inappropriate to allow the plaintiff to utilize his failure to make court-ordered child support payments as a way to force the sale of the marital residence.

It rejected plaintiff's contention that the Supreme Court improperly imputed an annual income of \$93,570.00 to him. Where a party's account is not believable, the court may impute a true or potential income higher than alleged. Supreme Court providently exercised its discretion in imputing income to the plaintiff based on, among other things, the parties' tax return filed just prior to the commencement of this action and evidence of the plaintiff's attempts to conceal his true income.

In determining the value of the plaintiff's business and his certification, the Supreme Court properly relied on the report prepared by the neutral appraiser. 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 opinion of the neutral expert was not challenged, and the Supreme Court's conclusion as to the value of the business was supported by the record. With regard to the certification, the neutral expert properly calculated the value of the plaintiff's enhanced earning capacity by comparing the expected earnings of a similarly situated individual with the plaintiff's actual normalized earnings as a certified public accountant and applying a present value discount.

Supreme Court did not improvidently exercise its discretion in determining the value of the investment property. The valuation rested on the credibility of the defendant's expert witness and his appraisal techniques, and was supported by the record.

New York Had Subject Matter Jurisdiction of Issue of Custody Where South Carolina Family Court Found South Carolina Was the Child's Home State and That New York Was the Appropriate Forum.

In *Dalcollo v. Dalcollo*, --- N.Y.S.2d ----, 2012 WL 4512926 (N.Y.A.D. 2 Dept.) the plaintiff father commenced an action for a divorce on September 27, 2010. He alleged that he and the defendant mother had resided in their home in Commack, New York, since 2005, and had married on February 7, 2010. The parties' child was born on September 22, 2010, in a Maryland hospital, while the defendant was en route from New York to South Carolina, where she intended to relocate with the child. The defendant moved, in effect, to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7). The plaintiff made an untimely cross motion to restrain the defendant from removing the child from Suffolk County until final disposition of the action. In an order dated December 22, 2010, the Supreme Court denied the defendant's motion and, sua sponte, restrained her from removing the parties' child from Suffolk County until final disposition of the action. It then denied the plaintiff's cross motion as academic, and noted that if it had not denied the cross motion as academic it would have denied it as untimely.

The Appellate Division noted that contrary to the defendant's contention, New York had subject matter jurisdiction of the issue of custody of the parties' child. The South Carolina Family Court, where the mother had commenced a custody proceeding in mid-October 2010, found that, under South Carolina's version of the Uniform Child Custody Jurisdiction and Enforcement Act South Carolina was the child's home state. However, since the Supreme Court, Suffolk County, had already determined, in its order dated November 23, 2010, that it had jurisdiction over the issue of custody of the parties' child in the divorce action commenced by the father, the South Carolina Family Court determined that New York was the appropriate forum, and stayed the custody proceeding before it pending a determination of the New York action. Under those circumstances, New York acquired jurisdiction under Domestic Relations Law §76(1)(b) and §76-f. Thus, the Supreme Court correctly denied defendant's motion which was, in effect, pursuant to CPLR 3211(a)(7) to dismiss the complaint.

While no appeal lies as of right from an order that does not determine a motion made on notice the Appellate Division granted the defendant leave to appeal from that portion of the order dated December 22, 2010 which sua sponte, restrained the defendant from removing the parties' child from Suffolk County until final disposition of the action. When the plaintiff cross-moved to restrain the defendant from removing the child from Suffolk County until final disposition of the action, the defendant objected to the cross motion as untimely, and did not submit any substantive opposition thereto. In the order dated December 22, 2010, the Supreme Court, sua sponte, restrained the defendant from removing the parties' child from Suffolk County until final disposition of the action, then denied the plaintiff's untimely cross motion for that same relief as academic. Under these circumstances, the Supreme Court's order prejudiced the defendant, who had no fair notice of the plaintiff's cross motion and was deprived of a sufficient opportunity to address the issues raised. Accordingly, it modified the order dated December 22, 2010, by deleting the provision thereof restraining the defendant from removing the child from Suffolk County until final disposition of the action.

Second Department Holds That for Purposes of an Order of Protection Child Was in an "Intimate Relationship" with the Live-in Boyfriend of Her Mother.

In *Matter of Jose M. v. Angel V.*, --- N.Y.S.2d ----, 2012 WL 4373042 (N.Y.A.D. 2 Dept.), the petitioner father commenced a family offense proceeding on behalf of his then-nine-year-old daughter by filing a family offense petition against the respondent (boyfriend), who was the live-in-boyfriend of the mother. The father alleged, in effect, that his daughter, K. M., was in an "intimate relationship" (Family Ct Act §812[1][e]) with the boyfriend. The petition alleged that, on September 25, 2010, the boyfriend "tied [the child] up with [a belt] around her hands which were pulled behind her back before being tied and [the child was tied with a belt] around her ankles." After tying up the child, the boyfriend allegedly "dumped her on the couch and then later [on] the kitchen table." The child was crying and calling for her mother throughout the incident. The child's mother finally appeared and told the boyfriend to stop, but he left the child tied up for several more minutes and told her that he would put her out on the fire escape the next time he tied her up. According to the petition, the child was terrified of the boyfriend and did not want to see the mother. The father alleged that he filed a police report and contacted the Administration for Children's Services (ACS), which then initiated an investigation. The father requested, inter alia, that the Family Court enter an order of protection against the boyfriend and in favor of the child. On the same day that he filed the petition, the father appeared before the Family Court. The father explained that he and the mother had a joint custody arrangement under which the father would have custody of the child during the week and one weekend per month, and the mother would have visitation with the child three weekends per month. The incident alleged in the petition had occurred during the weekend prior to the filing of the petition.

During a subsequent court appearance, the Family Court stated that because the boyfriend was not related to the child by blood or affinity, an issue existed as to whether there was an "intimate relationship" between the two. In response, the attorney for the child argued that the boyfriend was acting as the child's stepfather since the child was at the boyfriend's residence on a regular basis, the child identified the boyfriend as her stepfather, and the boyfriend exercised parental authority over the child. On May 23, 2011, the father, the mother, and the boyfriend, each pro se, appeared before the Family Court. The Family Court stated that the Legislature did not intend the term "intimate relationship" to cover situations such as this, involving a "quasi stepchild versus a quasi stepparent." It concluded that it did not have subject matter jurisdiction over the proceeding because the parties were not related by blood or affinity and, therefore, they were not in an intimate relationship within the meaning of the Family Court Act. Family Court dismissed the petition for lack of subject matter jurisdiction.

The Appellate Division, in an opinion by Justice Leventhal reversed on the law. He observed that a court's lack of subject matter jurisdiction is not waivable, but may be

raised at any stage of the action, and the court may, *ex mero motu* [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action. The Family Court is a court of limited jurisdiction, constrained to exercise only those powers conferred upon it by the New York Constitution or by statute. Pursuant to Family Court Act §812(1), the Family Court's jurisdiction in family offense proceedings is limited to certain enumerated acts that occur "between spouses or former spouses, or between parent and child or between members of the same family or household" (Family Ct Act §812[1]). On July 21, 2008 (see L 2008, ch 326), the Legislature expanded the definition of "members of the same family or household" to 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]). The Legislature expressly excluded from the definition of "intimate relationship" a "casual acquaintance" and "ordinary fraternization between two individuals in business or social contexts" . However, beyond those delineated exclusions, the Legislature left it to the courts to determine, on a case-by-case basis, what qualifies as an "intimate relationship" within the meaning of Family Court Act §812(1)(e). Additionally, the Legislature suggested certain factors which the courts may consider, including, but 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".

In his opinion Justice Leventhal observed that following the 2008 amendment, courts have found that persons who have dated or were engaged in a sexual relationship are covered within the meaning of "intimate relationship". The record supported a finding that the mother and the boyfriend were in an intimate relationship. However, while the nature of the relationship between the mother and the boyfriend is relevant, it was not dispositive of the issue before the Court. In this regard, case law suggests that in order for an "intimate relationship" to exist within the meaning of Family Court Act §812, the relationship should be direct, not one based upon a connection with a third party. Nonetheless, under the facts of this case, the Court found that the child and the boyfriend were in an "intimate relationship" within the meaning of Family Court Act §812(1)(e) such that the Family Court has jurisdiction over the proceeding. Even prior to the 2008 amendment, Family Court Act §812(1) encompassed a relationship between a stepparent and a stepchild, based on affinity. Here, the relationship between the child and the boyfriend was direct and akin to the relationship between a stepparent and a stepchild. The following factors, which are alleged in this case, supported the existence of this "quasi-stepparent-stepchild" relationship: the boyfriend had dated the child's mother for more than three years, he resided with the child's mother, and the child spent substantial time visiting with the mother in the home the mother shared with the boyfriend. The allegation that the boyfriend exercised parental authority over the child while she visited with the mother was particularly significant. Moreover, the interaction between the child and the boyfriend reportedly occurred on a regular basis (three weekends per month, from Friday afternoon until Monday morning) and was likely to continue in the future. Hence, the alleged relationship between the child and the boyfriend was one of the "unique or

special" relationships that "subject persons to greater vulnerability and potential abuse because of their nature"

The Court noted that the determination as to whether persons are or have been in an "intimate relationship" within the meaning of Family Court Act §812(1)(e) is a fact-specific determination which may require a hearing. However, considering the allegations here, the Family Court possessed sufficient relevant information to allow it to make an informed determination on that issue. Consequently, the Family Court incorrectly determined that the child was not in an intimate relationship with the live-in boyfriend of her mother. Accordingly, the Family Court erred in dismissing the proceeding on the ground that it lacked subject matter jurisdiction. The order was reversed, on the law, the petition reinstated, and the matter remitted to the Family Court for further proceedings on the petition.

Appellate Division, Fourth Department

Suspension of the Recreational Licenses of Respondents Who Have at Least Four Months of Arrears Does Not Apply to Respondents Who Are Receiving Supplemental Security Income

In *Matter of Commissioner of Social Services ex rel. Foster v. Turner*, --- N.Y.S.2d ---, 2012 WL 4748312 (N.Y.A.D. 4 Dept.) the Respondent contended that the court erred in failing to cap his unpaid child support arrears at \$500 and that his hunting and fishing licenses should not have been suspended because he received supplemental security income. Those contentions were raised for the first time on appeal and were not preserved for review. Nevertheless, the Appellate Division exercised its power to review his contention regarding his recreational licenses as a matter of discretion in the interest of justice. It observed that Family Court Act § 458-c (a) permits the court to order the suspension of the recreational licenses of respondents who have at least four months of arrears, but the statute further states that its provisions "shall not apply to ... respondents who are receiving ... supplemental security income" (Fam. Ct. Act §458-c [c][1]). Petitioner did not dispute that respondent received supplemental security income. Therefore, in light of the mandatory language in the statute, it modified the order by vacating that part suspending respondent's hunting and fishing licenses.

Equitable Distribution - Real Property - a Notice of Pendency May Be Filed in Any Action in Which the Judgment Demanded Would Affect the Title To, or the Possession, Use or Enjoyment Of, Real Property. A Claim That Real Property Is a Marital Asset Subject to Distribution Does Not, by Itself, Establish Grounds for a Notice of Pendency.

In Jolley v Lando, --- N.Y.S.2d ----, 2012 WL 4748740 (N.Y.A.D. 4 Dept.) Plaintiff husband commenced an action seeking equitable distribution of the parties' marital assets, which allegedly included 18 parcels of real property. In addition to filing a summons and complaint, plaintiff filed a notice of pendency as to the real property. The Appellate Division reversed. It agreed with defendant wife that Supreme Court erred in denying her motion to cancel the notice of pendency. It observed that a notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property"(CPLR 6501). In determining the merits of a motion to cancel a notice of pendency, a court is limited to examining the face of the pleadings. A claim that real property is a marital asset subject to distribution does not, by itself, establish grounds for a notice of pendency inasmuch as a claim for equitable distribution will not necessarily affect the title to, or possession, use, or enjoyment of, the subject real property. It held that the court erred in relying on, inter alia, Caruso, Caruso & Branda, P.C. v Hirsch (41 AD3d 407, 409) because the complaint in the underlying divorce action in that case asserted causes of action for fraudulent conveyance and constructive trust in addition to equitable distribution. Here, the complaint sought only equitable distribution. It rejected the plaintiff's contention that the relief demanded in the complaint "would, obviously, affect [defendant's] title to and/or her possession, use or enjoyment of the parcels identified in" the notice of pendency. At this juncture of the litigation was unclear whether the court, in the event that it ruled in favor of plaintiff, would order defendant to convey the properties to plaintiff or would instead order defendant to pay a money judgment to plaintiff. It thus could not be said with certainty that defendant would be required to sell or mortgage the subject properties.

Child Support - Award - Emancipation - Child Who Worked on a Full-time Basis and Filed Individual Income Tax Returns Not Emancipated Where Mother Continued to Pay for Child's Food, Gas, and Cell Phone and Demonstrated That Child Was Not Economically Independent and Self-supporting

In Matter of Cedeno v Knowlton, --- N.Y.S.2d ----, 2012 WL 4468502 (N.Y.A.D. 4 Dept.) the Appellate Division held that Family Court properly denied the fathers objections to the Support Magistrate's order that, after a hearing, determined that the parties' child was not emancipated and continued the father's child support obligation until the child turned 21 years of age. 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 (Matter of Smith v. Smith, 85 AD3d 1188, 1188; see Matter of Drumm v. Drumm, 88 AD3d 1110, 1112-1113; Matter of Burr v. Fellner, 73 AD3d 1041, 1041-1042; Matter of Thomas B. v. Lydia D., 69 AD3d 24, 28). Although the parties' child worked on a full-time basis and

filed individual income tax returns, the fact that respondent mother continued to pay for the child's food, gas, and cell phone demonstrated that the child was not economically independent and self-supporting.

Supreme Court

Pendente Lite Maintenance - Domestic Relations Law § 236(B)(5-a) - Insufficient Evidence to Determine Gross Income - Unjust or Inappropriate - Child Support - Pendente Lite - CSSA Not Considered - Counsel Fees - Domestic Relations Law §237 - Award - Presumption Rebutted - Support Award Shifted Parties' Finances, Giving the Defendant More Available Resources than Plaintiff.

In *Gaetano D v Antoinette D*, --- N.Y.S.2d ----, 2012 WL 4748311 (N.Y.Sup.) the defendant wife moved for pendente lite relief, including an order of child support of \$1,854.00 per month plus 71% of all statutory add-ons, maintenance of \$1,443.00 per month, contribution to the expenses of the marital residence including paying one-half of the mortgage and real estate taxes, an order directing the plaintiff to complete the transfer of title to the 1998 Ford Suburban and 2004 GMC Suburban to his sole name and to obtain insurance for these vehicles without prejudice to defendant's equitable distribution of these assets, and an award of interim counsel fees in the amount of \$10,000.00. The plaintiff opposed the motion claiming it was unnecessary. He alleged that he had been voluntarily contributing to the shelter and support of the children based upon his actual income. He claimed that the support award the defendant sought from him was impossible, as she misrepresented both his income and the parties' expenses to this Court.

The parties were married on March 7, 1999 and had two children of the marriage, ages 10 and 13. The action for divorce was commenced on December 13, 2011. The plaintiff was 45 years of age and the defendant was 52 years of age. The marital residence was located in Westchester County, New York. The plaintiff was removed from the marital residence after being arrested on December 4, 2011, following an incident where he allegedly choked the parties' son. The plaintiff denied choking his son, claiming he was only wrestling with him. A CPS report was "unfounded." The plaintiff lived with his parents in Westchester County.

The defendant was employed as a secretary in a school district and also worked selling real estate. In 2011 she earned \$45,127.55, comprised of \$30,150.50 from income as a secretary, as reflected on her 2011 W-2, and \$14,977.50 from her work in real estate, as reflected on her 1099. The plaintiff was self-employed and owned a construction business. The parties' 2010 tax return showed the plaintiff earned business income of \$28,345.00, with a net profit of \$8,571.00 after expenses. The parties' 2011 income tax return showed the plaintiff earned business income of approximately \$37,000.00, which, after deduction of various expenses, netted a profit of \$24,106.00. A review of the business' schedule C's for other years indicated net profits of \$42,635.00 for 2004, \$36,740.00 for 2005, \$37,937.00 for

2006, \$46,580.00 for 2008 and \$31,246.00 for 2008. Both parties acknowledged that many of the household expenses were historically paid through the plaintiff's business.

The defendant asked the Court to impute income to the plaintiff in the amount of \$110,000.00, claiming he had underreported his income on their tax returns. She asserted that they could not have afforded their lifestyle on plaintiff's claimed income. She asserted they purchased the marital residence in 2006 by paying \$100,000.00 in cash and taking a mortgage of \$400,000.00. She asked the Court to conclude that the plaintiff earned substantially more income than reported based upon their lifestyle and expenses. The plaintiff claimed his income as reported was accurate, pointing to the decline in the construction industry since 2008 due to the poor economy. He claimed that the parties were able to afford their lifestyle because their income had been supplemented by the proceeds of the sale of a "spec" house in 2008, which earned plaintiff a profit of \$258,946.09. This money was deposited into various marital accounts and used over the last four years for living expenses, with the remaining balance of \$48,000.00 distributed equally to the parties in approximately December, 2011, with each party receiving \$24,000.00. The defendant's stated expenses on her net worth statement dated March 2, 2012 totaled \$7,404.18 per month and included \$3,322.00 for the mortgage and real estate taxes, \$560.00 for utilities, \$540.00 for food, clothing, and laundry, \$298.00 for various insurances, \$350.00 for unreimbursed medical expenses, \$350.00 for household maintenance, \$200.00 for household help, \$280.00 for automobile expenses, \$90.00 for education, \$85.00 for camp, \$200.00 for recreation, and \$790.00 for miscellaneous expenses. She listed assets of \$36,909.99 in a Capital One account, \$24,106.00 in HSBC Mutual Funds, a life insurance policy on the plaintiff with a face value of \$1,588.86, a pension with an indeterminate amount, and an IRA valued at \$14,267.53. She claimed to have \$18,000.00 in premarital funds, which the plaintiff disputed. Her debts were listed as a mortgage on the marital residence in the amount of \$383,151.39 and approximately \$11,000.00 in credit card debt, \$5,000.00 of which she claimed was the plaintiff's business debt. She was also paying half of the automobile insurance coverage for two vehicles owned by the parties but used by the plaintiff in his business.

The plaintiff's stated expenses on his net worth statement dated February, 2012, totaled \$6,777.31 per month and included \$3,200.00 for the mortgage, \$640.00 for utilities, \$640.00 for food, \$416.66 for various insurances, \$26.50 for unreimbursed medical expenses, \$511.50 for automobile expenses for three vehicles, \$172.00 for educational expenses, \$251.00 for recreational expenses, and \$263.00 in miscellaneous expenses, which include the repayment of a loan. He claimed his personal monthly expenses included \$430.00 for groceries, \$475.00 for clothing, \$15.00 for dry cleaning, \$166.00 for automobile insurance, \$26.50 for unreimbursed medical expenses, \$511.50 for gasoline, repairs, and tolls, \$58.00 for miscellaneous expenses and \$200.00 for credit card debt. He also claimed he paid his parents \$700.00 per month for rent, which the defendant disputed. The plaintiff listed assets of \$13,800.00 in cash accounts, \$24,000.00 in a joint CD, and equity in the marital residence in an indeterminate amount. The plaintiff was the sole owner of a construction company, the value of which was unknown. His net worth

statement listed liabilities of \$4,700.00 in credit card expense, some of which was incurred by the business, and the mortgage of \$370,000.00.

The plaintiff had been voluntarily contributing support for the household expenses and children's needs. Initially, he was paying one-half of the mortgage on the marital residence, as well as paying the cable, internet, phones, car insurance, and Con Edison bills through his business. Currently, he was paying one-half of the mortgage payment and giving the defendant \$1,000.00 for other expenses, totaling \$2,700.00 per month. He challenged many of the defendant's claimed expenses, such as the expenses for babysitting when her family watches the children for no charge, and \$100.00 for a maid when she has never employed one. He also criticized her monthly expenses for gardening and snow plowing when there were no charges for these services. Many of the defendant's claimed expenses were non-existent or inflated, as she conceded in her reply affidavit. However, she anticipated having these expenses in the future once the parties are divorced. The defendant's net worth statement established her reasonable monthly expenses to maintain the home and care for herself and the children, excluding add-on expenses, were about \$6,000.00 per month.

It appeared the plaintiff had historically earned income greater than the amount reported on the parties' income tax returns. While it appeared the plaintiff underreported his income since 2008, the parties had also supplemented their earned income with proceeds from the sale of the spec house. The remaining proceeds in the approximate amount of \$50,000.00 to \$60,000.00 had been distributed to the parties. The defendant took the position that the remaining funds she received from the sale of the spec house should not be used to pay the household expenses, but rather, her share should be considered her separate property since the accounts had already been divided.

Supreme Court observed that for all actions commenced after October 12, 2010, courts are required to apply a statutory mathematical formula in determining temporary maintenance awards (DRL § 236 B[5-a][c]). The standards previously used by the courts no longer apply. (*Khaira v. Khaira*, 93 A.D.3d 194, 197, 938 N.Y.S.2d 513 [1st Dept 2012]). Pursuant to DRL §236 B(5-a)(c), after the statutory formula is applied to the parties' income, the calculated amount is considered the presumptive award of temporary maintenance, which shall be ordered, unless the court finds that the presumptive award would be unjust or inappropriate based upon 17 factors prescribed in DRL § 236 B(5-a)(e)(1). In making the calculations, the court must first determine the parties' income as defined by DRL § 236 B(5-a)(b)(4). In determining income for purposes of calculating temporary maintenance, the statute uses the same definition of income as set forth in the Child Support Standards Act, and also includes any income from income producing property to be distributed as part of equitable distribution (DRL § 236 B[5-a][b][4]). The court is required to establish the parties' support obligation "as a function of the income that is, or should have been, reflected on the party's most recently filed income tax return" (DRL § 240[1-b][b][5][I]). Where the record demonstrates that a party's income tax return does not reflect the party's actual income or demonstrated earning potential, the court may

impute income to establish the party's support obligation. The Court pointed out that in determining income for purposes of calculating temporary maintenance, the statute is problematic, as it requires the court "to consider factors some of which can only be established after a full trial and or extensive discovery" (*Scott M. v. Ilona M.*, 31 Misc.3d 353, 361, 915 N.Y.S.2d 834 [Sup Ct Kings Co 2011]). However, where the court is presented with insufficient evidence to determine gross income, or where a party defaults, DRL § 236(B)(5-a)(g) requires the court to issue a temporary maintenance award based upon the needs of the party seeking maintenance, or the standard of living of the parties prior to commencement of the divorce action, whichever is greater. Here, determining the plaintiff's income was particularly challenging. The parties' lifestyle and expenses suggested income greater than what they had reported on their income tax returns. Due to the questionable financial information contained in the parties' submissions, the Court could not determine with accuracy plaintiff's actual income. It was apparent that the parties' lifestyle and the expenses set forth in their net worth statements exceeded the income stated in their tax returns. The defendant suggested that this Court should impute income to the plaintiff of \$110,000.00. However, based upon the submissions, it appeared that the plaintiff earned less than this amount. The Court stated that if it were to use this figure for plaintiff's imputed income, the presumptive award for temporary maintenance would be \$13,048.00 per year, or \$1,087.33 per month. [The plaintiff's net income would be calculated at \$96,489.00 (\$110,000.00 less \$13,511.00 for FICA). The defendant's net income would be calculated at \$42,579.00 (\$45,128.00 less \$2,549.00 for FICA).

In addition to the guideline amount of temporary maintenance, the defendant requested that the temporary maintenance award direct the plaintiff to pay one-half of the monthly payments for the mortgage and real estate taxes. The Court noted that the statutory formula for calculating temporary maintenance is intended to cover all of the payee spouse's presumptive reasonable expenses, including an allowance for housing. If the Court were to order the plaintiff to pay a portion of the defendant's housing expenses in addition to the guideline amount of temporary maintenance, this award would include an impermissible double shelter allowance. (See generally *Khaira v. Khaira*, 93 A.D.3d 194, 198, 938 N.Y.S.2d 513 [1st Dept 2012]. After considering the 17 statutory factors set forth in Domestic Relations Law § 236 B(5-a)(e)(1), and the reasonable expenses to maintain the pre-divorce marital residence, the court found the presumptive amount of temporary maintenance of \$1,087.33 per month, which was based upon the imputed income suggested by the defendant, would be unjust and inappropriate, thereby warranting a deviation.

Since the Court was provided with insufficient evidence to determine the plaintiff's gross income, the temporary maintenance award was based upon the defendant's reasonable needs (DRL §236 B[5-a] [g]). It held that considering the defendant's income and the child support award an appropriate award for temporary maintenance would be \$2,000.00 per month.

Supreme Court observed that Courts considering applications for pendente lite child support may, in their discretion, apply the CSSA standards and guidelines, but they are not required to do so. Considering the children's reasonable monthly expenses, the Court declined to apply the guidelines and made an award of child support of \$1,200.00 per month, which was just and appropriate after considering the expenses covered by the temporary maintenance award.

The Court noted that defendant was responsible for paying all of the expenses for the marital residence, including the mortgage and taxes, as well as all other expenses for herself and for the children, except those set forth in its decision, which was to be paid based upon the parties' pro-rata share of income. The maintenance award was tax deductible to the plaintiff and taxable as income to the defendant, or as permitted by the IRS.

The Court directed that the parties maintain in full force and effect any life insurance policy in effect with the other spouse designated as beneficiary; maintain in full force and effect the current medical and dental insurance coverage and contribute to the cost thereof based upon their pro-rata share of income. The parties and the children were directed to use in-network healthcare providers whenever possible. The parties were directed to pay for the unreimbursed medical, dental, and other healthcare expenses, including psychological, psychiatric, therapy, and prescription expenses, based upon their pro-rata share of income, with the plaintiff's share being 70% and the defendant's share being 30%. The parties were also directed to pay the children's reasonable add-on expenses, including school expenses and extra-curricular activities based upon their pro rata share of income (DRL§ 240[1-b][c][4], [5], and [7]).

This award was retroactive to the original date of service of the application. Retroactive sums due by reason of the award were to be paid at the rate of \$500.00 per month in addition to the sums awarded until all arrears have been satisfied. The plaintiff was permitted to take a credit for sums voluntarily paid for actual support of the children incurred after the making of the motion and prior to the date of the decision for which he had canceled checks or other similar proof of payment.

The Court noted that DRL § 237 creates a "rebuttable presumption that counsel fees shall be awarded to the less monied spouse." The Court stated that at first blush it appeared that the plaintiff would be considered the monied spouse based upon the parties' respective incomes. However, the support award shifted the parties' finances, giving the defendant more available resources than the plaintiff. Considering that the parties had few assets to consider, the shift in financial resources to the defendant rebutted the presumption that the plaintiff is the monied spouse (See *Scott M. v. Ilona M.*, 31 Misc.3d 353, 915 N.Y.S.2d 834 [Sup Ct Kings Co 2011]). Nevertheless, the plaintiff had been the primary wage earner during the marriage and had the ability to earn a substantially higher income than the defendant over the long term. The defendant only recently returned to work in a secretarial position. Considering her educational level and experience, her

earnings potential was limited. Defendant sought \$10,000.00 in interim counsel fees. To date she had paid her counsel \$7,500.00 and owed an additional. In order to create parity in the divorce litigation, while also considering the shift in financial resources to the defendant, the availability of limited assets to pay for litigation fees, and the non-complexity of the issues presented, the plaintiff was awarded interim counsel fees of \$7,500.00 to be paid by the plaintiff directly to the defendant's attorney within 30 days after the date of the decision.

Actions - Stay of Proceedings - Federal Service Members Civil Relief Act and New York's Military Law - Right to a Stay Is Not Automatic

In *Lawry v Lawry*, --- N.Y.S.2d ----, 2012 WL 4785176 (N.Y.Sup.) the wife served a summons with notice for divorce upon her husband and eventually served an amended verified complaint. In her amended complaint, the wife alleged that her husband was "in the military service of the United States," stationed at Fort Drum in upstate New York, and that he had not been deployed outside the United States since July 2010. The defendant appeared without counsel for a pretrial conference and the court informed the defendant that because of his failure to file an answer to the complaint, he was in default and the court could award judgment to the wife based on his default. The court engaged wife's counsel and the defendant in a discussion over the resolution of the disputes in the underlying divorce action. The wife's attorney asked the defendant to produce any records regarding the credit card charges on the wife's credit card, so the wife could determine which charges were incurred for marital expenses during the marriage. The wife counsel also asked the husband to provide several items of personal property that the wife claimed were either separate property or marital property that she wanted distributed to her. The husband asserted that he wanted to retrieve personal property in the wife's possession, and that he would come to Rochester and pick up the property he claimed. The court ordered that the property exchange would occur no later than August 24, 2012, and that the husband needed to give his wife 48 hours notice of when he would make the exchange. After examining the undisputed facts and listening to the respective argument, the court verbally ordered the husband to refinance a certain truck by August 24, 2012, or return the truck to his wife's possession so she could sell the truck. In addition, the court ordered the husband to provide the credit card statements and accounts in his possession by August 15, 2012. The court also instructed the defendant to appear in court on September 6, 2012 to resolve any remaining issues in the case.

The date set by the court during the pretrial conference for delivery of the truck came and went. The truck was not delivered as directed and there was no evidence before the court that the husband refinanced the truck. The credit card statements were not provided and the items of personal property not exchanged. The wife's counsel then asked the court to sign an order for the husband to return the truck in good working order or, if he failed to deliver it, then permitting the wife to retrieve the vehicle. The requested order also required the husband to return a list of separate property.

In response, the husband provided the court with a letter, received on August 20, 2012, in which he stated that he was currently in military training and "my military service prevents me from appearing" in court. He asserted his "rights under the Service Members Civil Relief Act" and requested a stay of all proceedings, and an extension of time to file an answer for a period not less than 90 days. He added that he was participating in military training for which leave was not authorized. The defendant included a letter from his "commanding officer" which he stated verified "that my current duties prevent my appearance until at least November 14, 2012." The commanding officer's letter was addressed to the court and identified the defendant as a soldier under his command. The letter indicated that the officer knew that the defendant had been ordered to "exchange property" by August 24, 2012. The letter stated that the defendant's "ability to appear is materially affected by his military service" as the defendant was participating in required military training exercises and leave was not currently authorized. The commander suggested that the defendant was requesting "a stay in the proceedings until a time when his military service does not materially affect his ability to fulfill his civil obligation."

The court stated that it needed to resolve whether it could sign an order requiring the return of the truck and the personal property in the face of the soldier's application for a "stay" of proceedings under the federal Service Members Civil Relief Act and, although not requested by the soldier, whether New York's Military Law similarly bars the issuance of the repossession order. In addition, the Court needed to resolve whether it could order the service member's compliance with disclosure requests even if the court stayed any further court appearances. Both of these questions appeared to be without precedents in any other federal or state courts. Both of these questions it answered in the affirmative.

Supreme Court observed that the Service Members Civil Relief Act applies if the defendant is in military service and has received notice of the proceeding. 50 USCA App. 522. The statute requires the court, upon application by the service member, to stay the action if the service member attests in writing that his "current military duty requirements materially affect the service members' ability to appear" and the member's commanding officer makes a similar written statement. 50 USCA App. 522(b)(1)(2). The stay shall persist for not less than 90 days. The stay may be extended beyond 90 days upon further application and the court is empowered, if it denies an additional stay, to appoint counsel for the service member. *Nakayama v. Cameron*, 2007 Haw.App. Lexis 263 (Int.Ct.Hawaii, 2007). The only exception, granted in the language of the statute, is a provision that the stay may be denied if in the opinion of the court, "the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service." 50 USCA App. 521.

The Court also observed that New York's Military Law reaches even further than the federal statute, although the stay language nearly mirrors the terms of the federal law. Section 304 of the New York Military Law provides, in pertinent part: At any stage thereof,

any action or proceeding in any court or in any adjudicatory proceeding before any state agency, including any public authority in which a person in military service is involved as a party, during the period of such service or within sixty days thereafter shall, on application to it by such person or some person on his behalf, be stayed unless, in the opinion of the court or adjudicatory agency, the ability of plaintiff to prosecute the action, or the defendant to conduct his defense, or in any adjudicatory proceeding the ability of the party to represent his interest, is not materially affected by reason of his military service.

Despite the absence of any reference to divorce litigation, the Court readily acknowledged that the stay, under either statute, had been applied to prevent default divorces from being granted against servicemembers. (*Roslyn B. v. Alfred G.*, 222 A.D.2d 581 (2nd Dept.1995) *Boelsen v. Boelsen*, 182 Misc. 361 (Sup.Ct. Queens Cty.1944). It observed that in *Wuster v. Levitt*, 268 AD926, 927 (2nd Dept.1944), the Second Department noted: Under the decision of the United States Supreme Court in *Boone v. Lightner* (319 U.S. 561) considerable discretion is vested in the trial courts in the determination of motions of this character. However, the rule there is stated to be that the Soldiers' and Sailors' Civil Relief Act (U.S.Code, title 50, Appendix, § 501 et seq.) is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation, and that the discretion that is vested in trial courts to that end is not to be withheld on nice calculations. While "nice calculations" are not sufficient to deny a stay, a claim of substantial prejudice to another party would clearly qualify. The Supreme Court in *Boone v. Lightner* made that point clear: the stay would be conditioned, in part, on what "prejudice" to the non-military party might occur as a result of the stay. *Boone v. Lightner*, 319 U.S. 561, 569. In that respect, the court has an obligation to balance the substantial and respected rights of a member of the military service under state and federal law with the right of this wife to reclaim her own property and avoid substantial additional costs. *Nerkowski v. Nerkowski*, 2006 Conn.Super. Lexis 2706 (Sup.Ct.Conn.2006) (husband could not "viably invoke the protections of law to escape financial obligations" to his spouse and the court declined to stay the sale of the marital residence). Importantly, the critical language in the statutes was the phrase "materially affect" as a description of the consequences of the husband's absence from court proceedings. The same discretion in considering whether military service "materially affects" the service member's case applies in the New York Military Law. *Warshawsky v. Warshawsky*, 215 A.D.2d 374 (2nd Dept.1995 (stay denied where no material affect on the servicemember's ability to litigate a matter) Comparative analysis of sections 200 and 201 of the Soldiers' and Sailors' Civil Relief Act indicated that while section 200 certainly aims to prevent default judgments from being obtained against members of the military, section 201 permits the court to order a case forward if the military service does not materially affect the party's ability to proceed. In point of fact, the aim of sections 200 [of the federal law] and 303 [of the New York Military Law] was not in a blunderbuss fashion to protect members of the military from having a default judgment entered against them, but to protect them from having default judgments entered against them without their knowledge or when unable to defend themselves.

The Court noted that this servicemember was simply seeking a stay of any court appearances until November 14, 2012. The letter from the service member and his commanding officer specifically referenced that the service member's inability to attend court dates. Because the service member's letter specifically referenced the "inability to appear," the court granted the service member's application to stay the appearances scheduled by the court. However, the application before the Court did not seek a stay from a requirement that the servicemember deliver the goods sought by the wife or participate in discovery. The commanding officer letter acknowledged that the service member was "ordered to exchange property," but he added only that the service member's "ability to appear is materially affected by his military service."The commanding officer did not suggest that the husband, as a result of his training and inability to obtain leave, was forbidden or restrained from turning over the requested personal property or the truck. There was no evidence, in the application letter or the commanding officer's letter, that the husband's military service would "materially affect" his ability to return the truck or impede his wife's right to repossess the truck. Furthermore, the wife's repossession of the truck did not prejudice the husband. During the appearance in Supreme Court, the husband acknowledged that the truck was purchased using his wife's pre-marriage money, the truck was titled in her name, she paid the monthly installment payment on the truck and she was paying the insurance. At that time, in the courtroom, the court ordered the husband to return the truck or refinance it and take over the insurance and the payments. Under these circumstances, the truck was the wife's separate property, and although she had permitted him to use the vehicle, the husband had no marital interest in the truck. The refusal to grant a stay, in this instance, did not harm the husband's interest in the resolution of his disputes over marital property because he had no right to claim any marital interest in the truck.

Finally, the court noted that the service member was not geographically distant from Monroe County, a factor in determining whether a stay of all aspects of the proceeding was appropriate. Fort Drum was approximately 175 miles from the courthouse and, if the wife was willing to drive to pick up the truck and her other property, the husband, who admitted he had no interest in those properties, should be required to turn them over now. In addition, the order to provide disclosure of the credit card purchases was not impacted by the defendant's military service. The husband could review the statements and provide information on his purchasers through the internet or other resources. He did not have to take any leave in order to accomplish this task, and could forward the results to the wife's counsel.

Foreign Judgments - Recognition - Comity - Supreme Court Grants Applications Register, and Enforce a Judgment of Divorce and Order of Custody Rendered by the Courts of Abu Dhabi Where Both Parties Appeared and Fully Participated in the Proceedings

In S.B. v W.A., 2012 WL 4512894 (N.Y.Sup.), 2012 N.Y. Slip Op. 51875(U) plaintiff sought to enter, register, and enforce a judgment of divorce and order of custody rendered by the courts of Abu Dhabi where both parties appeared and fully participated in the proceedings. The parties were married on May 14, 1998 in a civil ceremony in the City, County, and State of New York. Thereafter, on July 19, 1998, the parties married in a religious ceremony under Islamic law, also in the State of New York. As part of the religious ceremony, the parties signed a Mahr agreement requiring the defendant to pay the plaintiff an advanced dowry of \$5,000.00 and, in the event of divorce, a deferred dowry of \$250,000.00. There were two children of the marriage, a girl, born on July 12, 2001, and a boy, born on August 3, 2004. Both children were born in the United States. In 2002, the parties purchased the marital residence in Westchester County, New York. In the fall of 2006, the defendant received an employment offer in Abu Dhabi, an emirate of the UAE, and decided to move there. The plaintiff and children remained in the United States until August 2007, when they joined the defendant in Abu Dhabi. Once there, the plaintiff obtained a job with United National Bank and entered into a three-year employment contract. The contract required her to fulfill the three-year term and give at least three months' advance notice before leaving her employment. If the plaintiff terminated her contract early, she would be subject to financial penalties and forfeiture of benefits, including an immigration ban

The Court observed that the UAE is a civil law country where regulations and procedures are codified in the UAE federal laws.. All emirates have Courts of First Instance and Courts of Appeal, either federal or local, in addition to the Sharia courts, which mainly deal with matters of personal status, such as marriage, divorce, and inheritance. The primary source of all legislation in the UAE is Shari'a (Islamic Law), based upon the Quran and the traditions of the Prophet Mohammed.

On July 1, 2009, the plaintiff filed a petition for divorce in the Court of First Instance under Article 117 of the Personal Status Law of the UAE, alleging that the defendant failed to provide support for the family, and physically and verbally abused the plaintiff, causing her to sustain numerous injuries, and that it had become impossible for her to live with him. The plaintiff requested that the court grant her a divorce and order the defendant to pay her the deferred dowry pursuant to the Mahr agreement in the amount of \$250,000.00, Udda (the three-month period observed by the wife before marrying someone else) Alimony and children's alimony, to provide and pay for a maid, custody of the children, possession and title to the marital residence, to provide a means of transportation for the children and to pay the previous support allowance, and other relief. The defendant filed a counterclaim against the plaintiff seeking an order from the court directing the plaintiff "to obey him, not to go out of the house without his permission, to move with him to their Homeland America, and to pay all fees and expenses."

Hearings on the divorce were held and both parties were represented by counsel and fully participated in the proceedings. Although the parties had a right to request that the Abu Dhabi Court apply the laws of the State of New York to their divorce

proceedings, at no time did either party make the request. On December 27, 2009, in the presence of both parties, the Court issued a ruling on the merits rejecting the defendant's counterclaim and finding in favor of the plaintiff. The Court granted the plaintiff a divorce from the defendant on the ground of "harm and damage," and issued a ruling declaring the Udda Alimony to be valid; directing the defendant to pay the plaintiff the Udda Alimony in the amount of 30,000 AED, payable upon the effective date of the divorce judgment; directing the defendant to pay the plaintiff the deferred dowry of \$250,000.00; directing the defendant to provide appropriate housing for the plaintiff, as the children's caregiver, or a housing allowance of 9,000 AED per month; directing the defendant to pay alimony for the children in the amount of 14,000 AED per month for each child, including food, clothing and transportation allowances, retroactive to January 7, 2009; directing the defendant to pay the plaintiff alimony in the amount of 10,000 AED per month retroactive to January 7, 2009 and payable until the effective date of the judgment of divorce; and directing the defendant to provide the plaintiff and children with a maid or 700 AED per month, which was the salary of a maid as of January 7, 2009. The Court also awarded the plaintiff custody of the children and directed the defendant to pay all relevant fees and expenses. The decision of the lower court was appealed to the Court of Appeals, and the Court of Cassation. Both courts affirmed the judgment, except that the Udda Alimony was reduced from 30,000 AED to 15,000 AED to allow for the accommodation allowance, only, since it was revealed that the defendant had already divorced the plaintiff and she was not pregnant.

Following the final conclusion of the divorce proceedings, the defendant left the UAE and returned to the United States. While the plaintiff remained in Abu Dhabi, she retained counsel in New York to pursue recognition and enforcement of the Abu Dhabi judgment of divorce in New York. She commenced a declaratory judgment action in January, 2011. During this time, the plaintiff also sought to obtain temporary passports for the children, as she intended to return to the United States with the children so they could register and attend school in September of 2011. After six months, the United States Embassy finally issued temporary passports enabling the plaintiff and the children to return to the United States on June 3, 2011.

The plaintiff filed an order to show cause seeking an order, inter alia, under the principles of comity, for an order recognizing, registering, and allowing the entry of a judgment of divorce and order of custody of the United Arab Emirates ("UAE"), with the same force and effect as if it were granted by a court of competent jurisdiction of the State of New York; an order pursuant to the principles of comity directing that custody of the parties' children be immediately transferred to the plaintiff as the adjudicated custodial parent; or in the alternative, an order awarding the plaintiff immediate custody of the children. While the plaintiff's motion was pending, the defendant filed a cross-motion on April 23, 2012 seeking physical custody of the parties' children.

The defendant claimed that the parties were deemed married under the laws of New York, as the Abu Dhabi courts entered a divorce judgment based on their religious

marriage, applying the laws of the Islamic Sharia, and no divorce action had been filed based upon the civil marriage. He claimed that the Abu Dhabi divorce was a religious judgment of divorce, not a civil judgment of divorce, and therefore, the New York courts should not afford it comity. The Supreme Court rejected this argument. It observed that the general principle of law is that a divorce decree obtained in a foreign jurisdiction by residents of this State, in accordance with the laws thereof, is entitled to recognition under the principle of comity unless the decree offends the public policy of the State of New York" (*Kraham v. Kraham*, 73 Misc.2d 977 [Sup Ct Nassau Co 1973]). Although not required to do so, the courts of this State generally will accord recognition to the judgments rendered in a foreign country under the doctrine of comity which is the equivalent of full faith and credit given by the courts to judgments of our sister States. A court has the inherent power pursuant to the principles of comity to recognize and enforce a foreign judgment of divorce"unless there is some defect of jurisdiction shown to be against the public policy of the domestic state. Absent some showing of fraud in the procurement of the foreign country judgment ... or that recognition of the judgment would do violence to some strong public policy of this State ... a party who properly appeared in the action is precluded from attacking the validity of the foreign country judgment in a collateral proceeding brought in the courts of this State (*Greschler v. Greschler*, 51 N.Y.2d at 376). Since New York recognizes bilateral divorce decrees from foreign countries, recognition will be given to all the contents of such a decree, including a separation agreement incorporated' and approved' therein. No specific language is necessary to create an incorporation by reference. The court must look to the entire judgment of divorce and the surrounding circumstances. A separation agreement incorporated in a valid foreign divorce judgment is also immune from challenge under the doctrine of comity, because such a challenge would essentially constitute an impermissible collateral attack on the foreign judgment" (*Tal v. Tal*, 158 Misc.2d 703, 706 [Sup Ct Nassau Co 1993] citing *Greschler v. Greschler*, 51 N.Y.2d at 378).

Both parties were residing in Abu Dhabi when the plaintiff instituted the divorce proceedings. The divorce decree was obtained after a trial and two appeals, including an appeal to the highest court in Abu Dhabi, the Court of Cassation, that rendered a final and binding judgment of divorce. Both parties were represented by counsel, participated in the divorce proceedings, and had a full opportunity to contest jurisdiction and all other issues. There was no question that the foreign court had jurisdiction over the parties at the time the divorce judgment was issued and that it was a final binding order, thereby precluding the defendant from now collaterally attacking its validity or relitigating any of its provisions (see *Borenstein v. Borenstein*, 151 Misc. 160 [Sup Ct N.Y. Co 1934]; *Greschler v. Greschler*, 51 N.Y.2d at 376).

Supreme Court found no compelling public policy for refusing full recognition of the Abu Dhabi judgment of divorce under the doctrine of comity and therefore, the defendant was precluded from attacking the validity of the foreign judgment of divorce in a collateral proceeding in the New York courts.

Plaintiff also sought an order recognizing, registering, and allowing entry of the Abu Dhabi judgment against the defendant for \$250,000.00 pursuant to the Mahr agreement. The Mahr agreement was executed as part of a religious ceremony two months after the parties' civil marriage on July 19, 1998. The plaintiff submitted that the Court should recognize the foreign court's judgment declaring the Mahr agreement valid and enforceable against the defendant, and allow entry of the judgment under article 53 of the CPLR since the Abu Dhabi court had jurisdiction over the parties, the judgment was rendered under a system compatible with the requirements of due process of law, neutral principles of law may be applied to the Mahr agreement without reference to any Islamic religious principles, and the agreement does not violate any public policy.

The Court found that the issue of the Mahr agreement was fully litigated at trial as well as on appeal to the highest court in Abu Dhabi. Both parties appeared, were represented by counsel, and fully participated in all proceedings. The defendant had not established nor raised any facts to suggest that the Mahr agreement was procured through fraud. Nor had he demonstrated that enforcement of the judgment derived from the Mahr agreement would be repugnant to the public policy of this state or our notions of fairness. Considering the relevant provisions of the Constitution, Personal Status Law, and procedural rules of the UAE, along with the court decisions in the civil divorce and criminal cases, the Court concluded that the Abu Dhabi courts had jurisdiction over the parties and the judgment was rendered under a system of justice compatible with due process of law. The defendant's challenge to the foreign judgment was nothing more than a forbidden collateral attack. The court held that the foreign judgment against the defendant in the amount of \$250,000.00 shall be recognized and entered as a New York judgment pursuant to CPLR 5301 et seq.

In her motion, plaintiff sought a declaratory judgment recognizing each provision of the divorce judgment, including those provisions covering spousal and child support. The defendant argued that article 53 of the CPLR specifically excludes foreign court support judgments in matrimonial matters from recognition and enforcement and therefore, the plaintiff is estopped from seeking support arrears based upon the foreign judgment of divorce. The Court held that this argument was inapposite. The plaintiff did not rely upon article 53 of the CPLR as the procedural tool for the Court to recognize the support portions of the foreign divorce decree. The mere fact that foreign court judgments for support are excluded from recognition and enforcement under article 53 does not prevent this Court "from recognizing the judgment as a simple matter of comity ... as long as the various features of the foreign proceedings are shown to satisfy basic concepts of due process analogous to our own." The foreign court's proceedings and procedural rules were compatible with the requirements of due process of law and our notions of fairness. The foreign court had jurisdiction over the parties and the support provisions of the divorce decree present no issues of fraud or violation of public policy. Accordingly, the support provisions of the foreign judgment of divorce would be recognized under the principles of comity and the plaintiff was permitted to convert the Abu Dhabi support judgment into a New York judgment. It observed that once entered as a domestic support

judgment, a New York court could entertain an application for enforcement or modification under Domestic Relations Law §244 and Family Court Act §§461(b) and 466(c).

To the extent the plaintiff's motion sought a judgment against the defendant for support arrears under the Abu Dhabi judgment of divorce, the application was denied with leave to renew. Although the Court had jurisdiction to entertain applications to enforce foreign decrees for spousal and child support before they are reduced to a domestic judgment, the record was insufficient for the Court to grant such relief, even in the form of a money judgment. "A decree of divorce by a foreign country court ... is enforceable in New York on the principle of comity, and should be given the same degree of enforceability with respect to entering a judgment for support arrears as would be given to a similar application based on a judgment of a New York court, subject to the discretion of the court, and inasmuch as there is a judgment stating the full amount of arrears," (see *M.H. v. M.G.*, 172 Misc.2d 526, 530 [Fam Ct Albany Co 1996]) or sufficient proof to establish that the accrued support arrears are vested and "incapable of being modified by the rendering country" (*Mandel-Mantello v. Treves*, 79 A.D.2d 569; see also *Oka v. Oka*, 92 Misc.2d 1080 [Sup Ct App Term 1977]; *Tannenberg v. Beldock*, 68 A.D.2d 307, 313 [1st Dept 1979]). "[I]f the rendering court has the power to modify its decree with retroactive effect, and thus reduce the amount of unpaid arrears or extinguish them entirely, an action will not lie in this state to recover the arrears unless and until the amount thereof has first been definitely fixed by the rendering court" (48A NYJur2d, Domestic Relations s 2735). Here, the Abu Dhabi support order did not represent a final determination of a fixed amount of money then found to be due, but rather, consisted of a directive to the defendant for the payment of specific sums to the plaintiff for support (see *Mittenthal v. Mittenthal*, 99 Misc.2d at 781). There was no proof in the record to establish the precise amount of accrued support arrears or that the accrued support arrears were vested and not subject to modification under the laws of the UAE (see *Tannenberg v. Beldock*, 68 A.D.2d at 313).

The Court noted that the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) applied nationally and internationally. The UCCJEA is mandatory and provides that "a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this article must be recognized and enforced," except where "the child custody law of a foreign country as written or as applied violates fundamental principles of human rights" (Domestic Relations Law §75-d [2] and [3]). This statute mandates that any foreign nation must be treated as if it were a state within the United States for purposes of jurisdiction and inter-court cooperative mechanisms. The UCCJEA is not a reciprocal act. There is no requirement that the foreign country enact a UCCJEA equivalent. The plaintiff was awarded custody of the children by the Abu Dhabi courts. The decision from the Court of First Instance noted that the mother usually has the right to custody of the children unless proven otherwise. The defendant made no showing to refute the custody award to the plaintiff. This award of custody to the plaintiff was affirmed following two appeals, including an appeal to the highest court in Abu Dhabi. The defendant thereafter petitioned

the Abu Dhabi court to change custody from the plaintiff to the defendant based upon the fact that he had moved to the United States. Defendant's application was denied by the Court of First Instance and affirmed on appeal. Neither party alleged that any of the child custody laws of the UAE violated fundamental principles of human rights or that the Abu Dhabi courts were without jurisdiction to determine custody. Nor did the Court find any such violation or lack of jurisdiction. Therefore, based upon the principles of comity and pursuant to Domestic Relations Law s 75-d, the Court had to recognize and enforce the custody determination of the Abu Dhabi courts awarding plaintiff custody.

Plaintiff moved for counsel fees in the amount of \$25,000.00 pursuant to Domestic Relations Law §237. In reviewing all of the circumstances of the case, including the financial circumstances of the parties and the relative merits of the parties' positions, the equities favored an award of counsel fees to the plaintiff. Based upon the totality of the circumstances of the case, an award of counsel fees to the plaintiff was appropriate. However, "[w]here an action or proceeding is not one expressly included in DRL§ 237, no award of counsel fees may be made thereunder". "It is well settled that DRL §237 does not provide for an award of counsel fees in actions to enforce or rescind prenuptial agreements" (Schapiro v. Schapiro, 204 A.D.2d 87, 88 [1st Dept 1994]); Ravel v. Ravel, 235 A.D.2d 410 [2d Dept 1997]). Since an action to enforce a premarital or postmarital agreement is a contract action rather than a matrimonial action, the Court held that it may not award counsel fees to the plaintiff in connection with her seeking an order advancing the validity of the Mahr Agreement (See generally Lamborn v. Lamborn, 56 A.D.2d 623 [2d Dept 1977]). However, to the extent that any portion of plaintiff's counsel fees were incurred in connection with an attempt to obtain maintenance or distribution of property under the foreign judgement of divorce, she was entitled to an award under Domestic Relations Law §237(a)(5) which permits a counsel fee award in an action brought to obtain maintenance or distribution of property following a foreign judgment of divorce. The plaintiff may also be awarded counsel fees she incurred to defend against the defendant's attempts to obtain custody of the children. Domestic Relations Law § 237(b) gives the court discretion to award counsel fees in child custody proceedings when warranted under the circumstances of the case. Domestic Relations Law § 237(b) also authorizes an award of counsel fees to the plaintiff to the extent her order to show cause concerns the maintenance of the children. Since the Court could not determine what portion of plaintiff's counsel fees were incurred on the issues of custody, maintenance, distribution of property, or maintenance of the children, plaintiff's counsel was directed to submit a separate affidavit detailing the counsel fees and expenses incurred on these issues. The Court directed that the defendant would be given an opportunity to challenge the reasonableness of the fees. A party resisting a counsel fee application is entitled to an evidentiary hearing as to the extent and value of the attorney's services. The right to a hearing includes the right to cross-examine the attorney-applicant.

October 1, 2012

Appellate Division, Second Department

Child Support - Award - Imputed Income - Income Properly Imputed Based upon Support Received from Family - Proper to Take Judicial Notice of Net Worth Statement Filed with Court

In *Baumgardner v. Baumgardner*,--- N.Y.S.2d ----, 2012 WL 3968575 (N.Y.A.D. 2 Dept.) the parties were married on March 22, 1997 and there were two children of the marriage. The action for a divorce was commenced on March 17, 2008. After an inquest on grounds for divorce, the plaintiff husband established the grounds for divorce and the parties executed stipulations as to, inter alia, custody, visitation, and partial equitable distribution, and referred to the court resolution of, child support and equitable distribution of the parties' respective retirement accounts. Supreme Court determined that each party would be awarded sole ownership of his or her respective retirement accounts, that the plaintiff would pay to the defendant child support for the parties' youngest son of \$1,063.21 per month, and that the defendant would pay to the plaintiff child support for the parties' oldest son of \$282.62 per month.

The Appellate Division observed that 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 money received from friends and relatives. Where the parent's account of his or her income is not credible, the court may impute an income higher than that claimed. Moreover, a court may impute income where the parent has received money, goods, or services from a relative or friend. Here, the record supported the Supreme Court's determination that the plaintiff's testimony lacked credibility and that an imputation of income higher than that claimed was warranted. The court properly determined that the plaintiff had access to, and received, financial support from his family. Considering these factors and all of the evidence presented, the court providently exercised its discretion in imputing income to the plaintiff of \$75,000 per year. Based on the evidence presented, the record supports the court's imputation of income to the defendant of \$20,000 annually.

The Court found no merit to the plaintiff's contention that the Supreme Court erred in taking judicial notice of the defendant's net worth statements which had been filed with the court pursuant to section 236 of the Domestic Relations Law and 22 NYCRR 202.16(b).

The Appellate Division reiterated the rule that there is no requirement that the distribution of each item of marital property be made on an equal basis. It held that

Supreme Court providently exercised its discretion by, in effect, awarding sole ownership of the defendant's retirement account to the defendant.

Editors Note: In *Halse v Halse*, --- N.Y.S.2d ----, 2012 WL 850604 (N.Y.A.D. 3 Dept.) 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]).

Child Support - Pendente Lite - Children's Unreimbursed Medical Expenses - must Be in the Same Proportion as Each Parent's Income Is to the Combined Parental Income

In *Goldberg v. Goldberg*, --- N.Y.S.2d ----, 2012 WL 3971662 (N.Y.A.D. 2 Dept.) the defendant appealed from an order which granted the plaintiff's motion for pendente lite relief. Most of the appeal was dismissed as the appeal from those portions of that order was rendered academic in light of a subsequent order of the Supreme Court . The Appellate Division found that the parties married in 2000 and had three children. The plaintiff was a high school guidance counselor and earned a yearly income of approximately \$103,000. At the time this action was commenced, the defendant was an investment banker with a yearly income of approximately \$500,000, of which approximately \$220,000 was a fixed income and the remainder was a bonus. The plaintiff commenced this action for a divorce on or about October 13, 2010, and subsequently moved for pendente lite relief, including payment of temporary maintenance, child care expenses, past due and future unreimbursed medical expenses of the plaintiff and the children, carrying charges for the marital residence, expenses related to a Honda Odyssey automobile and a Mercedes Benz automobile, and interim counsel fees.

The Appellate Division found that the the plaintiff was the less monied spouse, and the Supreme Court providently exercised its discretion in directing him to pay interim counsel fees to the plaintiff's counsel in the sum of \$30,000. However, the Supreme Court erred in directing the defendant to pay 100% of the past due and future unreimbursed medical expenses of the children. The obligation for children's unreimbursed medical expenses is to be prorated in the same proportion as each parent's income is to the combined parental income (Domestic Relations Law § 240[1-b][c][5][v]). It modified amended order by deleting the provision thereof directing the defendant to pay 100% of the past due and future unreimbursed medical expenses of the children, and remitted the matter for a calculation of the parties' respective pro rata obligations with regard to these expenses.

Child Custody - Modification - Attempt to Thwart the Child's Relationship with Other Parent Warrants Transfer of Custody to Father

In *O'Loughlin v. Sweetland*, --- N.Y.S.2d ----, 2012 WL 3978838 (N.Y.A.D. 2 Dept.) a child custody proceeding pursuant to Family Court Act article 6, the mother appeals an order of the Family Court dated December 31, 2010, which, after a hearing, granted the father's petition to modify an order of the dated February 23, 2009, so as to award him sole legal and residential custody of the parties' child, and an order of the same court dated March 18, 2011, which denied her motion pursuant to CPLR 4404(b) to set aside the order dated December 31, 2010.

The Appellate Division affirmed both orders. It found that Family Court properly denied the mother's motion to preclude the introduction into evidence of the report and testimony of a forensic evaluator, or, alternatively, for a negative inference to be drawn concerning the evaluator's credibility, based upon the evaluator's destruction of certain audiotapes of interviews she conducted in the course of her evaluation. The record did not support the mother's contention that the missing audiotapes denied her the ability to effectively cross-examine the forensic evaluator.

The parties had entered into a stipulation, pursuant to which they had joint custody of their daughter, with the mother having residential custody in California, and the father having visitation in New York for extended periods of time during school breaks and the summer, and the right to exercise weekend visitation in California two weekends each month. The relationship between the parties was strained when they entered into the stipulation, and subsequently deteriorated to the point that they could not communicate and cooperate with one another concerning the child; therefore, joint custody was no longer feasible. That factor, together with the Family Court's finding that the mother's animosity towards the father and her attempts to undermine the child's relationship with him were harmful to the child, constituted a sufficient change in circumstances to warrant a determination of whether a change in custody would be in the child's best interest. The court found there was a sound and substantial basis for the Family Court's determination that it was in the child's best interest to transfer sole custody to the father in New York, based upon the findings that the mother was attempting to thwart the child's relationship with her father, and that the father would be more likely than the mother to foster a meaningful relationship between the child and the noncustodial parent.

Equitable Distribution - Property Distribution - Credit for Payment of Pre-Marital Debt - Lump Sum Distributive Award - Lump Sum" Distributive Award Improper in View of Nonliquid Nature of Defendant's Assets, Which He Would Otherwise Have to Sell to Satisfy the Plaintiff's Distributive Award

In *Iarocci v. Iarocci*, --- N.Y.S.2d ----, 2012 WL 4094837 (N.Y.A.D. 2 Dept.) the defendant appealed, from portions of a judgment of the Supreme Court, which inter alia, awarded the plaintiff \$4,050 in monthly child support, directed the defendant to pay his pro rata share of the children's nanny and private school tuition expenses and his pro rata share of the children's extracurricular activities expenses up to \$3,000 per year, determined that the appreciation in value of the plaintiff's separate property located in White Plains was not subject to equitable distribution, and awarded the plaintiff a money judgment for her "lump sum" distributive award of \$591,832.

The Appellate Division held that Supreme Court incorrectly awarded the plaintiff a credit of \$24,175, representing reimbursement of capital gains taxes paid by her as a result of the defendant's sale of property in Lake George. The tax liability was incurred during the parties' marriage from the sale of marital property and, therefore, constituted the parties' marital debt. The plaintiff's distributive award was therefore reduced by \$24,175. It also held that the Supreme Court improvidently exercised its discretion in awarding the plaintiff a money judgment for her "lump sum" distributive award. In view of the nonliquid nature of the defendant's assets, which he would otherwise have to sell to satisfy the plaintiff's distributive award, the Supreme Court should have permitted him to pay the award in installments, together with interest at the statutory rate of 9% per annum, and it modified the judgment accordingly. It added a provision that, in the event the defendant should sell any of his real property during the payment period, the proceeds thereof should be applied to paying off any remaining balance of the plaintiff's distributive award.

The Appellate Division held that Supreme Court providently exercised its discretion by giving the plaintiff a full \$12,000 credit for repaying, during the marriage, the defendant's premarital separate debt owed by him to his sister (citing *Nidositko v. Nidositko*, 92 A.D.3d 653, 938 N.Y.S.2d 569; *Micha v. Micha*, 213 A.D.2d 956, 624 N.Y.S.2d 465).

The Appellate Division also found that under the circumstances of this case, where the parties' children had been attending private school during the parties' marriage, despite the defendant's purported objection to them doing so, the Supreme Court providently exercised its discretion in directing the defendant to pay his pro rata share of the children's private school tuition. It rejected his argument that he should not have been directed to pay a pro rata share of the children's nanny expenses. The plaintiff, who was the custodial parent, worked full time, and had been incurring these child care expenses both during the marriage and after commencement of the action. Under these circumstances, the Supreme Court's direction to the defendant that he pay his pro rata share of the children's nanny expenses would not be disturbed (DRL § 240[1-b][c][4])

Child Support - Award - Imputed Income - Income Properly Imputed Where Account of Finances Is Not Credible or Is Suspect

In *Matter of Huddleston v. Rufrano*, --- N.Y.S.2d ----, 2012 WL 4094865 (N.Y.A.D. 2 Dept.) as a result of the parties' August 2000 divorce, the father, who was a plumber by trade, was directed to pay \$250 per week as support for the child. In September 2004, because of a work-related injury resulting in the father's receipt of Workers' Compensation benefits, his obligation was modified downward to \$108 per week. In April 2008, in accordance with a cost-of-living adjustment, the father's obligation was increased to \$121 per week. In August 2011, the mother petitioned for an upward modification of the father's support obligation. After a hearing, the Support Magistrate determined that the father's annual income, stemming from self-employment with A & J Drain, Inc. was \$47,382.52, consisting of both monetary compensation and benefits, and, inter alia, directed the father to pay child support of \$155 per week. The mother filed objections, which the Family Court denied.

The Appellate Division observed 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 his or her employment history, future earning capacity, educational background, or money received from friends and relatives" The court may also properly impute income where a party's account of his or her finances is not credible or is suspect. It found that the Support Magistrate should have imputed an additional \$31,448.30 to the income earned by the father. The Support Magistrate failed to include a \$10,611 payment made to the father by A & J for services rendered as its vice president in the year 2010. The evidence at the hearing supported the conclusion that this was not a one-time payment, but would be a recurring one, particularly since the father's business was growing. Since the incorporation of A & J, the father increased his hours, charged a higher hourly rate, and added sheet-rocking as a component of his business. In addition, the Support Magistrate should have imputed \$8,736 to the father as income, based on the earnings generated for A & J by the father's father-in-law through sheet-rocking. The father's testimony that he received as salary only 30% of the amount he billed on behalf of A & J was not credible. The father did not know the balance on A & J's corporate checking account, and he provided only vague testimony about A & J's business expenses. A & J operated out of the father's home, and its only employees were the father, his wife, and his father-in-law. The father's credibility was impaired by his testimony that he was "volunteering" his time for A & J for more than one year after it came into existence while at the same time receiving unemployment benefits from the State of Nevada.. Considering the father's lack of credibility and the amount of his past earnings, the Support Magistrate should have concluded that the father earned an additional \$12,101.30 in income from the business he generated on behalf of A & J. Accordingly, the record demonstrated that the father's income was \$78,830.82 and, thus, he was obligated to make child support payments of \$259 per week.

Child Abuse or Neglect - Summary Judgment - Motion Made During Trial Is Untimely and Procedurally Improper Irrespective of Merit Where Respondent Not Given Opportunity to Present Case at Fact-finding Hearing

In *Matter of Giovanni S.*, --- N.Y.S.2d ----, 2012 WL 4094870 (N.Y.A.D. 2 Dept.) the fact-finding hearing in this child protective proceeding was held on two dates, October 28, 2009, and June 3, 2010. The petitioner, the Administration for Children's Services, adduced the testimony of a police detective involved in an undercover "buy and bust" operation, who arrested the mother after receiving a radio transmission from undercover officers describing two suspects involved in the sale of narcotics. Upon arresting the mother, the detective recovered 10 glassine envelopes of heroin from a diaper bag placed on the bottom part of the baby carriage; the seven-month-old infant was in the top part of the carriage. In addition, the ACS established with a certificate of disposition that the mother was subsequently convicted, upon her plea of guilty, of attempted criminal possession of a controlled substance in the fifth degree with intent to sell. The court took judicial notice of prior Family Court dispositions against the mother with respect to other children.

At the commencement of the proceedings on June 3, 2010, the attorney for the mother indicated that the mother anticipated testifying at the hearing. However, after the ACS rested its case, the mother's attorney noted that there was insufficient time remaining in the day for the mother to present testimony and requested leave to file a written motion to dismiss on the ground that the ACS had failed to present a prima facie case. In granting that request, the Family Court Judge noted that, due to his retirement, his last day on the bench would be June 30, 2010, and therefore, a mistrial would be ordered in the event that the mother's motion to dismiss was denied.

In her motion the mother contended that ACS did not establish a prima facie case of neglect. The ACS opposed the motion and cross-moved for summary judgment on the petition, contending that the evidence adduced at the hearing eliminated all triable issues and established as a matter of law that the mother neglected the child. The mother opposed the cross motion on the merits without interposing any objection to the procedure employed by the ACS in filing a summary judgment motion mid-hearing, nor did she indicate that she wished to testify or that the fact-finding hearing must be continued. The Family Court denied the mother's motion and granted the cross motion, finding that the mother neglected the subject child. The Appellate Division modified.

It found that Family Court properly denied the mother's motion to dismiss the petition. However, the Court improperly granted the ACS's cross motion for summary judgment on the petition under the facts and circumstances of this case. In an appropriate case, the Family Court may enter a finding of neglect on a summary judgment motion in lieu of holding a fact-finding hearing upon the petitioner's prima facie showing of neglect as a matter of law and the respondent's failure to raise a triable issue of fact in opposition to the motion (see *Matter of Suffolk County Dept. of Social Servs. v. James M.*, 83 N.Y.2d

178, 182-183). Here, however, the ACS submitted an untimely cross motion for summary judgment in the midst of the fact-finding hearing after presenting its case and prior to the mother presenting a case or resting her case. Moreover, even if the ACS's motion is deemed analogous to a motion for judgment during trial, such a motion should have been denied as premature, since such motions must be made "after the close of the evidence presented by an opposing party with respect to [the subject] cause of action or issue" (CPLR 4401). Although, in opposition to the cross motion, the mother did not actively seek continuation of the fact-finding hearing or object on the ground that the cross motion was procedurally improper or untimely, it did not deem these contentions waived in light of the Family Court Judge's imminent retirement and statements implying that it was impossible for the mother to present a case. It held that Family Court should have denied the ACS's motion outright as untimely and procedurally improper irrespective of its merit, since the mother had not been given the opportunity to present a case at the fact-finding hearing. It remitted the matter to the Family Court for a continued fact-finding hearing and a new determination.

Supreme Court

Maintenance - Modification - DRL § 236(B)(9)(b) -Surviving Agreement - Downward - Extreme Hardship - Child Support - Modification - Surviving Agreement - Boden - Brescia Rule - Where Stipulation did not contain any standard to apply to Modification once threshold Permitting application for a reduction has been met Supreme Court in effect ignores the Agreement Provision.

In *Mark P v Teresa P*, --- N.Y.S.2d ----, 2012 WL 3984468 (N.Y.Sup.) Plaintiff Mark P. moved by Order to Show Cause for a downward modification of his maintenance and child support required to be paid to the Defendant Teresa P. ("Defendant"). The parties were married in April 1987. They entered into the Stipulation of Settlement on October 7, 2004 which was incorporated but not merged into the divorce judgment entered on November 17, 2004. The Stipulation required the Plaintiff to pay spousal maintenance to Defendant in the annual amount of \$250,000.00 until 2017, and annual child support of \$140,000.00; the amount of child support is to decrease as the parties' children become emancipated (collectively the "Support Payments"). Paragraph XIX (2) of the Stipulation provided as follows: "2. Anything herein to the contrary notwithstanding, in the event of an involuntary, substantial, adverse change in the Husband's income, including income produced by his assets (such as involuntary loss of employment), he shall have the right to make application to a court of competent jurisdiction, which must include a sworn statement of net worth, for an appropriate modification of child-related support and/or spousal maintenance obligations hereunder, and if granted, the parties' Agreement shall be deemed amended to the extent of any relief afforded on such application. In the event

that the Husband is granted a downward modification and the Husband's income thereafter improve, the Wife shall have the right to make application to a court of competent jurisdiction for an upward modification of child support and/or maintenance, however, in no event shall the Husband be required to pay more than the amounts set forth in this Agreement.”

At the time the Stipulation was signed in 2004, Plaintiff was a securities trader with annual income of \$3.3 million dollars. At the time of this motion, Plaintiff was and remains employed as a securities trader; however, according to Plaintiff, his compensation decreased to \$651,000.00 in 2011, including capital gains, and Plaintiff stated that he anticipated earning no more than \$251,000.00 in 2012. Plaintiff maintained that the decline in his annual compensation was due to changes in the securities industry, the economy and a general decline in securities' sales volume, not to any lack of effort on his part. Plaintiff contended that under Paragraph 2, as long as he showed that he has suffered "an involuntary, substantial, adverse change in ... income", he may not only apply for, but was entitled to, a reduction in Support Payments, which would then be recalculated based upon his current income. Plaintiff argued that to read Paragraph 2 as limited to affording Plaintiff no more than an opportunity to apply for Support Payment relief would impermissibly render Paragraph 2 a nullity, since under the Domestic Relations Law and case authority, any party has the right to, at the very least, petition a court for support payment modification, be it in the nature of an increase or a decrease. Defendant contended that Paragraph 2 should be limited to what its terms expressly provided: a standard to determine when Plaintiff may apply for, but not necessarily obtain, a Support Payment reduction. Since Paragraph 2 is silent as to how the judicial determination of whether the payments should be reduced, and if so by how much, that standard may only be supplied by well recognized and prevailing law: in the case of child support, the amounts set forth in a Stipulation must be paid unless such provision was unreasonable or inequitable when entered into-a situation which is not at issue herein-or if an unanticipated and unreasonable change in circumstances has occurred. *Boden v. Boden*, 42 N.Y.2d 210, 397 N.Y.S.2d 701, 366 N.E.2d 791 (1977), *Merl v. Merl*, 67 N.Y.2d 359, 502 N.Y.S.2d 712, 493 N.E.2d 936 (1986). In the case of maintenance, in order to alter such payment terms, there must be a showing that extreme hardship would result should the originally agreed upon amounts remain in effect. See DRL 236, Part B(9)(b); *Alice C.V. Bernard C.*, 193 A.D.2d 97, 602 N.Y.S.2d 623 (2d Dept.1993).

The Court concluded that Defendant had the better argument, and that Plaintiff's motion should be denied. The Stipulation did not contain any standard to apply once the stated threshold sanctioning the application for a reduction has been met. This gap should only be filled by the standard generally invoked by the courts in assessing whether to deviate from the support payment regimen established by the parties' agreement. See *Heller v. Heller*, 43 A.D.3d 999, 842 N.Y.S.2d 512 (2d Dept.2007) (" unless such an alternative standard is clearly spelled out in the agreement, the Court will make that determination itself, using well established principles of whether a reduction in amount is warranted.)

Applying the general legal standards to determine whether a downward modification of Support Payments was warranted herein, it was clear that Plaintiff had not adduced sufficient facts to require a hearing with respect to either child support or maintenance payment reduction. Plaintiff's effort to reduce his child support obligations as set forth in the Stipulation proved equally unavailing. While Plaintiff does allege that his income has decreased significantly, he offered no evidentiary facts that would lead this court to conclude that he has actively and diligently sought more remunerative employment. Moreover, the fact that Plaintiff had over \$5.5 million in liquid assets also weighs against a reduction in child support. The law is clear that a parent's assets and financial resources, in addition to his or her income, should be taken into account in determining child support obligations, and whether such obligations should be modified. Plaintiff's current, albeit reduced, income in addition to his \$5.5 million in liquid assets proved more than sufficient to meet his child support obligations at the levels specified in the Stipulation.

Defendant's income was substantially lower than Plaintiff's income. However the Stipulation specifically gave Plaintiff the right to apply for downward modification of his support obligations. Plaintiff's income did substantially decrease, and although he failed to maintain that he had made efforts to augment this reduced income, the decrease appeared to be involuntary. Accordingly, notwithstanding the income disparity between the parties, the court held that it would be unfair to award counsel fees under these circumstances, when the Stipulation specifically provides for such a modification application.

Child Custody - Visitation - Modification - Hearsay - Evidence of Child's Out of Court Statements Admissible Where Corroborated By In Court Testimony of Child.

In *LDM v. RA*, --- N.Y.S.2d ----, 2012 WL 4054423 (N.Y.Sup.) the parties were the parents of a nine-year-old boy, D. The petitioner-mother sought seeking to modify a prior weekend visitation order to require that all contact between D. and his father take place at a social work agency in the presence of a supervisor. She claimed in a modification petition filed May 1, 2012 that the respondent-father had been driving in a fast and reckless manner with D. in the car and further endangered the boy by shoplifting with him at Macy's department store. The respondent-father denied the allegations.

The attorneys for the mother and child sought to have the Court admit into evidence the child's out-of-court statements regarding the father's alleged behavior. They sought to corroborate those statements with the child's in camera testimony. At a hearing at which the mother attempted to prove her allegations, she was asked during direct examination to testify as to what D. told her about these incidents. The father's counsel objected, arguing D.'s statements constituted inadmissible hearsay. Counsel for both the mother and the child argued they were admissible pursuant to case law allowing the admission of statements by children that relate to abuse or neglect.

The Court observed that Courts around the state have determined, usually without articulating any rationale, that a child's out-of-court statements about abuse or neglect are admissible in custody and visitation proceedings just as they are in formal neglect cases. See *Mildred S.G. v. Mark G.*, 62 A.D.3d 460, 462, 879 N.Y.S.2d 402 (1st Dept.2009); *Albert G. v. Denise B.*, 181 A.D.2d 732, 580 N.Y.S.2d 478 (2d Dept 1992); *Kimberly CC v. Gerry CC*, 86 A.D.3d 728, 730, 927 N.Y.S.2d 191 (3d Dept 2011); *Sutton v. Sutton*, 74 A.D.3d 1838, 902 N.Y.S.2d 746 (2010); see also, *Mateo v. Tuttle*, 26 A.D.3d 731, 809 N.Y.S.2d 699 (4th Dept.2006).

The statements counsel for the mother and the child sought to introduce through the mother revolved around two incidents; one, where the father allegedly shoplifted from a department store while with D., resulting in their arrest and the other, where the father drove at such an excessive rate of speed he caused D. to become ill and vomit. With regard to the shoplifting allegations, in *Bernton v. Mattioli*, 34 A.D.3d 1165, 1166, 825 N.Y.S.2d 566 (3rd Dept.2006), the court upheld the admission of a child's out-of-court statements regarding his mother's use of him as a decoy while she shoplifted as "they would support a finding of neglect." Another court determined a father was neglectful where he drove a car with his daughter after drinking alcohol and failed to place her in a child seat or restraint and allowed his son to ride in a car with a friend he knew or should have known was intoxicated. In re: *Bianca P.*, 94 A.D.3d 1126, 1127, 943 N.Y.S.2d 200 (2nd Dept.2012). The mother sought to introduce D.'s statements to her involving his father's shoplifting in his presence and his father's reckless driving while D. was in the car. Both these statements, under the principles stated in the *Bernton* and *Bianca* cases, go to possible abuse or neglect and were, therefore.

A child's out-of-court statements regarding possible abuse or neglect require corroboration. F.C. A. 1046(a)(iv), In re: *Mildred S.G.*, 62 A.D.3d at 462, 879 N.Y.S.2d 402. The Court held that if the parties wish to rely upon the child's own statements to corroborate his prior out-of-court statements, an in camera proceeding is insufficient. Given a child's best interests are paramount in custody matters, the Court in *Lincoln* determined that "in many cases" it would be necessary to conduct in camera interviews to protect those interests. 24 N.Y.2d at 272, 299 N.Y.S.2d 842, 247 N.E.2d 659. In instances where the family court receives material information adverse to one of the parents during the in camera, it is incumbent to "in some way" ascertain "its accuracy during the course of the open hearing." That was the situation here. Cross-examination is considered to be one of the most reliable and time-tested methods of getting to the truth. The child was at nine-years-old, legally capable of being sworn. See, e.g., C.P.L. 60.20(2). No testimony had been put forth by any expert indicating he was particularly vulnerable or emotionally fragile. The Court held that if the parties choose to corroborate D.'s out-of-court statements by his own testimony about what happened, the child must testify in court, but his parents, who were both represented by counsel, would be excluded. (citing In re: *Randy A.*, 248 A.D.2d 838, 839-40, 670 N.Y.S.2d 225 (3rd Dept.1998).

Equitable Distribution - Property Distribution - Pre-Marital Debt - Reimbursement Not Permitted for Debt Incurred to Pay for the Parties' Wedding and Honeymoon

In *Snacki v. Pederson*, --- N.Y.S.2d ----, 2010 WL 8941733 (N.Y.Sup.) the parties were married in April 2009 and separated six months later. The wife sought, through equitable distribution, reimbursement for debt she incurred to pay for the parties' wedding and honeymoon. The husband contended that the debt was "separate property" belonging to the wife alone because she incurred it prior to their marriage.

The husband has moved for a declaration that the pre-marriage expenses are separate property, not subject to equitable distribution. The wife alleged that \$12,294.84 (in Canadian dollars) in wedding, vacation, and honeymoon expenses were marital debts. The expenses included a wedding ring, vacation flights to Myrtle Beach, South Carolina, expenses in South Carolina, the honeymoon to Mexico, and other expenses. It is undisputed that the wife incurred these expenses, but it was unclear to the Court, based on the documents before it, what exact expenses the wife seeks to have equitably distributed under New York law. There was no evidence that the husband, prior to the marriage, entered into an agreement to share the wedding/honeymoon expenses. New York has recognized claims for breach of contract-even oral contracts-for wedding anticipation expenses. The only basis for the wife's claims for repayment of these expenses was through her right to equitable distribution under the Domestic Relations Law. The Court granted the husband's motion. It observed that only property acquired during the marriage is classified as "marital." DRL s 236 Part B, 1(c), (d)(1). Debt is subject to the same rules: only debt acquired during the marriage is marital property. *Eigenbrodt v. Eigenbrodt*, 217 A.D.2d 752, 754, 629 N.Y.S.2d 328 (3d Dep't.1995).] Conceding that her debt was incurred prior to her marriage, the wife nonetheless argued that it should be considered marital because it was incurred in expectation and in furtherance of the marriage. The Court rejected this argument finding that the authorities cited by the wife, *Jonas v. Jonas*, 241 A.D.2d 839, 660 N.Y.S.2d 487 (3d Dep't.1997); *Feldman v. Feldman*, 291 A.D.2d 876 (4th Dep't 2002), simply stood for the proposition that when determining whether a debt incurred during marriage is marital or separate, the nature of the debt itself is the primary factor to be considered. But, unlike the litigants in *Jonas* and *Feldman*, the wife incurred this disputed debt before the marriage, not during it. The debts incurred in this case were not marital property because they were incurred outside the marriage. The Court declined to use any legal theory to convert them into marital debts and sweep them into equitable distribution.

Agreements - Prenuptial - Validity - Agreement Held Invalid Where Agreement Not Read, Wife Has No Attorney, Agreement Did Not Contain What Was Promised, and Agreement Not Seen Prior to Signing it

In *A.N. v. E.N.*, 2012 WL 4335245 (N.Y.Sup.), 2012 N.Y. Slip Op. 51839(U) a hearing was held to determine whether the parties' prenuptial agreement was valid and enforceable. The Court found, after trial, that sometime in late 1994, the parties met and soon thereafter began dating each other. Plaintiff was 27 years old and working for Marrs Sales, a lighting company, as a sales representative. Defendant was 30 years old and employed by the New York City Police Department and had been so employed since 1993. The parties continued to date and in December 1996, they became engaged. Thereafter, in November 1997, Defendant bought a house in Garnerville, New York. Due to his own misgivings, and as the relationship intensified, Defendant made clear that if the parties were going to get married, Defendant wanted Plaintiff to sign a prenuptial agreement. However, since Defendant was not all too keen on the idea of getting married, Defendant researched another option through the NYPD which would provide insurance benefits for Plaintiff, i.e., a Domestic Partnership Agreement, as an alternative to marriage. Since Plaintiff was "old fashioned" and intent on getting married, she told Defendant she had no problem with signing a prenuptial agreement. The parties had a few discussions over the course of their courtship regarding such an agreement and pursuant to those discussions, Plaintiff understood that she would be giving up her right to Defendant's two bank accounts (i.e., an individual bank account and a jointly-held bank account Defendant had with his mother). During one of the conversations about the prenuptial agreement, Plaintiff told Defendant that he could probably find an attorney to prepare the prenuptial agreement on 149th Street in the Bronx. Plaintiff did not specify the name of any one particular attorney for Defendant to contact. In or about January or February 1998, Defendant contacted the law firm of Marvin Goldberg, a firm located on 149th Street in the Bronx to prepare a prenuptial agreement. Defendant met with the attorney one time and provided him with some of his financial records. In early June 1998, after Defendant made many telephone calls to the attorney's office to check on the status of the agreement, Defendant was finally advised that the prenuptial agreement was ready to be signed. Although Defendant may have seen a draft of the agreement prior to signing it, there is no dispute that Plaintiff never saw a copy of the agreement prior to signing it.

With their wedding date set for June 20, 1998, on June 6, 1998, Defendant contacted Plaintiff at work and told her that the prenuptial agreement was ready to be signed. Defendant arranged to pick Plaintiff up at work so that they could drive to the attorney's office in the Bronx to sign the agreement. At approximately 3:15 p.m., Defendant picked Plaintiff up and they drove to the attorney's office in the Bronx. On their way into the office, Defendant asked Plaintiff, "Are you sure about this?" and thinking he was asking her about getting married, Plaintiff answered in the affirmative. Defendant then clarified that he was talking about signing prenuptial agreement. Plaintiff indicated she was fine with it after Defendant reiterated to her that he would not marry her if she did not sign it.

Once in the attorney's office and after the attorney introduced himself to the parties and handed a copy of the prenuptial agreement to each of them, the parties' signed the prenuptial agreement. According to Plaintiff, they were in the attorney's office for a

total of "maybe 15 minutes." In addition, Plaintiff testified that at no time did the attorney discuss the specific contents of the agreement with them nor did the attorney discuss with her that she should have an attorney review it. Plaintiff did not read the agreement before signing it. After the parties' signed the prenuptial agreement, they were each given a copy of the agreement in a manilla envelope. However, after that date, Plaintiff never saw her copy of the agreement until she requested it from Defendant in 2010.

Supreme Court observed that a threat to cancel a wedding does not arise to duress. See, *Cohen v. Cohen*, 93 AD3d 506 (1st Dept.2012); *Ramunno v. Ramunno*, 91 AD3d 1355 (4th Dept.2012); *Weinstein v. Weinstein*, 36 AD3d 797 (2d Dept.2007). Numerous factors weighed heavily in favor of setting aside the prenuptial agreement. The evidence established that elements of overreaching, unconscionability and duress all surrounded the execution of the subject prenuptial agreement. Plaintiff had no input in negotiating the terms of the agreement or in its preparation. The agreement itself was prepared by an attorney that Defendant hired and paid for based on one, maybe two conversations between them. Nor was Plaintiff represented by counsel at any time during the drafting of the agreement or at the time of its execution. The result was a prenuptial agreement that left Plaintiff with absolutely nothing. There was no bargained-for benefit. The prenuptial agreement was completely one-sided in favor of Defendant, the party who was the prime beneficiary of the assistance of the attorney. Moreover, the terms of the agreement Plaintiff actually signed were very different from the terms of the agreement she thought she was signing. Based on several conversations she had with Defendant, Plaintiff thought that the purpose of the prenuptial agreement was to protect Defendant's individual and joint bank accounts. There was never any discussion between the two of them about Plaintiff waiving her rights to maintenance, insurance benefits, his pension, or his estate should he predecease her. Plaintiff did not see a copy of the agreement prior to signing it, nor did Defendant's attorney explain the contents of it to her prior to her signing it. Defendant testified that he did not entirely understand the provisions of the agreement at the time he signed it or even to this day. Defendant's testimony in this regard was significant for two reasons. First, Defendant's actions contradicted the terms of the agreement. Pursuant to the agreement, Plaintiff waived her right to Defendant's insurance benefits. Yet, prior to even retaining the attorney to draft the agreement, Defendant researched ways he could provide benefits to Plaintiff without them having to get married. Clearly, Defendant wanted to provide for her. In addition, pursuant to the agreement, the parties each waived their survivorship rights and waived any rights to each other's estate. Yet, in 2001, the Plaintiff and Defendant had "mirror" wills drawn up and signed, which was contradictory to the terms of the agreement. Again, it established that Defendant was unaware of, or did not fully understand the terms of the prenuptial agreement. Second, several of the terms of the prenuptial agreement made reference to specific statutes in the Domestic Relations Law and General Obligations Law. Based on the testimony of both parties, it was clear that such statutory references were never explained to either party and that neither party understood their import.

September 17, 2012

Appellate Division, Second Department

Domestic Relations Law § 243 - Sequestration - Receiver Has No Personal Liability for Actions Performed Within His Official Capacity and Within His Authority

In *Maltz Auctions, Inc., v Tannenbaum*, --- N.Y.S.2d ----, 2012 WL 3711186 (N.Y.A.D. 2 Dept.) after the defendant was divorced, the Supreme Court issued a judgment appointing him as receiver of the marital residence. It directed him to execute any and all documents necessary for conveying and transferring his former wife's title interest. The Supreme Court issued such directive so that the defendant would become the sole and exclusive owner of the property for the purpose of selling it in order to satisfy a money judgment for his share of the equity in the property. Thereafter, the defendant entered into a written agreement with the plaintiff Maltz Auctions, Inc. for the purposes of determining the market value of the property, as well as advertising and marketing the property for its eventual auction by Maltz. Their agreement included a liquidated damages clause which recited, in pertinent part, that in the event the property was withdrawn from auction by the defendant prior to auction, the defendant was obligated pay to Maltz an amount equal to 8% of the reserve price, with the reserve price set at \$350,000. Nearly one month after the parties entered into this agreement, and only two days prior to the scheduled auction date, the defendant directed Maltz to withdraw the property from auction. On that same day, the defendant entered into a stipulation of settlement with his former wife conveying the property to her for a sum certain. When Maltz demanded payment under the liquidated damages provision, the defendant refused, arguing that inasmuch as he entered into the agreement with Maltz in his capacity as court-appointed receiver, he was not personally liable.

Maltz commenced an action to recover damages for breach of contract. Supreme Court, *inter alia*, granted Maltz's motion for summary judgment on the complaint. The Appellate Division modified and denied the motion. It observed that generally, a receiver has no personal liability for actions performed within his or her official capacity and within the scope of his or her authority pursuant to the receivership order. Here, the receivership order directed the defendant to execute documents in order to become the exclusive owner of the property for the purpose of selling it, which he did. Contrary to the Supreme Court's determination, Maltz failed to demonstrate, *prima facie*, that the defendant entered into the agreement in his individual capacity. Based on Maltz's own submissions, triable issues of fact existed as to whether the defendant entered into the subject agreement in his individual capacity or in his capacity as receiver and, consequently, whether he was subject to personal liability under the contract. Specifically, for example, Maltz submitted proof in support of its motion which demonstrated that it listed the auction on certain

on-line auction web sites, including its own, as a "receiver ordered auction" subsequent to a divorce.

Child Support - Modification - Substantial Change in Circumstances - Party Seeking a Downward Modification based upon a Loss of Employment must Demonstrate He Diligently Sought to Obtain Employment Commensurate with Earning Capacity

In *Matter of Suyunov v. Tarashchansky*, --- N.Y.S.2d ---, 2012 WL 3711201 (N.Y.A.D. 2 Dept.) the Appellate Division found that the record supported the Support Magistrate's findings that the father was entitled to a downward modification of his child support obligation based upon his loss of employment. A party seeking modification of a support order has the burden of establishing the existence of a substantial change in circumstances warranting the modification. Loss of employment may 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. 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 commensurate with his qualifications and experience..

Child Support - Modification - Surviving Agreement - Boden - Brescia Rule - Must Demonstrate Unanticipated and Unreasonable Change in Circumstances, or Needs Were Not Being Met

In *Schneider v. Schneider*,--- N.Y.S.2d ----, 2012 WL 3711298 (N.Y.A.D. 2 Dept.) the parties stipulation of settlement dated November 28, 2005, provided that the defendant would have primary residential custody of their two children. The parties also agreed that the plaintiff would pay the defendant \$2,000 per month in child support until the emancipation of a child, whereupon the plaintiff's monthly child support obligation would be reduced by 32 percent. They also agreed that they would each pay one half of certain expenses for the children. Approximately 4 ½ years after the parties' marriage was dissolved, the parties' younger son moved out of the defendant's residence and moved into the plaintiff's residence. Subsequently, the plaintiff moved in effect, to modify the child support provisions of the stipulation to require the defendant to pay him child support for that son in accordance with the Child Support Standards Act. The defendant, who alleged that the plaintiff failed to pay his share of certain expenses of the children, cross-moved, among other things, to direct the entry of a money judgment in her favor in the sum of \$6,660.45, representing child support arrears.

The Appellate Division held that Supreme Court correctly determined that the plaintiff failed to demonstrate that the stipulation should be modified to adjust the parties'

respective child support obligations so as to require the defendant to pay the plaintiff child support for the younger son. The plaintiff did not claim that the younger son's change of residence was "an unanticipated and unreasonable change in circumstances," and failed to show that the younger son's needs were not being met (citing *Matter of Brescia v. Fitts*, 56 N.Y.2d 132, 138; see *Matter of Boden v. Boden*, 42 N.Y.2d 210, 212-213; *Bruney v. Hollingsworth*, 83 AD3d 755, 756).

Supreme Court

Child Custody - Modification - Relocation - Request Denied Where Preference of Older Children given Significant Weight by Court

In *Byron v. Davis*,--- N.Y.S.2d ----, 2012 WL 3846534 (N.Y.Sup.) the Supreme Court denied the mothers request to relocate with her two talented sons to Washington D.C. over the objections of their father. The Supreme Court observed that in assessing a parent's request to relocate, the relevant factors include each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements. *Matter of Tropea v. Tropea*, 87 N.Y.2d 727, 741, 642 N.Y.S.2d 575, 665 N.E.2d 145 (1996)

The attorney for the 14 and 11 year-old sons intoned that they favored remaining in Rochester, a factor for the court to consider, but as precedent clearly indicates, a non-decisive one. Both parents served in the ministry in Rochester-the father as the pastor of small church and the mother as the dean of Black Church Studies at Colgate Rochester Crozer Divinity School. It was undisputed that the mother and father were fine parents and that the sons were thriving in Monroe County. Both excelled in academic performance. Both were heavily involved in activities from lego robotics, to Boy Scouts, music, religious instruction and other activities. Neither parent could cite a single example in which the two sons had not achieved substantial success in their home community. The mother, in seeking to relocate the children, had obtained a substantial career advancement. She landed a position as an associate dean at a university-affiliated divinity school in Washington, D.C. The position paid nearly double what he had made in Rochester. In addition, she had already secured enrollment for the children at top-notch schools in Washington, which, she argued, would afforded her children of not just comparable, but "better opportunities" academically. While she admitted that her children would need to find new friends, she argued, without objection, that her sons were social and affable and would easily find new friends. She also argued that the cultural

opportunities for her sons in Washington D.C., would be enhanced. She testified that the larger African-American community in the District of Columbia would provide better role models and advantages for her sons. In addition, because of her work in a university-affiliated divinity school, the mother indicated that the children would have the advantage of tuition free college educations after their mother completed her first year at the university.

The father argued that his sons were thriving in Rochester, excelling in school, active in scouts, engaged with friends, playing music and otherwise appeared to be secure in their current environment. He described his relationship with his children as "close." The mother was the primary caretaker for the children. She testified, without contradiction, that she performed the daily living tasks. The Court examined the relevant factors. In the court's judgment, the relocation to Washington D.C. would impact the quantity of the visitation as well as the casual, easy-going quality described by the father as he interacted with his sons. If the father were required to visit his sons in Washington, there was no evidence of how he would achieve reasonable visitation while staying in a hotel, for example. Based on these factors, the quantity and quality of the father's visitation would be substantially impacted by the relocation. It also considered the economic, emotional, educational enhancement from the relocation and found that the moved did not not envision a substantial enhancement. While Washington offers some unique opportunities of a larger city and the nation's capital and perhaps greater cultural opportunities available in a large African-American community, it appeared these children had the skills to seize opportunities in their current environment and hence, there would be no significant "enhancement" occurring as a result of their relocation. The proof did not provide a sufficient basis to differentiate the educational opportunities possible in Washington with those already realized in Rochester. The son's already had an "enhanced" educational experience and the court did not find sufficient proof to adjudge that the Washington experience would be substantially better for these already fine students. The court could not conclude that the mother established that the emotional health of the sons would be favorably impacted by relocating to Washington or harmed by staying in Rochester. There was no persuasive evidence that the sons's religious education would be substantially enhanced by a move to Washington. In considering the feasibility of preserving the relationship between father and sons there was also no evidence before this court that "suitable visitation" arrangements could preserve the relationship between father and sons if they moved. The court noted that the wishes of the two sons were and their wishes had some role in the court's decision. The sons were middle school aged and described by their parents as highly intelligent and well rounded. There was no evidence of any impairment of their judgment. The sons remained firm in their desire to stay in Rochester since their mother announced the potential move. The sons knew the living options in their father's apartment and they were familiar with his preacher's lifestyle and, although their father's lifestyle was based on a much smaller income than his mother's future income, the sons's preference remained firm. The constancy of their preference and the sound basis for it required that the court ascribe some significant weight to their choice.

Family Court

Termination of Parental Rights - Surrender Agreements - Post Termination Visitation - Despite Breach of Forfeiture Clause Court Refused to Vacate Visitation Provision Because of Timely Attempt to Cure and Lack of Proof Visit Was Not in Child's Best Interests

In *Matter of Brown v. Westfall*, 36 Misc.3d 1234(A), 2012 WL 3655321 (N.Y.Fam.Ct.) petitioner sought an order enforcing a November 22, 2010 Judicial Surrender, post-surrender/post adoption contract agreement ("agreement") regarding her biological child, later adopted by the respondent and her husband on March 23, 2011. The petitioner executed a Judicial Surrender with conditions on November 22, 2010 and the respondents also agreed to allow certain contact of the child by the petitioner. The conditions stated, inter alia: "B. Erin Brown shall have visitation with the child once each year during the month April for a period of one hour at a public location, the specific day, time and place to be determined by mutual agreement. In order to arrange the visitation Erin Brown shall call the cell phone of Melissa Westfall between April 1 and April 7, inclusive, each year and if the phone is not answered shall leave a phone number where she (Erin Brown) can be reached, and Melissa Westfall or Jeffrey Westfall shall return the call as soon as possible.... At the time of execution of this document Melissa Westfall shall provide Erin Brown with her current cell phone number. If at any time there is a change in Melissa Westfall's cell phone number she shall promptly provide the new number in writing to the Deputy Commissioner of the Yates County Department of Social Services, 417 Liberty Street, Penn Yan, N.Y. 14527 and the number shall be provided to Erin Brown on her request. Should Erin Brown fail to call to arrange a visitation as set forth herein or should she fail to attend an arranged visitation, then in that event all visitation shall cease; and all visitation rights of Erin Brown shall be deemed abandoned by her and shall not be enforceable.

The proof established that for two years prior to execution of the Judicial Surrender, the petitioner had visitation with her son in her home twice a week and on April 29, 2011, the petitioner had a visit with her biological son (then age 2 ½) pursuant to the agreement. In 2011 the petitioner had a telephone number for respondent. The number was in her cell phone, but sometime in December of 2011 she had to change her cell phone because the battery would not take a charge. During this process she lost respondent's cell phone number as she did not take it out of her old government phone and put it into her new one. The petitioner got a new phone number but didn't give it to Yates County Department of Social Services (DSS) caseworker, Sarah Laun until February 15, 2012. Laun gave it to the respondent who acknowledged receiving it in a letter to the petitioner dated February of 2012. As the time for the April, 2012 visit approached the petitioner realized

she no longer had respondent's phone number. She called Laun a number of times in order to get respondent's number. But she did not get a return call from Laun until after April 7th, which was outside the specified time period to contact respondent to arrange for her yearly visit. Even so, the petitioner attempted to call and leave messages with the respondent, but respondent did not return petitioner's calls. As a result, no 2012 visit took place in accordance with the agreement.

The Court observed that it was the petitioner's and not the respondent's responsibility under the agreement to call and arrange for the yearly visitation. Petitioner had no phone records to back up her claim that she called Laun numerous times between February and April, 2012. Petitioner did not attempt to call the Westfalls at their published phone book number. However, she felt that would be a breach of the agreement as it set out that the only way to contact respondent was through her cell phone and not her home phone. Sarah Laun testified that it was her recollection that she first heard from the petitioner at the end of March 2012 regarding giving petitioner's new phone number to respondent. However, this was contradicted by respondent's February, 2012 letter to the petitioner acknowledging receipt of her new telephone number. On or about April 10th, respondent contacted Laun and said that petitioner did not contact her regarding the set-up of the yearly visit. She wanted this documented in her foster care file. Prior to the April 10, 2012 call from the Westfalls, Laun said she had not received any request from the petitioner for the Westfalls' phone number.

Family Court pointed out that in *Matter of Mya V. P.*, 79 AD3d 1794 (4 Dept 2010), the Court found that the hearing court correctly applied principals of contract law in making its determination that the agreement was void because the biological mother breached the contract by missing visits due to her incarceration. The agreement provided it would be voided if the biological mother missed two visits during any 12 month period. But, the Appellate Division also remitted the matter to Family Court for a new hearing to determine whether enforcement of the agreement was in the best interests of the child. In the case at bar the petitioner did not strictly comply with the terms of the agreement but, unlike the mother in *Mya V. P.*, she was ready, willing and able to participate in a visit. Petitioner amply explained why she did not make the call in the required time frame, and she offered a reasonable excuse why she didn't. The respondent had petitioner's new telephone number by February 2012. The petitioner corrected her breach as soon as she got the respondent's phone number and in the meantime, she made efforts to obtain it from DSS. As to best interests, the petitioner's proof was that she participated in the visit in 2011, and that it went well. Petitioner also testified that before the surrender, she exercised her visits with the child in her home, twice a week, for two years. The Court found that the petitioner's failure to comply with the provision requiring her to contact respondent between April 1 and April 7 regarding the 2012 visit was a breach of the agreement. However, given the nature of the circumstances surrounding the breach, including the petitioner's timely attempt to cure same and lack of proof that the annual visit was not in the child's best interests, the Court refused to vacate the visitation provision of the agreement.

September 3, 2012

Appellate Division, Second Department

Child Custody - Modification - Substantial Change of Circumstances - Evidence Regarding Wife's Interest in Spiritual and Paranormal Phenomena Did Not Establish a Change in Circumstances Warranting Modification of Custody Award.

In *Sano v Sano*, --- N.Y.S.2d ----, 2012 WL 3590462 (N.Y.A.D. 2 Dept.) the Appellate Division observed that a modification of an existing custody arrangement should be allowed only upon a showing of a sufficient change in circumstances demonstrating a real need for a change of custody in order to insure the child's best interests. It found that the husband failed to meet that burden with the evidence he presented regarding the wife's interest in spiritual and paranormal phenomena, which did not establish a change in circumstances contrary to the best interests of the child. Moreover, the evidence of an isolated accidental injury of the child while in the wife's care was an insufficient basis on which to change the custodial arrangement. Accordingly, the Supreme Court's determination that there had been a sufficient change in circumstances since the Family Court's issuance of the custody and visitation order to warrant a change in residential custody was not supported by a sound and substantial basis in the record.

Child Custody - Modification - Relocation - In Determining Request of Parent to Relocate Sufficient Weight Must Be Given to Allegations of Domestic Violence.

In *Matter of Eddington v McCabe*, --- N.Y.S.2d ----, 2012 WL 3324264 (N.Y.A.D. 2 Dept.) the Appellate Division held that Family Court properly found that there was a change of circumstances sufficient, in effect, to grant the mother's amended petition to modify the parties' amended stipulation of settlement to award her sole custody of the parties' child. It noted that after the amended stipulation of settlement transferred primary custody to the father, the mother moved in with the father and continued to serve as the child's primary caregiver for several years. In addition to the evidence that the mother had been, in effect, the primary caregiver throughout the child's life, the father had limited involvement in the child's life due, in large part, to the father's unusual work schedule. The Family Court found credible the mother's allegations that the father engaged in incidents of alcohol-induced domestic violence against her.

It also found that the determination by the Family Court to condition the custody award on the mother residing in Orange County to ensure that the child could stay in his current school district and to deny the branch of the mother's amended petition which was for leave to relocate with the child to Auburn, New York, lacked a sound and substantial basis in the record. Despite 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 and the noncustodial parent remains a central concern. The mother had been the primary caregiver throughout the child's life, while the father had limited involvement in the child's day-to-day care. Even when the child lived only with the father, primary care had fallen to the father's relatives, such as the father's aunt and the child's paternal grandmother. Family Court failed to give enough weight to the mother's allegations of domestic violence, often in the child's presence, even though it credited those allegations. The mother, whose income was limited to Social Security disability payments, testified that she could not afford to live in the Monroe-Woodbury school district. The mother expressed a willingness to provide liberal visitation to the father and to drive the child to visit with the father. The mother's move was motivated by a desire to escape domestic violence, to reside closer to her extended family who could provide financial and emotional support, and to secure affordable housing. Although the mother's relocation would inevitably have an impact upon the father's ability to spend time with the child, a liberal visitation schedule, including extended visits during summer and school vacations, would allow for the continuation of a meaningful relationship between the father and the child. Under the totality of the circumstances, the hearing testimony established that the child's best interests would be served by permitting the mother to relocate with the child to Auburn, New York.

Supreme Court

Maintenance - Modification - DRL § 236(B)(9)(b) - Surviving Agreement - Downward - Extreme Hardship - Extreme Hardship Calls for Substantial Dislocation of Financial Circumstances So That the Litigant Is Nearly Without Resources or Shelter.

In *Platt v Platt*, 2012 WL 3627418 (N.Y.Sup.), 2012 N.Y. Slip Op. 51583(U), in March 2011, the parties entered into a separation agreement which provided that the 47-year-old husband would pay maintenance to the wife at a rate of \$700.00 per month from the period of March 1, 2011 through February 1, 2015. The agreement provided that the maintenance payments would increase in later years to \$1000 per month, after the couple's daughter had graduated from college. At the time that the parties entered into the agreement, the husband was employed and earning an annual salary of \$68,000. The wife was disabled and receiving \$721.00 per month in Social Security benefits, \$60.00 per month in SSI benefits, and food stamps in the amount of \$187.00 per month. After the parties were

divorced, the husband's job was terminated and he began collecting unemployment benefits. This Court then reduced his maintenance obligation from \$700.00 per month to \$400.00 per month. In April 2012, the husband's unemployment benefits expired and he moved for a suspension of his maintenance obligations until he regained employment. He claimed that the unemployment benefits that he received until April 2012, were his sole source of income, and that he had engaged in a diligent and extensive search to obtain employment commensurate with his qualifications, both inside and outside of New York State. The wife contended that the husband has failed to demonstrate that a continuation of the agreed upon maintenance obligation will result in extreme financial hardship to him. As evidence of the employment search, the husband provided the court with a three-page list of the positions that he had applied for, the approximate dates of the application, and the location of the prospective employer. Despite his efforts, he has not received an offer of employment. He asserted that it has been extremely difficult to find employment in the IT field because he lacked a college degree. Since his unemployment benefits expired, the husband admitted he has received financial assistance from his parents, as they contribute to his rent and grocery bills. The husband's statement of net worth revealed that a checking account and 401(k) were his only assets. As of May 2012, he had a balance of \$978.56 in his checking account. He had \$9.54 in his savings account. He had a 2005 car with a value of \$5,498. He listed household furnishings at \$1,000. As of May 17, 2012, the husband's 401(k) had a balance of only \$4,302.00 which he had not withdrawn from because he planned to use this money to fund the parties' daughter's college expenses next quarter. The husband had no other assets. Under the terms of the separation agreement, he was solely responsible for the daughter's college expenses. He listed debts to his attorney in excess of \$2,000 and a \$464 debt to his physician. He borrowed money from a relative to move back to Rochester. His 2011 income tax return listed \$31,452 in earned income and then \$10,024 in unemployment compensation. There was no evidence of any other income. His expenses in his statement of net worth, substantially exceeded his income. After he paid rent, telephone, groceries, auto payments and insurance, college loans and other sundries, his monthly expenses were \$2,177.75. The wife, in her response, painted an equally dismal fiscal picture.

Supreme Court observed that a party seeking to modify the maintenance provisions of a judgment of divorce in which the terms of a separation agreement have been incorporated, but not merged, must demonstrate that the continued enforcement of these maintenance provisions would create an "extreme hardship." DRL § 236(B)(9)(b). In addition, the movant must show that the loss of his or her income was unavoidable. Absent a prima facie showing of entitlement to a modification, the proponent has no right to a hearing. (Rockwell v. Rockwell, 74 AD3d 1045, 1046 (2nd Dept.2010); Vinnik v. Vinnik, 295 A.D.2d 339-40 (2nd Dept.2002); Barden v. Barden, 245 A.D.2d 695, 696 (3rd Dept.1997). The Court noted that extreme hardship in its plain meaning calls for a "substantial dislocation" of financial circumstances such that the party is almost lacking resources or shelter (citing V.P. v. C.P., 936 N.Y.S.2d 62 (N.Y.Sup.Ct.2011). It is extreme financial hardship which diminishes his ability to maintain his lifestyle, brings him below any poverty guideline, or compels him to liquidate assets or incur huge unmanageable

debt. "Extreme hardship" is not merely the medical consequences of a maturing life but its plain meaning calls for a substantial dislocation of financial circumstances so that the litigant is nearly without resources or shelter. The Court found that the husband had made a prima facie showing of extreme hardship. His statement of net worth and most recent income tax return documented his chronic unemployment. He had no consistent source of income. He earned meager sums through daily labor. He admitted that he relied on the financial contributions of his parents to meet his financial obligations such as rent and grocery bills. This constituted an appreciable change in circumstances which was unforeseen and unanticipated such that the husband would experience extreme hardship in the absence of a temporary suspension of his maintenance obligation. The husband's current level of income also placed him well below the federal poverty limit for the western New York area. The court also declined to require him to invade his 401(k) to satisfy his maintenance obligation, as the wife suggested he should.

The husband's motion to suspend his maintenance obligation was granted based on the finding of extreme hardship and the wife's motion to deny the suspension of maintenance payments was denied. The Court directed that maintenance payments resume immediately, "in an amount that the court deems proper," upon the husband obtaining employment or receiving other benefits from any sources, including significant gifts from his parents. The Court, as a condition of the suspension of the maintenance obligations, required the husband to: (a) immediately, upon securing full or part-time employment, provide the name, address and amount of salary to the wife and further provide that, until the further order of this Court, one-quarter of his net payment, each week, shall be forwarded directly to the wife; (b) provide a monthly statement, under oath, to the wife of his income, including any gifts from any other person and include any pay stubs or contracts under which he is providing services and identify the name and addresses of any employer; (c) provide a monthly list of employment applications, with the names and addresses of the putative employers, filed by the husband during that month or other steps taken to procure employment; and, (d) provide a monthly list of all government sponsored benefits received by the husband.

August 16, 2012

Appellate Division, First Department

Attorneys - Legal Fees - Effect of Disciplinary Rules - Where 'Substantial Compliance' with Matrimonial Rules, Attorney Allowed to Recover Fees Owed for Services Rendered, but Not Yet Paid For - Block Billing Is Not Improper

In *Daniele v Puntillo*, --- N.Y.S.2d ----, 2012 WL 3079201 (N.Y.A.D. 1 Dept.), Plaintiff was retained by defendant in March 2004, replacing defendant's prior counsel in her divorce proceeding. Plaintiff and defendant executed a retainer agreement in March 2004. The agreement specified the nature of representation, a \$25,000 retainer fee, billing arrangements and payments, and billing rates, among other details. Attached to the retainer agreement was a Statement of Client's Rights and Responsibilities, also executed by both parties in March 2004. Plaintiff contended that on May 14, 2004, he filed a copy of the executed retainer agreement with the court as well as defendant's updated statement of net worth, as mandated by 22 NYCRR 1400.3. Shortly after executing both documents, defendant paid the \$25,000 retainer fee. Plaintiff represented defendant from March 2004 through December 2004, when defendant's divorce proceedings ended in a stipulation of settlement. During that time, plaintiff sent defendant detailed billing statements, which were in "block billing" form, meaning that each timekeeper would enter a description of his or her work for a particular day, along with the total amount of time spent on those tasks for that day. Defendant made intermittent payments up until December 2004. When plaintiff commenced suit, there was an outstanding balance of \$104,918.46.

At the close of plaintiff's case, defendant moved for a directed verdict dismissing the complaint on the ground that plaintiff failed to comply with 22 NYCRR 1400.3, thereby barring his claim for fees. The trial court denied the motion on the ground that defendant had admitted compliance with 22 NYCRR 1400.3 in her answer. The trial continued to conclusion, and the court found an account stated in that defendant had not established that she objected to the bills. The court then granted judgment to plaintiff in the amount of \$106,048.96.

The Appellate Division affirmed. It observed that where there has been 'substantial compliance' with the matrimonial rules, an attorney will be allowed to recover the fees owed for services rendered, but not yet paid for. The applicable rule, 22 NYCRR 1400.3, mandates that an attorney in a matrimonial matter file a copy of the signed retainer agreement with the court, along with the statement of net worth. The record showed that a copy of the executed retainer was filed with the court on May 14, 2004, along with the updated statement of net worth. Even if plaintiff, as substituted counsel, should have filed the retainer within 10 days of its execution, he substantially complied with the requirements by filing the executed copy with the updated statement of net worth. Although it would have been better practice for plaintiff to have put proof of the filing in evidence on his direct case, his failure to do so did not change the fact that he substantially complied with the rule.

The Appellate Division rejected the Defendant's argument that plaintiff's billing practices and willful spoliation of evidence should result in sanctions, and dismissal of his claims. Defendant argued that block billing was improper and that "task billing," which listed the time for each separate task and is an enhanced level of billing, should have been used. However, block billing is common practice among law firms and neither 22 NYCRR

1400.3 nor the retainer agreement called for task based billing. Regarding the spoliation of evidence allegation, defendant contended that plaintiff intentionally destroyed a particular attorney's individual time sheets, thereby preventing her from using those records to impeach plaintiff. Plaintiff testified at trial that the information from that attorney's individual time sheets was entered into the firm's time entry system, then reviewed by him and incorporated into the firm's bills to defendant. The court found that, in any event, the time sheets were not key evidence, and thus their alleged destruction did not deprive defendant of the ability to defend against plaintiff's claim for fees. Accordingly, a spoliation sanction was not warranted.

Appellate Division, Second Department

Maintenance - Award - Imputed Income - Wife of 30 Year Marriage Who Worked Only 3 Years During Marriage Properly Denied Maintenance Where She Was Highly Educated and Similarly Situated to the Defendant

In Carr-Harris v Carr-Harris,--- N.Y.S.2d ----, 2012 WL 3204572 (N.Y.A.D. 2 Dept.) plaintiff and the defendant were married for more than 30 years, during which time the defendant worked as a church minister. The parties had four children, one of whom was a minor at the time the trial was commenced. At trial, the plaintiff testified that the defendant was the main breadwinner of the family and that, although she had a Master's degree and had worked towards two separate doctorate degrees, she worked for only three years during the course of the marriage. She also testified that the parties had borrowed more than \$75,000 from her aunt, Gloria Ewsuk, although they did not execute a promissory note or other documentation confirming the loan. The parties also borrowed \$40,000 from the plaintiff's mother, Kathleen Petrochko, and received \$50,000 from the defendant's mother, Zoya Carr-Harris. The plaintiff claimed that, although the parties executed a promissory note for the sums received from Zoya, the principal amount was a gift and the parties were obligated only to repay \$20,000 in interest, of which \$17,000 had been repaid. Toward the end of the trial, the plaintiff admitted that she signed confessions of judgment in favor of various family members and friends, claiming that these individuals had loaned her money during the marriage and during the divorce proceedings and that she wished to ensure that the lenders would be repaid. The defendant claimed that the sums received from Ewsuk were gifts and that he never had any direct discussions with Ewsuk regarding the alleged loans. He acknowledged that the parties borrowed \$40,000 from Petrochko, which they agreed to pay back with interest. He also claimed that the entire sum received from Zoya was a loan, and the parties were obligated to repay the principal and accumulated interest.

Supreme Court found that the sums received from Ewsuk were gifts, as there was no documentary evidence to support the claim that the sums were intended to be loans. It

determined that the parties owed \$70,000 to Petrochko, \$50,000 to Zoya, and \$21,000 to the three nonminor children, reflecting the sums the parties had borrowed from their children in order to make a down payment for the purchase of the marital home. Supreme Court determined that the plaintiff was not entitled to reimbursement of the cost of repairs to the marital residence, as her proof on this point was insufficient. Supreme Court ordered the sale of the marital home and determined that the parties should share equally in the proceeds after payment of all loans and expenses other than the liens that the plaintiff unilaterally placed on the home in favor of her family and friends. It imputed an income of \$40,000 to the plaintiff, noting that she was highly educated and had not worked to her potential. Supreme Court found that the defendant, who was now working as a public school teacher, had an income of \$54,000. The court ordered the defendant to pay \$705.91 per month in child support and determined that the parties would share in the cost of statutory add-ons, with the defendant being liable for 57% of such expenses. In addition, it ordered defendant to maintain health insurance for the minor child until he reached the age of 21, ordering the parties to share the cost of unreimbursed medical expenses with the defendant paying 57% of such costs. The defendant was also ordered to pay child support arrears from his share of the proceeds of the sale of the marital residence. The Supreme Court found both parties at fault for the litigious nature of the proceedings and determined that the parties were equally situated, as both were in the process of beginning new careers. Thus, Supreme Court denied the plaintiff's requests for counsel fees and spousal support. The parties were ordered to share equally in the educational costs for the minor child's college through his 21st birthday.

The Appellate Division affirmed. It found that Supreme Court appropriately exercised its discretion in denying spousal maintenance to the plaintiff. The plaintiff was highly educated and was similarly situated to the defendant in terms of age, educational background, and future potential to work. Like the defendant, she was in the process of beginning a new career and, according to her own testimony, she should be able to earn approximately \$40,000 per year. Thus, Supreme Court's imputation of income to her was appropriate, and the record supported the court's finding that the plaintiff was not entitled to spousal maintenance. It found that for the same reasons, Supreme Court properly denied the plaintiff an award of counsel fees. It also found that each of each of the Supreme Court's findings regarding the loans was supported by the record. The Supreme Court was free to credit the defendant's testimony. The Supreme Court properly denied the plaintiff's request for reimbursement of expenses that she allegedly incurred in making repairs to the marital home because the plaintiff failed to sufficiently prove that claim.

Maintenance - Award - Imputed Income - Proper to Impute Annual Income Based on Pre-retirement Earnings and Experience, Where No Proof Disability Retirement Medically Necessary -- Counsel Fee Awarded for Delaying Litigation

In Morales v. Inzerra, --- N.Y.S.2d ----, 2012 WL 3104243 (N.Y.A.D. 2 Dept.) the Appellate Division noted that "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 plaintiff failed to sustain his burden, as he failed to set forth proof that the property actually increased in value and, in any event, he failed to demonstrate the manner in which his contributions resulted in any alleged appreciation .

The Appellate Division found that Supreme Court providently exercised its discretion in requiring the plaintiff to pay the defendant -wife maintenance of \$325 per week for a period of 10 years. The Supreme Court found that the defendant was disabled as a result of multiple sclerosis. She lived in an assisted-living facility and Social Security disability benefits were her only independent source of income.

Supreme Court properly determined that the defendant was unable to support herself, and would not likely become self-supporting in the future. Supreme Court properly imputed \$52,000 in annual income to plaintiff based on his pre-retirement earnings and experience. Although the plaintiff claimed that he retired because of a purported disability, he failed to offer medical evidence of his disability and his employment was uninterrupted in the years leading up to the commencement of the action. Moreover, the court found that he retired shortly after he was ordered to pay pendente lite maintenance to the defendant.

Supreme Court properly awarded the defendant an attorney's fee of \$10,000, based on the relative financial circumstances of the parties, the relative merits of their positions at trial, and its finding that the plaintiff's actions prolonged the litigation.

Equitable Distribution - Property Distribution - Credit for Payment of Pre-Marital Debt - Where Marital Funds Used to Pay off the Separate Debt of Titled Spouse on Separate Property, Nontitled Spouse May Be Entitled to a Credit to Remedy Inequity Created by the Expenditure of Marital Funds to Pay off Separate Liabilities.

In Khan v. Ahmed, --- N.Y.S.2d ----, 2012 WL 3104254 (N.Y.A.D. 2 Dept.) the Appellate Division pointed out that when evaluating whether a court providently exercised its discretion in awarding maintenance, the factors to be considered are whether the award encourages economic independence, the present and future earning capacity of the parties, the reduced or lost lifetime earning capacity of the party seeking maintenance, the duration of the marriage, whether the amount and duration of the award is appropriate in light of the pre-separation standard of living, the reasonable needs of the recipient spouse, the income and property of the parties, the distribution of the marital property, and the health of the parties. In light of the relevant factors, including the disparity in the parties' income, the Supreme Court providently exercised its discretion in awarding the plaintiff

maintenance of \$350 per week until March 15, 2014. However, the court erred in awarding maintenance retroactive to the date of commencement of the action, as the record reflected that the plaintiff did not make an application for maintenance until she filed a proposed statement of distribution dated May 14, 2010. Accordingly, the award of maintenance should have been made retroactive to May 14, 2010.

The Appellate Division pointed out that where marital funds are used to pay off the separate debt of the titled spouse on the separate property, the nontitled spouse may be entitled to a credit. The reduction of indebtedness on separate property is not considered appreciation in the value of the separate property; rather, the credit is to remedy the inequity created by the expenditure of marital funds to pay off separate liabilities. The marital funds used to pay off those liabilities are added back into marital property, and the nontitled spouse is awarded his or her equitable share of those recouped marital funds. While the Supreme Court properly determined that the plaintiff's Toyota Corolla was her separate property, it erred in failing to credit the defendant for one-half of the \$7,000 in marital funds used to pay off the loan on the vehicle. Accordingly, the defendant was entitled to a credit in the sum of \$3,500, to be deducted from the plaintiff's distributive award, which had been in the sum of \$3,520.

In light of the disparity in the parties' incomes and the defendant's actions in unnecessarily prolonging the litigation, the award of an attorney's fee to the plaintiff in the sum of \$20,000 was appropriate.

Attorneys - Disqualification of Counsel - Rule 4.2 of the Rules of Professional Conduct (22 NYCRR 1200.0) - Violation of the Rule Against ex Parte Communications Will Support a Motion Seeking an Attorney's Disqualification, Including Situations Where the Party Is a Child

In Madris v. Oliviera,--- N.Y.S.2d ----, 97 A.D.3d 823, 2012 WL 3024450 (N.Y.A.D. 2 Dept.) the Appellate Division reversed an order which granted mother's motion to disqualify the father's attorney and the attorney's law firm from appearing in the action. In the course of this Family Court Act article 6 proceeding, the father and the subject child allegedly experienced difficulty communicating with the caseworker assigned by the Nassau County Department of Social Services (DSS) to complete the court-ordered investigation. The father's attorney wrote to the caseworker's supervisor to alert her to the problem and to ask that she interview the parties to ensure that a complete and accurate report was produced for the court, and sent copies of the letter to the attorneys for the mother and the child. The mother moved to disqualify the father's attorney and the attorney's law firm on the basis that the attorney had violated Rules of Professional Conduct (22 NYCRR 1200.0) Rule 4.2 by engaging in improper ex parte communications with the child and with the DSS. The court granted the motion and disqualified the father's attorney and her firm.

The Appellate Division reversed. It observed that a party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted. While the right to choose one's counsel is not absolute, disqualification of legal counsel during litigation implicates not only the ethics of the profession but also the parties' substantive rights, thus requiring any restrictions to be carefully scrutinized. The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination.. Whether to disqualify an attorney is a matter which lies within the sound discretion of the court.

Rule 4.2 of the Rules of Professional Conduct (22 NYCRR 1200.0) provides that an attorney may not communicate with a represented party regarding the subject of the representation (subsection a) or permit his or her client to do so (subsection b) unless opposing counsel has consented or the communication is authorized by law. Although a violation of the rule against ex parte communications will support a motion seeking an attorney's disqualification, including situations where the party is a child, conclusory assertions of conduct violating a disciplinary rule will not suffice to support disqualification. Here, the court improperly placed the burden on the father rather than on the mother (i.e., on the opponent of disqualification rather than on the movant) and failed to consider the evidence in the light most favorable to the nonmoving party. There was no evidence that the father or his attorney improperly questioned the child regarding his interactions with the caseworker assigned to conduct the court-ordered investigation. Because there was no violation of Rule 4.2(b) of the Rules of Professional Conduct (22 NYCRR 1200.0), there was no basis for disqualification of the father's attorney due to communications with the child.

The Appellate Division also held that family court misapprehended the role of the DSS where it has merely been assigned as the agency to complete a court-ordered investigation. An entity cannot claim a blanket protection from ex parte interviews by taking the position that house counsel is responsible for all future legal matters affecting that entity. Similarly, if a governmental party were always considered to be represented by counsel for purposes of the rule against ex parte communications, the free exchange of information between the public and the government would be greatly inhibited. Because the DSS was not a represented party within the meaning of Rule 4.2(a) of the Rules of Professional Conduct (22 NYCRR 1200.0), the court erred in disqualifying the father's attorney and the attorney's law firm on this basis as well.

Family Court - Jurisdiction - Referees - Referee Lacks Jurisdiction to Issue Order Made after Reference to Referee to Hear and Report Only

In Martinborough v. Martinborough, --- N.Y.S.2d ----, 2012 WL 3104237 (N.Y.A.D. 2 Dept.) in 2009, the father filed a petition alleging that the mother was violating a prior order of visitation by interfering with his visitation rights. The mother responded by filing a petition to suspend the father's visitation rights indefinitely. In an order dated November 15, 2010, the Court Attorney Referee (Referee), granted the mother's petition to suspend the father's visitation upon the father's default in appearing. The father moved to vacate the order entered upon his default. By order of reference dated May 19, 2011, the Family Court, on its own initiative pursuant to CPLR 4212 and 4313, referred the matter to the Referee to hear and report. In an order dated July 28, 2011, the Referee denied the father's motion.

The Appellate Division reversed. It observed that a referee derives his or her authority from an order of reference by the court. Here, the order of reference referred the matter to the Referee to hear and report only, not to hear and determine. Thus, the Referee lacked jurisdiction to issue the order dated July 28, 2011. Accordingly, the order dated July 28, 2011, was reversed and the matter remitted to the Family Court, for a new determination of the father's motion.

Equitable Distribution - Property Distribution - Wife Awarded \$300,000 more than Husband. No requirement that the assets be split evenly

In Franco v Franco, --- N.Y.S.2d ----, 2012 WL 3023999 (N.Y.A.D. 2 Dept.) the parties were married for 41 years. During the course of the marriage, the defendant was the sole source of financial support for the plaintiff and their three children (now emancipated), while the plaintiff, who never worked outside of the home, took care of the marital home and the parties' children. Also during the course of the marriage, the parties acquired a number of commercial properties and business interests, as well as significant liquid assets, which were equitably distributed between the parties by the Supreme Court following a nonjury trial. The plaintiff's distributive award was valued at \$3,032,226 and consisted largely of the liquid assets, and the defendant's award was valued at \$2,700,000, consisting largely of rental income-producing property, prior to various adjustments. Observing that there is no requirement that the assets be split evenly the Appellate Division found no basis to disturb the Supreme Court's determinations regarding the equitable distribution of the parties' property.

The Court noted that in 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, as well as the tactics of a party in unnecessarily prolonging the litigation. Under the circumstances of this case, the Supreme Court's award of \$15,000 counsel fees to the plaintiff, including appellate counsel fees to defend against the defendant's appeal and

counsel fees to enforce the defendant's obligations under the divorce judgment, were a provident exercise of discretion .

Supreme Court

Pendente Lite Maintenance - Award - Imputed Income - \$ 75,000 Income Imputed to Unemployed Husband Based on Employment History and Continual Influx of Financial Assistance from His Parents

In *G.R.P. v. L.B.P.*, 2012 WL 3023506 (N.Y.Sup.), 2012 N.Y. Slip Op. 51364(U) the court had to determine, on this motion for pendente lite support, what income and assets, financed almost exclusively by a parent, were imputable to the son for purposes of supporting his now estranged wife and his children. The parties were married for twenty years and had three children. During their marriage, the parties lived a substantial lifestyle. They lived in a home valued in excess of \$300,000, belonged to a country club and health clubs, vacationed annually in resort communities including skiing in Colorado and winters in Florida. This way of life persisted throughout most of the couple's marriage. The husband held two undergraduate degrees; the wife had one. The husband had been employed as a photographer in a business owned by his father, but the business stalled and was closed in the last 18 months. In his statement of net worth, the husband identified \$8,470 in annual income as of July 2011. The wife, in her statement of net worth submitted in the same period, listed \$25,000 in income from employment at Paychex. The husband never earned significant sums. His social security report indicated that his annual earnings in the last decade had never exceeded \$39,000. On the average, his yearly income from 2000-2009 was approximately \$35,000. If he paid his income and payroll taxes for those years, his net income would have been less than \$30,000.

The degree to which the couple's lifestyle was subsidized by outside sources was revealed by an undisputed analysis of the family expenses. The husband's statement of net worth listed monthly expenses of \$7,901 or \$94,812 annually and asserted that he is "primarily responsible for expenses of our family." The wife, estimated the family expenses at \$8,988 monthly or more than \$107,000 annually. The costs revealed that the couple were able to buy a \$30,000 automobile for the husband in 2007, but did not include any expenses for the college education of the oldest child, who attended Marquette University. The husband listed as separate property a margin account in the amount of \$143,252, which was based on an annual gift from his mother. The husband's only other significant asset was another gift in the form of an Individual Retirement Account valued at \$32,378. His assertion that his parents "helped us from time to time" seemed to be understated. The wife's statement of net worth was further evidence of the same. She had only \$1,000 in a savings account, an estimated \$10,000 in the cash surrender value of a life

insurance policy, and \$1,900 in credit card debt. The parental subsidy extended to the marital residence as the home was owned by the husband jointly with his father. According to the husband's statement of net worth, his father also was a joint owner of the entire contents of the house. The house was valued in excess of \$325,000, and there were three separate mortgages, one held jointly by the father and the husband. The couple were not paying this mortgage. The second mortgage was a demand note for \$100,000 to his mother, given in 1997 for which there had been no payments, and no accumulated interest because the value of the current debt equaled the value of the original loan. The third mortgage was from a bank and was placed in 1997. The husband and his wife were jointly liable on all three mortgages. The husband and wife never generated enough income to pay their mortgages, yet they lived in a fully furnished, expensive, suburban home. The husband had no income, had not worked for two years, and had \$96,000 in annual family expenses. From the documents before the court, the husband needed more than \$95,000 in net income in order to meet his expenses, but exclusive of unemployment insurance benefits, he had less than \$10,000 in income. The Court observed that either the husband had borrowed huge sums from third parties to maintain his lifestyle during the last two years or his parents financed his entire financial life. There was no evidence that the former had occurred-the husband's statement of net worth showed no credit card balances, no notes payable, and no other debts. There was no evidence of accumulated debt, which might lead to the conclusion that the husband borrowed sums in previous years to finance his family expenses. The conclusion was inescapable that the husband's parents have routinely gifted or transferred large sums of money to the husband to pay for his family living expenses. In reaching this conclusion, the court was struck by the husband's failure to quantify the "loans" or "gifts" given to him by his parents during the last two years. At no point did he admit the amount of annual gifts; he never stated exactly how much he received from his parents.

Supreme Court observed that New York law gives the court considerable discretion to impute income to a parent where the parent receives money, goods, or services from a relative or friend. DRL 240(1-b)(b)(5)(iv)(D)). The court held that it had to impute income to the husband based on his employment history and his parental support; and there was an equally compelling command to impute income to the wife based on her income and family support. The husband's decade long history of income, as reflected in his social security report, justified imputing \$35,000 in annual income to him. In addition to his earnings history, the husband had two college degrees, has operated a business, and worked as stock broker. Based on the history of the families's earnings and the continual influx of financial assistance to the husband through his parents, the husband was determined to have annual financial assistance from his parents in an amount of \$75,000. For purposes of the application, the court found that the wife had \$25,000 in imputed income.

Based on these determinations, the court found that the husband had total resources available in the amount of \$110,000; \$75,000 from annual subsidies from his parents and the \$35,000 as imputed income. This court reduced that amount by the amount

of payroll taxes that would be paid on \$35,000 to \$33,023. The total income for purposes of maintenance and child support was \$103,023. The maintenance to be paid to the wife under the temporary maintenance guidelines was \$25,906 annually or \$2,158.91 monthly. The child support, calculated after subtracting the maintenance from the father's income, was \$22,363 annually or \$860 bi-weekly. The pro rata contributions to add-ons expenses (health insurance, extracurriculars) were calculated using a 75% contribution for the husband and 25% contribution for the wife.

August 1, 2012

Appellate Division, Second Department

Child Support - Modification - Substantial Change of Circumstances - Substantial Reduction in the Father's Visitation with Child, Which Significantly Reduced Amount of Money He Was Required to Spend on Child Constituted an Unanticipated Change in Circumstances That Created Need for Modification of Child Support Obligations

In *McCormick v McCormick*, --- N.Y.S.2d ----, 2012 WL 2819303 (N.Y.A.D. 2 Dept.) the Appellate Division found that mother established that an increase in the father's child support obligation was warranted by a change in circumstances (*Matter of Gravlin v. Ruppert*, 98 N.Y.2d 1, 3-6). The substantial reduction in the father's visitation with the child, which significantly reduced the amount of money the father was required to spend on the child, "constituted an unanticipated change in circumstances that created the need for modification of the child support obligations". Furthermore, contrary to the Family Court's conclusion, the child's derivative Social Security benefits may not serve as a credit against the father's child support obligation. It reversed and remitted the matter to the Family Court for a new determination of child support.

Custody - Visitation - Domestic Relations Law § 71 - Sibling Visitation - Petitioners' Attorney Was a "Proper Person" to Commence Proceeding

In *Matter of Alexandra D. v. Santos*, --- N.Y.S.2d ----, 2012 WL 2913497 (N.Y.A.D. 2 Dept.), a sibling visitation proceeding pursuant to Family Court Act article 6, Alexandra D. and Natalie D. appealed from an order of the Family Court, which, in effect, denied their petition and dismissed the proceeding for lack of standing. The Appellate Division reversed, on the law, and reinstated the petition. It observed that pursuant to Domestic Relations Law § 71, a sibling may commence a proceeding to seek visitation with a whole or half sibling who is under the care, custody, and control of a parent or other person or

party. Where the sibling seeking such relief is a minor, "a proper person" may seek such relief on his or her behalf . Contrary to the Family Court's determination, the petitioners at bar, who were seeking visitation with their half brother, had standing to commence this proceeding. Moreover, the petitioners' attorney was a "proper person" to commence this proceeding on their behalf. Accordingly, the Family Court erred by, in effect, denying the petition and dismissing the proceeding for lack of standing.

Custody - Appeal - Record on Appeal - Matter De Hors the Record - Judicial Notice - Appellate Division Considers and Rejects New Facts Submitted to It on Appeal

In *Matter of Cooper v. Robertson*, --- N.Y.S.2d ----, 2012 WL 2913503 (N.Y.A.D. 2 Dept.), the Appellate Division found Family Court's determinations that there had been a change in circumstances since the issuance of the order awarding the parties joint custody of the subject children, and that an award of sole custody of the subject children to the father would be in the their best interests, had a sound and substantial basis in the record and, thus, should not be disturbed. It observed that the new facts that the attorney for the subject children set forth on appeal did not demonstrate that the record before it was no longer sufficient for determining the best interests of the subject children (citing *Matter of Michael B.*, 80 N.Y.2d 299, 318).

Authors Note: We note that in *Matter of Michael B.*, 80 N.Y.2d 299, the Court of Appeals considered new facts brought to its attention on appeal which required it to remit the matter to Family Court for an expedited hearing and determination of whether appellant was a fit parent and entitled to custody of the Child. The Court was informed that, during the pendency of the appeal, that appellant was charged with--and admitted--neglect of the children in his custody (not Michael), and that those children had been removed from his home and were again in the custody of the Commissioner of the Social Services. The neglect petitions alleged that appellant abused alcohol and controlled substances including cocaine, and physically abused the children. Orders of fact finding had been entered by Family Court recognizing appellant's admission in open court to "substance abuse, alcohol and cocaine abuse." Moreover, an Order of Protection was entered prohibiting appellant from visiting the children while under the influence of drugs or alcohol. The Court of Appeals stated that " Appellant's request that we ignore these new developments and simply grant him custody, because matters outside the record cannot be considered by an appellate court, would exalt the procedural rule--important though it is--to a point of absurdity, and "reflect no credit on the judicial process." (Cohen and Karger, *Powers of the New York Court of Appeals* § 168, at 640.) Indeed, changed circumstances may have particular significance in child custody matters (see, e.g., *Braiman v Braiman*, 44 NY2d 584, 587, 590; *Matter of Angela D.*, 175 AD2d 244, 245; *Matter of Kelly Ann M.*, 40 AD2d 546). This Court would therefore take notice of the new facts and allegations to the extent they indicate that the record before us is no longer sufficient for

determining appellant's fitness and right to custody of Michael, and remit the matter to Family Court for a new hearing and determination of those issues.” It reversed the order of the Appellate Division and remitted to Family Court for further proceedings in accordance with the opinion.

Maintenance - Child Support - Equitable Distribution - Error for the Supreme Court to Direct That That Separate Property Be Sold. Plaintiff Entitled to a Credit for Her Equitable Share of the Marital Funds That Used to Pay off the Mortgage That was the Defendant's Separate Debt. Accordingly, the Matter Was Remitted to the Supreme Court for the Calculation of That Credit.

In *Davidman v Davidman*, --- N.Y.S.2d ---, 2012 WL 2819349 (N.Y.A.D. 2 Dept.) the defendant acquired the marital residence prior to the parties' marriage, using the proceeds of a settlement from a personal injury action. The deed and mortgage were placed and kept solely in his name. Consequently, the marital residence was separate property. The Appellate Division found that plaintiff failed to carry her burden establishing that the marital residence appreciated in value during the parties' marriage and, if so, that such appreciation was due in part to her efforts. Thus, it was error for the Supreme Court to award the plaintiff a 50% share in the appreciation of the marital residence. Moreover, it was error for the Supreme Court to direct that this separate property be sold (see *London v. London*, 21 AD3d at 603). However, the plaintiff was entitled to a credit for her equitable share of the marital funds that were used to pay off the mortgage, which was the defendant's separate debt. Accordingly, the matter was remitted to the Supreme Court for the calculation of that credit.

Since the Supreme Court did not direct the plaintiff to pay the carrying charges for the marital residence, including the mortgage, during the pendency of her exclusive occupancy of it, the defendant became obligated to do so, while also paying child support. Moreover, the Supreme Court did not award the defendant a credit against his child support obligation for any portion of the carrying charges he paid during the plaintiff's exclusive occupancy of the marital residence. As a result, the defendant was making double shelter payments. (*Mosso v. Mosso*, 84 AD3d 757, 759). Therefore, the matter had to be remitted to the Supreme Court for a recalculation of the defendant's child support obligation, with the defendant receiving a credit for any double shelter payments he previously made.

Appellate Division, Third Department

Child Support - Award - Split Physical Custody - When Custodial Arrangement Splits Children's Physical Custody So That Neither Parent Can Be Said to Have Physical Custody

of the Children for a Majority of the Time" the Parent with the Greater Pro Rata Share of the Child Support Obligation Should Be Identified as the Noncustodial Parent

In *Smith v Smith*, --- N.Y.S.2d ----, 2012 WL 2848686 (N.Y.A.D. 3 Dept.) Plaintiff and defendant were married in 1996 and had twin sons (born in 1996) and a daughter (born in 2004). In 2009, plaintiff commenced the action for divorce. After a trial, Supreme Court issued findings of fact and conclusions of law which provided that it was in the best interests of the children that the parties have "joint custody with shared parenting as set forth in the existing temporary order ... [which order] shall become the permanent order of the [c]ourt." Supreme Court also "deemed [plaintiff] to be the non-custodial parent by virtue of his greater income for purposes of child support," and directed plaintiff to pay an amount of support to defendant pursuant to Domestic Relations Law 240(1-b). The parties' marriage was thereafter dissolved by judgment of divorce which incorporated the findings of fact and conclusions of law. The judgment, specifically provided that the children's primary residence would be with plaintiff.

The Appellate Division held that Supreme Court erroneously designated plaintiff as the noncustodial parent and required him to pay child support. It observed that generally, the custodial parent for purposes of child support is the parent who has physical custody of the children for the majority of the time. In such cases, the court may determine which parent is the custodial parent based on the " 'reality of the situation' " (*Bast v. Rossoff*, 91 N.Y.2d at 728). It is only when "the parents' custodial arrangement splits the children's physical custody so that neither can be said to have physical custody of the children for a majority of the time" that the parent with the greater pro rata share of the child support obligation as calculated pursuant to the Child Support Standards Act should be identified as the noncustodial parent (*Baraby v. Baraby*, 250 A.D.2d 201, 204 [1998]). Here, Supreme Court's judgment provided that the children's primary physical residence was with plaintiff and set a parenting schedule that undisputedly resulted in the children being with plaintiff 18 nights out of every 28 nights and with defendant 10 nights out of every 28 nights during the school year. For the remainder of the year, including school recesses and holidays, the parties shared parenting time equally. Inasmuch as "shared" custody is not synonymous with "equal" custody and plaintiff clearly had physical custody for a majority of the time during the greater part of the year, Supreme Court incorrectly determined that plaintiff was the noncustodial parent for child support purposes by virtue of his higher income, and erred in directing plaintiff to pay child support to defendant. It reversed the direction to pay child support to defendant and remitted the matter Supreme Court for further proceedings.

Agreements - Construction - "Inherited" - In Construing the Provisions of an Agreement the Court Should Consider the "Plain Meaning" of the Words and Phrases Used by the Parties

In *Momberger v Momberger*, --- N.Y.S.2d ----, 2012 WL 2849162 (N.Y.A.D. 3 Dept.) the parties executed a separation agreement in 2007, later incorporated but not merged into their April 2009 judgment of divorce, providing that plaintiff would pay defendant \$1,000 a month in maintenance. Under the terms of the agreement, plaintiff's maintenance obligations would be either reduced if defendant inherited over \$100,000 or terminated if the inheritance exceeded \$200,000. In January 2009, defendant was deeded a remainder interest in her father's residence, which was valued at over \$200,000, subject to a life estate retained by the father. Upon the death of defendant's father in 2010, plaintiff claimed that defendant had "inherited" the residence and ceased making maintenance payments. Plaintiff thereafter sought an order terminating his maintenance obligation and directing defendant to disclose information related to her inheritance. Supreme Court denied plaintiff's motion.

The Appellate Division affirmed. It rejected plaintiff's challenge to Supreme Court's finding that defendant did not inherit her father's residence for purposes of the separation agreement. In considering the "plain meaning" of the words and phrases used by the parties in the separation agreement it noted that an "inheritance" is commonly defined as property acquired "under the laws of intestacy" or "by bequest or devise" (Black's Law Dictionary [9th ed 2009]). Plaintiff conceded that defendant's father made a valid inter vivos gift of a remainder interest in his residence to defendant, and that interest was indefeasible and immediately vested upon the deed's delivery. Accordingly, Supreme Court properly concluded that defendant's interest had been transferred prior to her father's death and did not constitute an inheritance for purposes of the separation agreement.

Divorce - Grounds - Domestic Relations Law §170(7) - Irretrievable Breakdown - Divorce on Irretrievable Breakdown Grounds Is Not Another Action Pending for the Same Relief Where Other Action Is Based upon Cruel and Inhuman Treatment and Abandonment.

In *Rinzler v Rinzler*, --- N.Y.S.2d ----, 2012 WL 2849241 (N.Y.A.D. 3 Dept.), plaintiff commenced an action for divorce on the grounds of cruel and inhuman treatment and abandonment in 2009. Defendant answered and counterclaimed for spousal support arrears. In September 2010, after enactment of Domestic Relations Law § 170(7), plaintiff unsuccessfully sought defendant's consent to discontinue the action, presumably so that he could commence a new action based on the recently added no-fault ground. In March 2011, plaintiff commenced an action for divorce pursuant to Domestic Relations Law §170(7). Supreme Court granted Defendants motion to dismiss the action on the basis that there was "another action pending between the same parties for the same cause of action" (CPLR 3211[a][4]).

The Appellate Division reversed. It did not agree that the complaint in the second action alleged the same cause of action as the complaint in the first action. It observed that in determining whether two causes of action are the same, it considers "(1) [whether]

both suits arise out of the same actionable wrong or series of wrongs[] and (2) as a practical matter, [whether] there [is] any good reason for two actions rather than one being brought in seeking the remedy". (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:15, at 29). Plaintiff's first complaint sought a divorce on the grounds of cruel and inhuman treatment and abandonment. To obtain a divorce on the ground of cruel and inhuman treatment, plaintiff was required to show that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.(Domestic Relations Law § 170[1]). The other ground asserted by plaintiff in the first action required proof of the abandonment of the plaintiff by the defendant for a period of one or more years (Domestic Relations Law § 170[2]). On the other hand, the complaint in the second action sought a no-fault divorce. Such relief requires a sworn declaration that the marriage was irretrievably broken for a period of at least six months (Domestic Relations Law § 170[7]). In its view these causes of action were not the same.

Turning to the second prong of the inquiry, as a practical matter, there was a good reason to allow plaintiff to maintain this action. As the Legislature noted, the intent of no-fault divorce was "to lessen the disputes that often arise between the parties and to mitigate the potential harm to them ... caused by the current process" Similarly, the Governor stated, in signing the legislation, that its intent was to "reduce litigation costs and ease the burden on the parties in what is inevitably a difficult and costly process.". Thus, allowing plaintiff to proceed on the cause of action for a no-fault divorce, which was not available to him at the time he commenced the first action, would not "unreasonably burden ... defendant with a series of suits emanating from a single wrong merely by basing each suit on a different theory of recovery".

It rejected the defendant's contention that having previously commenced an action prior to the effective date of Domestic Relations Law § 170(7), plaintiff may not avail himself of the benefit of the no-fault provision by commencing a new action because it would contravene the Legislature's intent regarding the statute's effective date. Unlike the equitable distribution statute, which substantially expanded the economic rights of a spouse in a divorce the change created by Domestic Relations Law 170(7) simply provides another ground for obtaining a divorce . Thus, allowing plaintiff to maintain the new action for a no-fault divorce would not circumvent the Legislature's intent.

Antenuptial Agreements - Construction - Where a Contract Employs Contradictory Language, Specific Provisions Control over General Provisions

In *Herr v Herr*, --- N.Y.S.2d ----, 2012 WL 2849472 (N.Y.A.D. 3 Dept.) Plaintiff and defendant, who had each gone through a divorce, began to discuss marriage in 2002. As part of that discussion, plaintiff encouraged defendant to prepare a prenuptial agreement in order to overcome his reluctance to remarry and to accommodate each party's desire to

devise certain assets to their children from their previous marriages. Defendant then contacted an attorney to draft an agreement that would allow the parties to opt out of the statutory scheme governing equitable distribution. When defendant presented an early draft of the agreement to plaintiff in 2003, she objected to its failure to provide for her in the event that defendant died while the parties were still married. Defendant had his attorney add language to the agreement stating that it would not preclude plaintiff from making claims on defendant's separate property in the event of his death. Additionally, language which required the parties to forfeit their rights to each other's retirement plans by consenting to the beneficiary designation made by the other party was completely eliminated. Apparently satisfied with the changes, plaintiff executed the agreement and, two days later, the parties were married.

In 2010, plaintiff commenced this action for divorce and, moved for an order setting aside the prenuptial agreement. Following hearings, Supreme Court found that the evidence did not support plaintiff's contention that the signing of the agreement was the product of duress or coercion. Nevertheless, the court held that the terms of the agreement were unconscionable because, as read by the court, they did not allow plaintiff any interest in defendant's property in the event that the marriage terminated by his death and, since that was the provision that plaintiff had insisted on, she could not have understood its language. It granted plaintiff's motion to set aside the agreement.

The Appellate Division reversed. It held that Supreme Court erred. "[D]uly executed prenuptial agreements are generally valid and enforceable given the 'strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements' " (*Van Kipnis v. Van Kipnis*, 11 NY3d 573, 577 [2008], quoting *Bloomfield v. Bloomfield*, 97 N.Y.2d 188, 193 [2001]). Such an agreement is construed in accord with the parties' intent, which is generally gleaned from what is expressed in their writing. So long as the agreement is fair on its face, it will be enforced according to its terms absent proof of fraud, duress, overreaching or unconscionability. In holding that the prenuptial agreement was unconscionable, Supreme Court erroneously interpreted the agreement's provisions as failing to provide for plaintiff in the event of defendant's death during the parties' marriage. The agreement's second recital stated that the parties desire their separate property, as defined in the agreement, to be free from any claim of the other if the marriage were to terminate "other than by death." Paragraph 1.1 of the agreement further emphasized that the parties waived their right to share in each other's separate property in the event the marriage terminates other than by death. Paragraph 1.2 specifically provided that the parties do not waive any rights to share in each other's separate property in the event of death. While paragraph 1.3 stated that "neither party shall at any time make a claim against the separate property owned by the other" and, when read separately, it may suggest an internal inconsistency in the document, a contract should be interpreted in a way which reconciles all its provisions, if possible. Thus, where a contract employs contradictory language, specific provisions control over general provisions. Here, paragraph 1.2 carved out a specific exception to the general language of paragraph 1.3 and, taken together, these provisions established that plaintiff retained a

right to her elective share in defendant's separate property in the event that the marriage terminated by death. Accordingly, it disagreed with Supreme Court's determination that plaintiff's interest in defendant's separate property was "at best, illusory." In view of this, it did not have to consider the extrinsic evidence of the parties' intent.

Agreements - Construction - Termination Provision - Dum Custa Clause - Supreme Court Finds No "Spousal Type of Relationship" Where No Economic Partnership

In *Fecteau v Fecteau*, --- N.Y.S.2d ----, 2012 WL 2923994 (N.Y.A.D. 3 Dept.) the parties entered into a separation agreement in 2004 in which defendant agreed to pay plaintiff a monthly spousal support payment until the occurrence of any one of four specified termination events. The agreement, amended in 2005 as to the monthly payment, was incorporated into, but not merged with, a 2007 judgment of divorce. One of the events that would trigger termination of plaintiff's spousal support was her "living habitually with another person over the age of [18] years in a spousal type of relationship." In September 2010, defendant moved to terminate his spousal support obligation, alleging that plaintiff had triggered the termination provision by cohabiting with an adult male. After a full hearing, Supreme Court denied the motion and awarded plaintiff counsel fees.

The Appellate Division affirmed. It found that the record amply supported the conclusion that plaintiff had been living habitually with the male, an adult. The dispute distilled to whether plaintiff's relationship with him was a "spousal type of relationship" within the meaning of the separation agreement. Consideration of the entirety of the agreement failed to shed light on the parties' intent in drafting the "spousal type of relationship" language, although it was clear that it did not equate to marriage inasmuch as the agreement contained a separate termination provision regarding remarriage by plaintiff. Both parties appeared to concede, and the court agreed, that, given the ambiguous language, it was necessary for Supreme Court to hold a hearing to consider extrinsic evidence in order to determine their intentions (see *Dagliolo v. Dagliolo*, 91 AD3d at 1260).

Defendant testified that, although not represented by counsel during the negotiations, he was "very actively involved" in drafting the terms of the agreement, and that it was he who proposed the phrase at issue. As to his intent in including the "spousal type of relationship" phrase, defendant provided various explanations, including: that it was "intended to cover any and all possible occurrences of [plaintiff] living under the same roof in any type of relationship, under any circumstance, with anyone on a regular basis, over the age of 18"; Plaintiff testified, among other things, that she thought a "spousal type of relationship" was "being married in every way other than that legal piece of paper, total."

Supreme Court found the majority of defendant's testimony regarding his intentions surrounding the disputed phrase to be self-serving and incredible and rejected his broad

proposed definition of the phrase. The court found plaintiff's testimony and that of the male to be credible and concluded that the evidence demonstrated that their relationship was not a spousal type of relationship within the meaning of the termination clause.

The Appellate Division held that the record fully supported Supreme Court's conclusion. Plaintiff and the parties' teenage daughter moved in with the male in the spring of 2010. According to plaintiff, she was experiencing financial hardship from her mortgage payments and carrying charges on her house and substantial credit card debt. After discussing her finances with the male, the two agreed that plaintiff and the daughter would stay in his home until plaintiff became financially secure, and that this arrangement would keep the daughter in their current school district and allow plaintiff to sell her house. Although this arrangement did not initially require plaintiff to pay rent or utilities, they did agree that she would begin to pay both after the sale of her house. While they did not determine an exact date where the arrangement would end, they believed that it would take approximately two to three years before plaintiff was financially secure, at which point she planned to purchase or rent a residence of her own. Plaintiff's attempts to carry through with this plan were evidenced by her efforts to sell her house after making various renovations, with his assistance, to make it more attractive to buyers. While there was evidence that plaintiff and the male share many responsibilities around his home, including cooking meals, buying groceries and doing laundry for one another, the record demonstrated that all of plaintiff's finances remained independent of his and neither held any expense, debt or asset of the other. The only evidence of money being exchanged between them was his \$2,000 loan to her in 2008, which she had fully repaid before the hearing. Although plaintiff named him as the beneficiary of a \$25,000 term life insurance policy, she testified that she did so because he is familiar with her children, and she trusted him to distribute the proceeds among her children according to their needs. Although his current marriage would prohibit any greater commitment until after any divorce proceedings were finalized, the male and plaintiff both testified that, while their relationship was romantic they had not discussed any such plans.

Maintenance - Award - Equitable Distribution - Award - Plaintiff Was Entitled to a Credit for Half of the Marital Funds Used to Reduce Defendant's Separate Indebtedness - Domestic Relations Law § 236[b][5][D] [13] - Court May Consider Transfers Made in Contemplation of a Matrimonial Action as One of the Factors in Equitably Distributing Marital Property

In *Biagiotti v. Biagiotti*,--- N.Y.S.2d ---, 2012 WL 2849476 (N.Y.A.D. 3 Dept.), the parties were married in September 2002. In June 2010, when plaintiff was 48 and defendant was 54, plaintiff commenced the divorce action. In response to a request for temporary relief, Supreme Court granted plaintiff exclusive use and occupancy of the marital residence, instructed defendant to pay carrying costs on the residence, awarded plaintiff \$250 per month in temporary maintenance and ordered the equal division of a Charles Schwab investment account held in defendant's name that was valued at around \$20,000.

Following trial, Supreme Court granted plaintiff a divorce, equitably distributed the parties' property, and awarded plaintiff exclusive use of the marital residence until August 2012 and maintenance of \$250 per month for 15 months and \$125 per month for three years thereafter or until she remarries, whichever comes first. The judgment contradictorily stated that \$250 should be paid for 12 months and 15 months.

The Appellate Division held that Supreme Court did not err with respect to its award of maintenance to plaintiff. The court identified 11 factors that it found particularly relevant here. This was not a marriage of long duration, the parties did not have any children in common, they were in relatively good health and employed, and they enjoyed an upper middle class standard of living. Plaintiff had been occupying the marital residence, which was defendant's separate property, while defendant had been paying the carrying costs. Although plaintiff earned significantly less than defendant, her salary was approximately \$40,000 and she received child support for her child from a previous marriage. She was also attending college and planned to become a certified public accountant in the near future, which will enhance her earning potential. "[M]indful that the primary purpose of maintenance is to encourage self-sufficiency by the recipient," and noting that Supreme Court considered the relevant statutory factors, it could not say that the court abused its discretion in awarding plaintiff maintenance.

The Appellate Division held that Supreme Court did not err in distributing the appreciation in value of the marital residence. The parties agreed that the residence, which defendant owned prior to the marriage, was defendant's separate property. Appreciation in value of separate property can become marital property if the appreciation is due to the contributions or efforts of the nontitled spouse. The parties stipulated that the residence increased in value by \$105,500 between the date of marriage and date of commencement of the divorce action, and that they spent \$185,000 to improve the home. The evidence showed that defendant was more personally involved in the renovations than plaintiff. The renovations were paid for with marital funds. According to an appraisal the improvements only accounted for approximately \$11,000 of the increase in value. Considering the parties' different levels of involvement, and that most of the appreciation was passive based on market forces rather than related to the improvements, the court did not err in granting plaintiff 15% of the amount of the property's appreciation.

The Appellate Division held that Plaintiff was entitled to a credit for half of the marital funds used to reduce defendant's separate indebtedness. "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" (*Burtchaell v. Burtchaell*, 42 AD3d 783, 786 [2007]). Defendant testified that he had a mortgage and a home equity line of credit as liens against his home prior to the marriage. In 2003, shortly after the marriage, he refinanced the mortgage and paid off the existing line of credit by rolling it into the new mortgage. The parties each testified that the mortgage payments were made from a checking account where both parties deposited their paychecks. The amount of the refinanced mortgage was reduced by \$24,028 during the marriage. As these payments from marital funds reduced

defendant's indebtedness on his separate property, plaintiff was entitled to recoup \$12,014, or half of the marital funds applied to this separate debt. The Appellate Division held that Supreme Court properly divided the debt from the home equity line of credit. After refinancing the mortgage, defendant took out a new line of credit. Both parties testified that it was repeatedly borrowed against and paid down during the marriage from marital funds. Defendant testified that they borrowed to pay for home maintenance and repairs, vehicles, furniture and other living expenses. As this evidence established that the line of credit was used for marital expenses and plaintiff's evidence did not refute this, the court did not abuse its discretion by equally dividing the debt between the parties.

The Appellate Division modified Supreme Court's distribution of the parties' retirement accounts. The court relied upon the same factors for analyzing defendant's retirement plan as for plaintiff's retirement plan and IRA, yet awarded plaintiff 10% of defendant's account while giving defendant 20% of plaintiff's accounts. Based on the parties' disparate incomes, and the court's lack of any explanation for the discrepancy in the percentages awarded for these similar assets, it modified by awarding each party 10% of the other's retirement plans.

The record did not include any value for defendant's three IRAs for any time period between the date of commencement of the action and the date of trial. As Supreme Court must use a valuation date within that time frame (Domestic Relations Law 236[B][4][b]), the court could not assign a value to these assets. The burden of proving the value of a pension rests on the party seeking an equitable share of that pension. Because plaintiff did not meet her burden, the court did not err in declining to distribute any portion of defendant's IRAs to plaintiff.

The Appellate Division held that Supreme Court erred by ordering defendant to reimburse plaintiff for all withdrawals from his Charles Schwab account made in the six months prior to commencement of this action. A court may consider transfers made in contemplation of a matrimonial action as one of the factors in equitably distributing marital property (Domestic Relations Law § 236[B][5][d] [13]). In the months prior to commencement, and after defendant had informed plaintiff of his desire to end the marriage, defendant withdrew over \$17,000 from the subject account. The account was marital property, so the court did not err in determining that plaintiff was entitled to credit for some of the amounts that defendant had withdrawn from that account. On the other hand, plaintiff already received the benefit of the amounts that defendant used to make a payment toward the loan on plaintiff's vehicle and for a utility bill at the marital residence where she was living. These were not improper transfers made in contemplation of the divorce but, instead, were ordinary living expenses that inured to plaintiff's benefit. Thus, the court erred in requiring defendant to repay plaintiff \$500, representing half of the vehicle payment, and \$505.82, representing half of the utility bill.

Supreme Court

Divorce - Grounds - Domestic Relations Law § 170(7) - Irretrievable Breakdown - Separation Agreement Which Resolves All Issues Between the Parties Is Not a Bar to the Granting of Summary Judgment

In *Burger v Burger*, 2012 WL 2849614 (N.Y.Sup.), 2012 N.Y. Slip Op. 22181 Unreported Disposition, Plaintiff ("Wife") moved for an Order awarding her summary judgment as a matter of law; granting a judgment of absolute divorce in favor of the dissolving the marriage upon the ground of an irretrievable breakdown of the marriage for a period of at least six months; incorporating by reference the terms of the written Agreement of Separation entered into between the parties on April 18, 2011, such that same shall survive and not be merged into the Judgment of Divorce; and directing Husband to reimburse Wife the reasonable counsel fees and costs incurred her in connection with the motion.

The parties were married on July 2, 1994, and there were two children of the marriage. On or about September 1, 2009, the wife commenced an action for divorce, which was resolved pursuant to a Separation Agreement executed and acknowledged by the parties on April 18, 2011. On or about January 17, 2012, the wife commenced another action for divorce, by the filing of a Summons and Verified Complaint, upon the grounds set forth in DRL § 170(7) an irretrievable break down of the marriage for a period of six months. She requested that the Court incorporate the terms of the Separation Agreement into a Judgment of Divorce.

In opposition to Wife's motion, the husband argued that at the time they entered into the Separation Agreement, it was the parties' intent to live pursuant to the agreement for a period of at least two years, so that he could continue to receive health benefits. He did not cite any provision in the Agreement requiring the parties to remain separated and living under the Agreement for at least two years. The Husband counter-claimed for specific performance of Article VII of the Separation Agreement, which provided for future medical coverage of each party.

The Supreme Court found that under the terms of the Separation Agreement, the wife was not precluded from bringing the action for divorce under DRL §170(7), notwithstanding the fact that parties had not been living separate and apart under the agreement for at least one year. DRL § 170(7) provides that an action for divorce may be maintained by a husband or wife to obtain a Judgment of Divorce dissolving the marriage where 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. 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 fees and experts' fees 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.

It was undisputed that all of the issues set forth in DRL § 170(7) were fully resolved by the Separation Agreement. What remained in the action were the parties' respective claims of non-compliance. Supreme Court granted the motion. It held that non-compliance with/or enforcement of the Separation Agreement is not an element of DRL §170(7) such that the Court would be without the authority to grant the wife a Judgment of Divorce based upon the wife's sworn statement that the parties' marriage had been irretrievably broken for a period of six months, and the existence of the parties' Separation Agreement pursuant to which all financial and ancillary issues had been resolved. The statute does not require compliance with the terms of an agreement between the parties, and this Court is not authorized to add or insert requirements.

Family Court

Family Court - Family Offenses - Family Ct Act §812 - Order of Protection- Jurisdiction - No Intimate Relationship Where Parties Met on the Internet , Communicated by Email, Met Once Socially and Never Had Any Kind of Sexual Relationship.

In Matter of Shannon M. v. Michael C., --- N.Y.S.2d ----, 2012 WL 2877566 (N.Y.Fam.Ct.) Petitioner filed a family offense petition seeking an order of protection against the Respondent. In the petition the Petitioner alleged that the most recent incident was on September 20, 2011 at her residence: "Respondent e-mailed Petitioner with a bizarre message that his protests are going to start again soon.'His protests involve his delusional belief that Petitioner owes him money for carpentry work done inside her brownstone 1 ½ years ago. Petitioner has long since paid the Respondent for services rendered, and after she received last night's e-mail, she made it clear to him via e-mail that she was not going to pay him a second time for the work already paid for. That led to another e-mail from Respondent this morning, in which he continued his harassing and threatening behavior telling her in the e-mail that this is going to stop;' just pay me, pay me, pay me.' He also said to Petitioner that he was really enjoying this' and that she should be logical and just pay him'." Additionally on 8/29/11 at 10:30 a.m. at Petitioner's residence, Respondent arrived with an unidentified man, both unannounced and uninvited, and they both screamed and banged on Petitioner's front door for 45 minutes, demanding money to go away.' Petitioner called 911; Respondent overheard this call from outside the residence, which led to more screaming on his part. He left with this threatening warning: We'll be back and stronger'." A third incident, not pled in the petition but testified about by the Petitioner and one of her witnesses, without objection, involved an encounter

between the parties in Prospect Park on the evening of June 30, 2011 when she alleged the Respondent intruded on her picnic with friends and began "relentlessly" talking to her and them about getting paid for the work he did on her house.

At the hearing Respondent maintained the matter should be dismissed, in the first instance, for lack of subject matter jurisdiction because the parties were involved in nothing more than a business transaction and there was no evidence to support a conclusion that this was an "intimate relationship" as that term is defined in the statute.

The Petitioner maintained there was subject matter jurisdiction and the petition should not be dismissed as an "intimate relationship" was established based on their numerous, lengthy chats and e-mails and the three dates they had between January and mid-February 2010 before they entered into a business relationship.

The Family Court found that there was no intimate relationship and dismissed the petition for lack of jurisdiction. It observed that under the definition in Family Court Act, in 812.1 (e) the phrase, "members of the same family or household," includes "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." In determining whether an "intimate relationship" exists between the parties, the Legislature set forth a dearth of factors for the courts to consider. "Leaving more precise definition to the courts, the legislature suggested factors to be considered in determining whether an intimate relationship exists including but not limited to the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between persons; and the duration of the relationship" (*Lodichand v. Kogut*, 30 Misc.3d 891 [Sup Ct Nassau County 2011]). However, the Legislature did exclude from the statute's protection "casual acquaintances" and "ordinary fraternization between two individuals in business or social contexts." The Appellate Division, Third Department suggested that "[b]ecause the Legislature declined to include a definition of the term intimate relationship' in Section 812(1)(e) ... courts should construe the term using its usual and commonly understood meaning" (*Jessica D. v. Jeremy H.*, 77 AD3d 87, 89-90 [3rd Dept 2010]).

Based on the evidence it was clear that the contact and communication began as just ordinary fraternization in a social context. When the parties lost interest in each other, she by "discovering [he] was crazy," and he by meeting "the girl of his dreams," the conversation changed to ordinary fraternization in a business context. The evidence was clear that in January and February 2010, the parties were prospecting for an intimate relationship and their contact over the internet focused on getting to know each other. Since it is not uncommon for people who meet over the internet to ask for a date to meet the person in a public place to see if they live up to the picture and promotion contained in their profiles and whether there is any "chemistry" between them, the Petitioner's testimony that the Respondent immediately asked her for a date on January 2, 2010 was not contrary to the conventions of online dating. There was no evidence the content of the parties' chatting and e-mailing went beyond casual conversation about each other's

history and interests. The personal content revealed in their conversations was innocuous. There was no evidence of sexual undercurrents or emotional investment in their chatting or e-mailing. In these exchanges the parties did not reveal the kind of information from which it could be assumed a personal relationship existed. The flirtations revealed in these conversations were precisely what the Respondent labeled them-"just banter" between two casual people who have never met "and not the stuff of an actual true intimate relationship."The Respondent's final attempt to show that theirs was not an intimate relationship was based on the domestic incident report which the Petitioner filed on August 29, 2011 in which she identified the relationship of the victim to the perpetrator as "employee, not boyfriend, ex-boyfriend or intimate partner."

Even though the Petitioner ultimately gave the Respondent her cell phone number, there is no evidence the dialogue between them moved off the printed electronic page to a live, in-person cell phone conversation. There was no evidence the parties utilized Google Talk or Skype software with a webcam to engage in voice and video chats online. Within a few weeks the parties' flirtation fizzled without incident and their attention quickly turned from a social purpose to a business one.

Surrogates Court

Adoption - Domestic Relations Law § 110 - Standing - a Functioning Second Parent Has Standing to Adopt a Child Where Petitioner and the Child's Adoptive Father Were Not Married, Did Not Live Together, Had Never Had a Spousal Relationship, and Were Not "Unmarried Intimate Partners."

In re Adoption of a Child Whose First Name is Chan, --- N.Y.S.2d ----, 2012 WL 2923194 (N.Y.Sur.), 2012 N.Y. Slip Op. 22196 Petitioner ERJ and LMB had a romantic relationship which led them to desire to adopt a child together. ERJ was active in charitable pursuits in Cambodia, and while there located an orphaned boy, Chan, the subject of the current proceeding. At the time, the United States had a moratorium on adoption of Cambodian children, so the only way for Chan to enter the U.S. was through a humanitarian visa based on alleged medical problems. Once here, ERJ and LMB tried several schemes to have LMB adopt the child through his alleged membership in an Indian tribe, or in Trinidad and Tobago, where LMB was born, and which citizenship he re-obtained in efforts to avoid the U.S. moratorium. During this time, Chan, now called William, lived with ERJ where he was cared for by a nanny who had raised ERJ's other, biological children. LMB was a constant visitor, was acknowledged as William's father, and he and his family were very much a part of William's life. Unfortunately, the relationship between ERJ and LMB soured, and after some time she cut off LMB's contact with William. In early 2006 she petitioned this court to "re-adopt" William, based on what she stated was

her earlier Cambodian adoption. LMB was not given notice, did not appear, and the adoption was granted in April 2006 in routine manner. When LMB subsequently learned of the adoption, he brought a proceeding to vacate it on the ground, inter alia, that he had validly adopted William in Cambodia, that his alleged renunciation of that adoption was invalid because it did not comply with the requirements of New York law, and that ERJ's subsequent Cambodian adoption and New York re-adoption were, therefore, void.

ERJ then took the position, contrary to her re-adoption petition, that Cambodia does not grant binding and final adoptions, but, rather, only permission to adopt in a foreign country, here, the U.S. As such, she claimed, LMB had never validly adopted William, thus entitling him to no relief. The court held a trial on Cambodian law which resulted in findings that: a) William, a Cambodian orphan, was validly adopted by LMB under Cambodian law in June 2004; b) the Cambodian adoption should be accorded comity; c) LMB was, therefore, William's legal father; and d) ERJ's adoption of William was vacated, as fatally flawed because LMB's rights were never effectively relinquished; thus, adoption by ERJ could not take place in the absence of notice to, and consent by, LMB. The decision was affirmed by the Appellate Division (Matter of Doe, 58 A.D.3d 186, 868 N.Y.S.2d 40 [1st Dept 2008]), and the Court of Appeals subsequently affirmed (14 N.Y.3d 100, 896 N.Y.S.2d 741, 923 N.E.2d 1129 [(2010)]).

Throughout this entire period LMB was steadfast in this willingness to treat and acknowledge ERJ as William's mother and to enter into a second-parent adoption with her, if permitted by law. In October 2011, the parties entered into a joint parenting agreement which recites, inter alia: "[LMB] shall consent to a second-parent adoption of William by [ERJ] ..." LMB then petitioned to re-adopt his son, William, and ERJ petitioned for a second-parent adoption with a signed consent by LMB.

The Court observed that Domestic Relations Law § 110 states in pertinent part: "An unmarried adult person or an adult husband and his adult wife together or any two unmarried intimate partners together may adopt another person." While the statutory text neither authorizes nor prohibits the adoption of a child by two unmarried individuals, in 1995 the Court of Appeals settled the question of whether unmarried couples are barred under all circumstances from adopting under the statute, holding that an unmarried partner of a biological parent has standing to adopt the child they are raising together (Matter of Jacob, 86 N.Y.2d 651 [1995]). In so holding, the Court advised that while the language of New York's adoption statute must be strictly construed, it must also be interpreted in accordance with the statute's legislative purpose: to effect the best interests of the child. Subsequent cases, relying upon the Court of Appeals' analysis in Matter of Jacob, have interpreted § 110 in a manner that further expands the class of persons who may adopt. While the standing of an unmarried couple to file a joint petition to adopt a child biologically unrelated to either party was not before the Court of Appeals, New York courts have since conferred standing upon unmarried joint petitioners without any biological tie to the child (Matter of Carolyn B., 6 A.D.3d 67, 774 N.Y.S.2d 227 [4th Dept 2004]; Matter of Carl, 184 Misc.2d 646, 709 N.Y.S.2d 905 [Fam Ct Queens County 2000];

Matter of Joseph, 179 Misc.2d 485, 684 N.Y.S.2d 760 [Sur Ct Oneida County 1998]), as well as upon joint petitioners with a remote biological tie (Matter of Emilio, 293 A.D.2d 27, 742 N.Y.S.2d 22 [1st Dept 2002]). And, in 2010, the legislature amended § 110 to specifically include "unmarried adult intimate partners" "to both codify and broaden the ability of domestic partners to undertake a joint adoption". The Court observed that under the law as it currently existed there was no question that an adult unmarried person had standing to adopt under the plain language of §110. Furthermore, there was no question that an adult partner of a child's biological parent had standing to adopt the child under the Court of Appeals' ruling in Matter of Jacob. There was also little question under Matter of Jacob and its progeny that an adult partner of a child's adoptive parent had standing to adopt . And there was no question that unmarried persons, regardless of their gender, who are "intimate partners," can adopt together. The question remained, however, whether an adult unmarried person had standing to petition to become the second parent of a previously adopted child where petitioner and the adoptive father of the child did not reside together and, in fact, have never had a spousal relationship, and are not currently "unmarried intimate partners."

The Court held, among other things, that the limited issue of petitioner's standing could be determined based on the plain language of the statute with the only inquiry whether petitioner is an unmarried adult. It noted that as stated in Matter of Jacob: "Domestic Relations Law § 110, entitled Who May Adopt,' provides that an adult unmarried person or an adult husband and his adult wife together may adopt another person'.... Under this language, both appellant G.M. in Matter of Dana and appellant Stephen T.K. in Matter of Jacob, as adult unmarried persons, have standing to adopt and appellants are correct that the Court's analysis of section 110 could appropriately end here" (86 N.Y.2d at 660, 636 N.Y.S.2d 716, 660 N.E.2d 397).

The court indicated that once standing is found to exist, courts are still bound to make a further determination as to whether adoption will serve a child's best interest. It may be that in some cases, a court's best interest analysis will lead it to conclude that adoption by a petitioner who does not live with the child and is not romantically involved with the child's legal parent will not serve her or his best interest, even as adoption by a married couple might not. That such a conclusion may ultimately be reached by a given court in a given case does not, however, affect the analysis of whether standing exists in the first instance. Based upon the same considerations identified by the Court of Appeals in Matter of Jacob, this court concluded that, as a "functional parent," ERJ had standing under § 110 to seek to adopt William. This holding had also been implicitly approved by Court of Appeals' apparently favorable notice that, with regard to William's best interest, "LMB is still willing to agree to a second-parent adoption by ERJ" (Matter of Doe, 14 N.Y.3d at 111, 896 N.Y.S.2d 741, 923 N.E.2d 1129).

July 16, 2012

Court of Appeals

Unjust Enrichment - Elements of Cause of Action - Court of Appeals Holds Pleadings must Indicate Relationship Between Parties That Could Have Caused Reliance or Inducement.

In *Georgia Malone & Co., Inc. v. Rieder*, --- N.Y. 3d ----, 2012 WL 2428246 (N.Y.) the Court of Appeals, in an opinion by Judge Graffeo, set forth the current elements to establish a cause of action for "unjust enrichment". In an opinion by Judge Graffeo, the Court observed that " '[t]he theory of unjust enrichment lies as a quasi-contract claim' " and contemplates "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (citing *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 [2009], quoting *Goldman v. Metropolitan Life Ins. Co.*, 5 N.Y.3d 561, 572 [2005]). An unjust enrichment claim is rooted in "the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another". Thus, in order to adequately plead such a claim, the plaintiff must allege "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (citing *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 [2011]).

Judge Graffeo noted that in *Sperry v. Crompton Corp.* (8 N.Y.3d 204 [2007]), the Court held that a plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party. In that case the Court held that, while "a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment," there must exist a relationship or connection between the parties that is not "too attenuated" . More recently, the Court elaborated on the pleading requirements for unjust enrichment in *Mandarin*, (16 N.Y.3d at 177), where, reaffirming *Sperry*, the Court held that although the plaintiff was not required to allege privity, it had to assert a connection between the parties that was not too attenuated. It concluded in that case that "under the facts alleged, there are no indicia of an enrichment that was unjust where the pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement." Judge Graffeo pointed out that the Court's mention of awareness in *Mandarin* was intended to underscore the complete lack of a relationship between the parties in that case. Thus, the pleadings must indicate a relationship between the parties that could have caused reliance or inducement.

Chief Judge Lippman dissented, in an opinion in which Judge Pigott concurred. He pointed out that the majority now required plaintiffs pleading unjust enrichment to have a "sufficient relationship" with defendant, involving "dealings with each other" . He stated that requiring a relationship of mutual dealing where the plaintiff confers a benefit on the unjustly enriched party treads too close to requiring privity, which the Court expressly

disclaimed in Sperry and Mandarin Trading, and that those holdings never required that there be direct contact or a close relationship between the parties.

Appellate Division, Second Department

Maintenance - Award - Factors Considered - Equitable Distribution - Factors Considered - (13) Any Transfer or Encumbrance Made in Contemplation of a Matrimonial Action Without Fair Consideration-

Defendant Should Have Been Charged with Marital Waste Based upon to Agree to File Joint Income Tax Returns - Required Life Insurance Should Be Declining Term.

In *Leavitt v Leavitt*, --- N.Y.S.2d ----, 2012 WL 2580397 (N.Y.A.D. 2 Dept.) Supreme Court, among other things, awarded the wife maintenance of \$7,500 per month until the date of the sale of the marital residence and \$15,000 per month for a period of 10 years thereafter, awarded her retroactive maintenance from the date of the commencement of the action of \$92,177.42, equally distributed the plaintiff's stock, stock options, and interests in two limited partnerships, directed the plaintiff to secure his maintenance obligation by maintaining a life insurance policy with a death benefit in the amount of \$1,800,000, held that the defendant would not be charged with marital waste of \$73,500, and denied her request for an award of an attorney's fee.

The Appellate Division observed that in determining the amount and duration of an award of maintenance, the court "must consider the factors enumerated in Domestic Relations Law § 236(B)(6)(a) , which include the predivorce standard of living of the parties, the income and property of the parties, the equitable distribution of marital property, the duration of the marriage, the present and future earning capacity of the parties, the ability of the party seeking maintenance to be self-supporting, and the reduced or lost earning capacity of the party seeking maintenance. Considering the relevant factors, including the long duration of the marriage, the extended absence of the defendant former wife from the work force, and the parties' predivorce standard of living, the Supreme Court providently exercised its discretion in awarding the defendant maintenance of \$7,500 per month until the date of the sale of the marital residence, and \$15,000 per month for a period of 10 years thereafter. However, the Supreme Court incorrectly calculated retroactive maintenance from the date of the commencement of the action, as it was the former husband who commenced the action. It observed that a party's maintenance obligation commences, and is retroactive to, the date an application for maintenance was first made (Domestic Relations Law § 236[B][6][a]). In addition, the court erred by failing to credit the plaintiff for voluntary maintenance payments he made during the pendency of the action. Consequently, the matter had to be remitted for further proceedings, including a hearing if warranted, to calculate the amount of retroactive maintenance from the date of the defendant's first application for

maintenance, and to credit the plaintiff for any amount of temporary maintenance already paid

The Appellate Division agreed with the plaintiff that the life insurance policy he was required to maintain to secure his maintenance obligation may be a declining term policy that would permit him to reduce the amount of coverage by the amount of support actually paid. Additionally, it found that the Supreme Court should have charged the defendant with marital waste in the sum of \$73,500, representing the amount of additional income tax the plaintiff was required to pay based upon the defendant's failure, as of the time of trial, to agree to file joint income tax returns for 2009 (citing cf. *Teich v. Teich*, 240 A.D.2d 258; *Bursztyn v. Bursztyn*, 379 NJ Super 385, 397-398).

Equitable Distribution - Property Determination - Personal Injury Recovery - Award for Pain and Suffering Transmuted into Marital Property by Deposit into Joint Account.

In *Harris v Harris*, --- N.Y.S.2d ----, 2012 WL 2580405 (N.Y.A.D. 2 Dept.) the parties were married on January 11, 1987, and had two children, born October 26, 1990, and May 18, 1993, respectively. The action for divorce was commenced on September 4, 2007. In a pendente lite order dated June 24, 2008, the Supreme Court directed the plaintiff to pay the monthly carrying charges on the marital residence consisting, inter alia, of mortgage payments. The judgment appealed from directed the plaintiff to pay \$436.19 per week in child support computed pursuant to the Child Support Standards Act, plus 63.41% of future unreimbursed health care expenses, and 65% of certain educational expenses, commencing January 1, 2010. That judgment also directed the plaintiff to continue to pay carrying charges on the marital residence occupied by the defendant and the children until entry of the judgment of divorce, and directed the plaintiff to pay the defendant maintenance of \$1,000 per month for two years after entry of the judgment of divorce, and \$500 per month in the third year following entry of the judgment of divorce. The judgment of divorce was entered on January 11, 2011. Therefore, because of the delay in entering the judgment of divorce, the plaintiff's obligation to pay child support pursuant to that judgment, in addition to obligations pursuant to the pendente lite order, were continued for one year beyond the entry of the judgment.

Both parties acknowledged on appeal that the award of basic child support was excessive. The Appellate Division held that Supreme Court improperly included the children's social security benefits in computing the plaintiff's income (*Graby v. Graby*, 87 N.Y.2d 605). It also held that Supreme Court's directive that the plaintiff pay child support pursuant to the CSSA and the mortgage on the marital residence for the same period of time erroneously granted the children a double shelter allowance. Further, in calculating the plaintiff's child support obligation, which commenced on January 1, 2010, the Supreme Court deducted maintenance from the plaintiff's income notwithstanding that the plaintiff's obligation to pay maintenance only commenced on January 11, 2011, when the judgment

of divorce was entered. Since the court erroneously deducted maintenance from the plaintiff's income in determining child support commencing January 1, 2010, it appeared that the court contemplated that the judgment would be entered, and the maintenance obligation would commence, shortly after January 1, 2010. The one-year delay in entering the judgment, until January 11, 2011, extended the plaintiff's support obligations for an additional year. In view of the foregoing, the plaintiff's obligation to pay maintenance for three years should have commenced on January 1, 2010, and his obligations pursuant to the pendente lite order should have terminated on January 1, 2010.

The Appellate Division held that basic child support pursuant to the CSSA had to be recalculated. The plaintiff's pro rata share of unreimbursed health care expenses also had to be recalculated, since it was directly connected to the basic child support calculation and based upon the plaintiff's share of combined parental income (see Domestic Relations Law § 240[1-b][c][5]). Therefore, it remitted the matter to the Supreme Court, for new determinations of basic child support pursuant to the CSSA and the plaintiff's pro rata share of unreimbursed health care expenses.

The Appellate Division held that under the circumstances of this case, the provisions of the judgment directing the plaintiff to pay 65% of certain educational expenses of the children was a provident exercise of discretion. Considering the long-term marriage of the parties, the predivorce standard of living, the present and future earnings capacities of the parties, and the ability of the defendant to become self-supporting the award of maintenance was proper. However, the Supreme Court should have directed that, in the event that either party dies or the defendant remarries during the period when the plaintiff was obligated to pay maintenance, that obligation would terminate.

The Appellate Division observed that an issue at the nonjury trial was whether the plaintiff's award for pain and suffering, which he received during the marriage in a personal injury action, constituted marital property. The judgment appealed from awarded the defendant the sum of \$63,436.49, representing 25% of the funds remaining from that award maintained in a jointly held account. At the time the plaintiff received the award for personal injuries, that award constituted separate property. However, the plaintiff deposited that separate property into a jointly held investment account, creating a presumption that those funds constituted marital property. Although that presumption is rebuttable, and a depositor may create a joint account with the right of survivorship "without necessarily transferring a present beneficial interest in the funds in the account" (*Wacikowski v. Wacikowski*, 93 A.D.2d 885, 885), here, the plaintiff used money in the account to pay marital expenses. Thus, those funds did not retain their character as separate property. The weight of the credible evidence adduced at trial supported the Supreme Court's conclusion that the plaintiff failed to rebut the presumption that the subject funds were marital property. The award to the wife of counsel fees of \$15,000 was affirmed.

Equitable Distribution - Property Determination - Appreciation of Separate Property - Failure of Proof - Counsel Fee Award - Claim Without Merit Where No Formal Application Made and No Supporting Documentation Submitted.

In *DiNoto v DiNoto*, --- N.Y.S.2d ----, 2012 WL 2580416 (N.Y.A.D. 2 Dept.) the plaintiff wife appealed from that part of a divorce judgment which failed to direct that her name be placed on the deed for, and grant her equal use of the parties' condominium unit in Fort Lauderdale, Florida, awarded her only one-third of the net proceeds from any sale of marital real property located in Whitestone, Queens, and failed to award her an attorney's fee.

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. Here, the trial court providently exercised its discretion in drawing unfavorable inferences from the plaintiff's testimony. In particular, the court correctly determined that the plaintiff's testimony was substantially unworthy of belief. The trial court also properly determined that the plaintiff was not entitled to share in the appreciation in value of the former marital residence, which was the defendant's separate property. Appreciation in the value of separate property is considered 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]). Plaintiff failed to demonstrate that she made either direct financial or any nonfinancial contributions to this property such that the appreciated value was subject to equitable distribution. Inasmuch as the court concluded that the plaintiff was responsible for causing damage to the former marital residence, the court providently exercised its discretion by awarding her only one-third of the net proceeds from any sale of marital real property located in Whitestone, Queens, rather than one-half of the net proceeds from the sale.

The Appellate Division held that the trial court properly determined that a condominium unit located in Fort Lauderdale, Florida, was marital property, and that the parties were to share equally in either the financial loss or gain realized upon the sale or transfer of the property. Accordingly, the judgment was modified to direct that the plaintiff's name be placed on the deed to that property as a tenant in common with the defendant.

The plaintiff's claim that the court should have awarded her an attorney's fee was without merit, "since she never made a formal application for such an award, and submitted no supporting documentation regarding the legal services rendered.

Child Custody - Jurisdiction - Home State - Foreign Country - Domestic Relations Law §§ 75-d, 76 [1][a] and 75-a[7] - New York Not Home State of Child

In *Matter of Malik v Fhara*, --- N.Y.S.2d ----, 2012 WL 2580303 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order of the Family Court which dismissed the father's custody petition for lack of jurisdiction. The child was born in New York on November 20, 2007. The father stated that the mother brought the child to Bangladesh on May 7, 2008. The father filed a custody petition dated December 30, 2008. The father's petition for custody was dismissed on the ground that New York lacked jurisdiction.

The Appellate Division observed that under the Uniform Child Custody Jurisdiction and Enforcement Act specific and limited grounds are set forth to establish initial child custody jurisdiction, including, inter alia, 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" (Domestic Relations Law § 76[1][a]). The home state of the child is "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" (Domestic Relations Law § 75-a[7]). For purposes of the Act, a court must treat a foreign country as if it were a state of the United States (Domestic Relations Law § 75-d).

The Appellate Division held that Family Court properly determined that New York was not the child's home state since, as the father conceded, the child did not live in New York for at least six consecutive months immediately before the commencement of this child custody proceeding, and New York was not the home state of the child within six months before the commencement of the proceeding (Domestic Relations Law § 76[1][a]).

Child Support - Modification - Downward - Law of the Case - Court of Coordinate Jurisdiction Has No Authority to Rule on Matter Already Reviewed by Another Judge of Equal Authority

In *Grossman v Composto-Longhi*, --- N.Y.S.2d ----, 2012 WL 2401852 (N.Y.A.D. 2 Dept.) pursuant to the parties' stipulation of settlement dated April 22, 2005, which was incorporated but not merged into their judgment of divorce entered August 16, 2005, the plaintiff agreed to pay child support to the defendant of \$3,000 per month. In an order dated September 29, 2008, the Family Court granted the defendant's petition for an upward modification and increased the plaintiff's child support obligation to \$4,340 per month. The plaintiff moved for a downward modification of his child support obligation in the Supreme Court, Suffolk County. In an order dated July 20, 2009, the Supreme Court, after a hearing,

granted the plaintiff's motion for a downward modification of his child support obligation. Thereafter, in an order dated April 8, 2010, the Supreme Court granted those branches of the plaintiff's motion which were to transfer a proceeding entitled Matter of Composti-Longhi v. Grossman, which was pending in Family Court, Suffolk County, under Docket No. F-06377-08, to the Supreme Court, Suffolk County, and to vacate orders of the Family Court dated September 29, 2008, and April 10, 2009, respectively, granting the defendant a retroactive increase in child support. Additionally, in an order dated May 11, 2010, the Supreme Court denied the defendant's motion, inter alia, pursuant to 22 NYCRR 130-1.1 to impose sanctions upon the plaintiff and his counsel.

The Appellate Division held that Supreme Court properly exercised its concurrent jurisdiction with the Family Court (N.Y. Const, art VI, s 7[a]) in entertaining the plaintiff's motion for a downward modification of his child support obligation. The plaintiff demonstrated his entitlement to a downward modification of his child support obligation. A party seeking downward modification of a support obligation has the burden of showing a substantial change in circumstances and that he used his best efforts to obtain employment commensurate with his qualifications and experience. The plaintiff showed that his prior employment was terminated through no fault of his own and that, despite his efforts to secure employment commensurate with his qualifications and experience, he was only able to obtain a position at a much lower salary.

However, it held that the Supreme Court should not have granted plaintiff's motion to vacate orders of the Family Court, Suffolk County, dated September 29, 2008, and April 10, 2009, granting the defendant a retroactive increase in child support. A court of coordinate jurisdiction has no authority to rule on a matter already reviewed by another Judge of equal authority. Supreme Court had no discretion to reduce or cancel arrears of child support which accrue before an application for downward modification of the child support obligation.

Child Custody - Visitation - Grandparent Visitation - Domestic Relations Law § 72 - Hearing Not Necessary to Determine Standing Where Order of Protection in Effect.

In *Chifrine v. Bekker*,--- N.Y.S.2d ---, 2012 WL 2580315 (N.Y.A.D. 2 Dept.) the petitioners were the grandmother and step-grandfather of the child, who was born in December 2001, and the respondents were his parents. The petitioners had a close and loving relationship with the child until December 2007, when the grandmother and the mother got into an altercation and the grandmother stabbed the mother with a knife. The mother filed a criminal complaint and the matter was resolved when the grandmother pleaded guilty to disorderly conduct. The mother also filed a family offense petition against both grandparents and requested, and was granted, several orders of protection against the grandmother, prohibiting her from contacting either the mother or the child from December 2007 to December 2010. On April 18, 2008, the grandparents separately

petitioned for visitation. Family Court granted a motion to dismiss on the basis of lack of standing, and dismissed the petitions without a hearing.

The Appellate Division affirmed. It found that petitioner Maxim Chifrine was not the biological grandfather of the child, and he was not a legal grandfather by virtue of adoption. He was, therefore, not the child's grandparent within the meaning of Domestic Relations Law § 72, which governs the standing of grandparents to seek visitation, and had no right thereunder to visitation. The Family Court also properly determined that the petitioner Irina Chifrine lacked standing to seek visitation with the subject child. In considering whether a grandparent is entitled to visitation under Domestic Relations Law § 72 where both parents are alive, the Family Court must determine, first, whether equitable circumstances exist which provide the grandparent with standing and, if such circumstances exist, whether visitation would be in the grandchild's best interest. Under the particular circumstances of this case, a hearing was not necessary to determine that the grandmother lacked the requisite standing.

Appellate Division, Third Department

Child Custody - Jurisdiction - Continuing Jurisdiction - Inconvenient Forum - Domestic Relations Law §§ 76-a[3], 76-f - New York Has Continuing Jurisdiction to Modify its Own Orders until Connections with New York Cease.

In *Matter of Belcher v Lawrence*, --- N.Y.S.2d ----, 2012 WL 2579533 (N.Y.A.D. 3 Dept.) Petitioner (father) and respondent (mother) were the parents of a son (born in 1999) and a daughter (born in 2001). Pursuant to a 2005 New Hampshire judgment of divorce, they were awarded joint legal custody of the children with primary physical custody to the mother and liberal visitation to the father. The father thereafter relocated to New York. In 2006, he commenced a proceeding to modify the New Hampshire custody order. The mother, who did not reside in New York, appeared and was represented by counsel. By order entered in 2007, Family Court granted the father sole legal and physical custody of the son and set visitation between the parents and the children. The mother subsequently relocated with the daughter to Virginia, where she has since resided. In August 2011, the father commenced a proceeding seeking sole custody of the daughter on the ground that the mother's husband had neglected her and subjected her to repeated acts of physical abuse. The petition also alleged that the mother's husband had physically abused the son during a recent visit, and sought to modify the prior order by requiring that visitation between the son and the mother occur outside the presence of the mother's husband. Family Court placed the daughter in the temporary custody of the father, and the mother moved to dismiss the

petition for lack of jurisdiction with regard to the daughter. Family Court found that it lacked jurisdiction to make a child custody determination with respect to the daughter and that, although it had exclusive continuing jurisdiction to determine issues of custody and visitation with regard to the son, New York was "the least convenient forum" to address those claims. Accordingly, Family Court dismissed the petition.

The Appellate Division reversed. It observed that pursuant to Domestic Relations Law § 76-a, a court of this state that has made a child custody determination maintains exclusive continuing jurisdiction over that determination until certain circumstances exist divesting the court of such jurisdiction. Family Court erroneously found that, because its prior order addressed custody only with respect to the son, the court did not have continuing exclusive jurisdiction as to the issue of custody of the daughter. "Child custody determination" is defined, however, as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child" (Domestic Relations Law § 75-a [3]). Thus, as the 2007 order addressed visitation with respect to the daughter, it constituted a prior "[c]hild custody determination" over which Family Court maintained continuing jurisdiction (Domestic Relations Law § 75-a [3]). As Family Court had continuing exclusive jurisdiction over custody matters involving the daughter, that jurisdiction continued until it is determined, as relevant here, that "neither the child [nor] the child and one 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 § 76-a [1][a]). Although Family Court never reached this issue in light of its finding that the 2007 order did not constitute a child custody determination with respect to the daughter, the parties fully argued and briefed it before Family Court and, upon its independent review, the Appellate Division found that Family Court retained jurisdiction over the proceeding.

The father had lived continuously in New York since 2005. This state was also the home of the daughter's brother, who had resided here for the past seven years. The daughter visited with the father and her brother several times each year in New York, including summer vacations and various holidays. Moreover, in the prior custody proceeding, New York exercised jurisdiction over the daughter, an attorney for the child was appointed to represent her and, following a fact-finding hearing, Family Court made decisions about her best interests. Thus, the daughter continued to have a significant connection to New York. Although the events that form the basis of the petition occurred in Virginia, it found that that substantial evidence pertaining to those events, as well as the ultimate issue of custody, lie within this state. The allegations in the petition centered mainly around the alleged abuse and mistreatment of the daughter, who was currently residing in this state albeit on a temporary basis. The son allegedly witnessed the abuse committed upon the daughter and was himself the victim of abuse and neglect. The father witnessed the bruising and other injuries suffered by the daughter, and possessed evidence regarding a conversation he had with the mother following the incident in which she purportedly stated that the physical abuse was "no big deal and well deserved." All of these individuals were present in New York and could provide significant evidence

relevant to the determination at issue. Moreover, evidence regarding what custodial arrangement would serve the daughter's best interests was equally present in New York and, given that Family Court presided over the most recent custody proceeding involving these children, it was the New York courts, not those of Virginia, that possessed pertinent information regarding the parties' past circumstances. Applying the "flexible approach" of Domestic Relations Law § 76-a (1)(a) to the facts of this case the record supported the conclusion that the daughter continued to have a significant connection to New York and that substantial evidence existed in this state regarding her care, protection, training and personal relationships .

The Court rejected the mother's contention that the petition should be dismissed on the ground that New York was an inconvenient forum (Domestic Relations Law §76-f). It noted that this case involved allegations that the children were subject to violence, mistreatment and abuse by the mother's husband. Much of the evidence underlying the allegations of the petition, particularly the testimony of the children, was located in New York and, to the extent that such proof or evidence relating to the best interests of the daughter was available in Virginia, this evidence may be submitted by way of depositions or testimony "by telephone, audiovisual means, or other electronic means" (Domestic Relations Law § 75-j [2]). In addition, having heard the previous custody matter involving these children, the New York Family Court had the ability to expeditiously resolve this matter and was far more familiar with the case than the Virginia courts.

Inasmuch as it was undisputed that Family Court had jurisdiction to modify its 2007 custody order with respect to the son, as he had continuously lived in New York since 2005, and given that the issue of custody of the daughter, which involved the same allegations underlying the request for a modification of the son's visitation, would be litigated in New York, it found that this state was the more appropriate and convenient forum to address issues of visitation with respect to the son.

Appellate Division, Fourth Department

Appeals - Inadequate Record on Appeal - Effect upon Determination - Counsel Fee Reversed Where Trial Court Failed to State its Reasons.

In *Andress v Andress*, --- N.Y.S.2d ----, 2012 WL 2626965 (N.Y.A.D. 4 Dept.) defendant appealed from an order in this post-matrimonial proceeding that, inter alia, directed him to pay plaintiff's counsel fees. The Appellate Division agreed with defendant that the court abused its discretion in granting that part of plaintiff's motion seeking an award of counsel fees. While plaintiff asserted in support of her motion that she incurred counsel fees solely because of defendant's failure to disclose his remarriage, the record

established that, even had he disclosed that information, the contested issues regarding maintenance would have nevertheless required litigation. The record was silent regarding the court's rationale for awarding plaintiff counsel fees, and the court was unable to determine whether the court considered 'appropriate factors' in granting" that part of plaintiff's motion (citing Carnicelli, 300 A.D.2d 1093 (2002) . Therefore, it concluded on the record before it that the award was not appropriate.

Family Court - Family Offenses - Family Ct Act § 812 - Harassment Not Established Where Petitioner Failed to Establish Conduct Had "No Legitimate Purpose".

In Matter of Marquardt v Marquardt, --- N.Y.S.2d ----, 2012 WL 2626949 (N.Y.A.D. 4 Dept.) the Family Court concluded that respondent committed a family offense by engaging in acts that would constitute either first or second degree harassment "by cutting open [her] pills on the counter, knowing that the Petitioner has allergies" to medications. The Appellate Division reversed finding that the evidence was not legally sufficient to establish that she committed a family offense. Although harassment in the first or second degree is a family offense it held that petitioner failed to establish by a preponderance of the evidence that respondent engaged in acts constituting either offense. To establish that respondent committed acts constituting harassment in the second degree, petitioner was required to establish that respondent engaged in conduct that was intended to harass, annoy or alarm petitioner, that petitioner was alarmed or seriously annoyed by the conduct, and that the conduct served no legitimate purpose (Penal Law 240.26[3]). Assuming, arguendo, that petitioner was alarmed or seriously annoyed by the conduct of respondent in opening her medicine to eat it with pudding based on her inability to swallow the pills, and further assuming, arguendo, that respondent thereby intended to harass, annoy or alarm him, the Appellate Division concluded that petitioner failed to establish that the conduct served no legitimate purpose. Petitioner testified that respondent took the medication as prescribed to prevent acid reflux, and that respondent opened the pills and ate the medication with food because she was unable to swallow the pills. With respect to petitioner's allegation that he was allergic to certain medications, he failed to establish that he was allergic to the particular medication taken by respondent, or to introduce any expert evidence in support of his testimony that the medication was "a poison, a toxic poison that causes death."

Similarly, petitioner failed to establish that respondent's acts constituted harassment in the first degree. That statute requires, inter alia, that the perpetrator commit "acts which place [another person] in reasonable fear of physical injury" (Penal Law 240.25). Even assuming, arguendo, that petitioner was in fear of physical injury when respondent opened her medication, the Court concluded for the reasons set forth above that he failed to establish that his fear was reasonable.

Family Court - Jurisdiction - Where Family Court Lacks Jurisdiction Ab Initio All Orders Entered Must Be Vacated.

In *Matter of Allen v Fiedler*, --- N.Y.S.2d ----, 2012 WL 2478244 (N.Y.A.D. 4 Dept.) the child's parents were both deceased. From the child's birth until her mother's death in August 2008, the child resided with the mother. After the mother's death, petitioner, the child's maternal aunt, and the father filed petitions seeking custody of the child. Family Court issued an order awarding custody to the father and visitation to petitioner. Thereafter, the father's health began to deteriorate. In October 2009, the father designated respondent, a family friend, as standby guardian of the child in the event of the father's physical or mental incapacitation or death and, in January 2010, the father executed a last will and testament naming respondent as the child's guardian.

In March 2010, the child began residing with respondent as a result of the father's declining health. In May 2010, Surrogate's Court granted letters of guardianship to respondent, appointing her guardian of the child. The letters of guardianship "authorize and empower [respondent] ... to perform all acts requisite to the proper administration and disposition of the person ... of the [child] in accordance with the decree and the laws of New York State." The father passed away in August 2010. Petitioner then commenced a proceeding in Family Court seeking to "modify" the prior custody order on the ground that the father's death constituted a change of circumstances. The parties entered into a stipulation transferring custody of the child to petitioner, and entitling respondent to one week of visitation with the child each year and telephone contact twice per month. After Family Court entered the modification order based upon that stipulation, respondent moved to vacate the stipulation and modification order on the grounds of duress, unconscionability, ineffective assistance of counsel, and the best interests of the child and to transfer the matter to Surrogate's Court because that court had previously appointed her as the child's guardian. Family Court denied respondent's motion.

The Appellate Division reversed holding that the proceeding had to be dismissed because Family Court lacked jurisdiction ab initio and all orders entered therein had to be vacated. The Appellate Division observed that both Family Court and Surrogate's Court are courts of limited jurisdiction, with concurrent jurisdiction in certain areas and exclusive jurisdiction in other areas. Neither court is superior to the other and neither court's orders take priority over the other's. Family Court and Surrogate's Court share concurrent jurisdiction over the guardianship of minors, although only Surrogate's Court can appoint a guardian of both the person and the property of the child (SCPA 1701; Family Ct Act 661). Where courts have concurrent jurisdiction, the law demands that their orders do not conflict. It is well established that when two courts have concurrent subject matter jurisdiction, once one has exercised jurisdiction in the matter, it should not be entertained by the other. In October 2009, the father, the child's only living parent and legal custodian, commenced proceedings in Surrogate's Court to designate respondent as the child's standby guardian in the event of his physical incapacitation or death. SCPA

103(24) defines "[g]uardian" as "[a]ny person to whom letters of guardianship have been issued by a court of this state, pursuant to this act, the family court act or article 81 of the mental hygiene law." "[L]etters granted by the [Surrogate] are conclusive evidence of the authority of the persons to whom they are granted until the decree granting them is reversed or modified upon appeal or the letters are suspended, modified or revoked by the [Surrogate] granting them" (SCPA 703[1]). Thus, once Surrogate's Court issued letters of guardianship to respondent in May 2010, she became the child's legal guardian.

Five months after the issuance of the letters of guardianship, petitioner commenced this custody proceeding. While guardianship and custody are separate concepts, custody decrees and those appointing a legal guardian of the person create the same sort of relationship between the child and the person to whose care he or she is awarded.. In amending the provisions of the Family Court Act and the SCPA in 2008 concerning the legal powers of custodians and guardians of children, the Legislature stated that "there is no substantive difference between the rights and responsibilities of a custodian or guardian of a child" . Thus, the general rule is that guardianship of the person of an infant implies the custody and control of the person of an infant .

The Appellate Division concluded that Family Court erred in ignoring the letters of guardianship and the prior decree of Surrogate's Court, and in entertaining the petition inasmuch as Family Court lacked jurisdiction from the outset. Nothing in the Family Court Act permits Family Court to amend or supersede an order of Surrogate's Court, which is in essence what Family Court did when it awarded custody of the child to petitioner despite the letters of guardianship appointing respondent as the child's guardian. SCPA 701(3) specifically provides that "[n]o court except the court which issues letters [of guardianship] shall have power to suspend, modify or revoke them, so long as the court issuing them has jurisdiction of the estate or matter in which the letters were issued." Family Court therefore lacked authority to act as it did, by in effect revoking the letters of guardianship granted to respondent.

The Court noted that that, aside from general principles of comity and the first-in-time rule, Surrogate's Court was the proper forum in which to determine the custody and guardianship of the child in light of the father's designation of respondent as the child's guardian in his will (SCPA 1701). A court "cannot disregard the testamentary provisions for guardianship, unless the welfare of the child demands it (Matter of Lewis's Will, 74 N.Y.S.2d 865, 867; see Matter of Sapanara, 89 Misc.2d 956, 960). Although the father's will had not been submitted to probate prior to commencement of the proceeding, the will was subsequently filed with Surrogate's Court and a probate petition was pending when respondent moved to vacate the modification order.

Supreme Court

Equitable Distribution - Maintenance - Property Distribution - Removal of Barriers to Remarriage - Domestic Relations Law § 236[B][5][h] - Husband to Forfeit Maintenance and Equitable Distribution If He Doesn't Remove Barriers to Remarriage.

In *Mojdeh M. v. Jamshid A.*, 2012 WL 2732169 (N.Y.Sup.), 2012 N.Y. Slip Op. 51236(U), Unreported Disposition, the parties were married on October 21, 1996 in a religious ceremony. The husband was 56 years of age and the wife was 41 years of age. The wife was granted a divorce on the grounds of constructive abandonment and the wife was awarded custody of the parties' child. The Supreme Court, in a very lengthy decision, made awards of maintenance to the unemployed husband, directed he pay child support and divided the parties marital property equitably, but denied the parties requests for counsel fees.

At trial the wife testified that since the date she commenced the action, on December 27, 2007, she repeatedly asked the husband, both in person and by email, to accompany her to a mosque to obtain a religious divorce. The wife averred that in accordance with the parties' religious practices in the Islamic faith, the husband had to accompany the wife to a mosque where "...there is a gentleman or lady that will read some part of the Koran that we are divorced. So it's going to be transported to [her] birth certificate" thereby officially divorcing the parties. The wife testified that this is the only way the parties can obtain a religious divorce. The wife also testified that in the Islamic faith until her birth certificate reflects her religious divorce, she would be unable to remarry. She testified that she located a mosque located near both parties in an effort to make it as convenient as possible. Despite these efforts and the wife's repeated requests, the husband had not participated in this process. He simply stated "no comment. I have to talk to my lawyer". Thereafter, the husband conceded that he had still not accompanied the wife to a mosque. There was no testimony by the husband to explain his refusal to participate in this process. In addition to the wife being unable to remarry if she did not obtain a religious divorce she averred that if she were to travel to Iran, the husband could legally withhold his permission for her to leave Iran indefinitely. The wife asserted that she would have no remedy; a civil judgment of divorce would bear no impact in this situation.

The credible testimony by the wife led the court to find that the husband's refusal to give the wife a religious divorce, thereby removing barriers to her remarriage, was a basis to exercise its discretion under Domestic Relations Law § 236[B][5][h] to disproportionately distribute marital assets. It directed that the husband would have 45 days from the date of the decision to take any necessary steps to remove any barriers to the wife's remarriage. In the event that the husband failed to comply, he would forfeit the maintenance and equitable distribution award.

The wife also testified that Iranian society follows a practice of signing a "mehrieh" which is an amount of money paid or a gift given to the bride from the groom. The couple

negotiates, agrees and signs the mehrieh which is a written marital contract. The wife testified that if this agreement is not signed by both parties at the time of the marriage ceremony, the religious ceremony does not take place. During the preparations the bride is to propose an amount to the groom to pay. In this case, the wife proposed that the husband pay to her 1,348 Iranian gold coins which are called Bahar Azadi. The wife testified that the Bahar Azadi are full gold coins that are sealed by a bank. She testified that she chose 1,348 gold coins based on the year she was born in her calendar. The husband rejected the wife's proposal and counter offered the amount of 1,000 coins. When the wife asked the husband why he was decreasing her request by 348 coins, she testified that he stated that he had to agree to an amount that he could pay her. Thereafter, the parties agreed on 1,000 coins, a silver mirror, candle sticks and a Koran. The wife testified that both parties had the opportunity to read the document in its entirety before signing the mehrieh. She also testified that they each signed various portions of the mehrieh in front of the person performing the marriage ceremony, and three (3) witnesses that included the wife's father, the husband's father and the wife's uncle. The wife testified that the coin value fluctuates on a weekly basis. At the time of trial, the wife testified that a coin was valued at approximately \$340.00, but that a week prior, a coin's value was approximately \$380.00, according to an official Persian news channel that announces its values. The wife further testified that as part of the agreement, any time after the marriage ceremony, she may ask the husband to pay her the financial portion of the agreement. She testified that she asked the husband for the coins on two (2) occasions since the marriage.

The Court observed that the mehrieh was an agreement between the parties that was made prior to the parties' marriage. It was in writing and subscribed by both parties, but it was not acknowledged or proven in the manner required to entitle a deed to be recorded. Accordingly, due to its failure to comply with all three statutory requirements of Domestic Relation Law section 236[B][3], the court lacked the necessary jurisdiction to enforce its terms as part of this matrimonial action. Although the court could not enforce the mehrieh as a valid and enforceable matrimonial agreement, the court noted that the wife may bring a separate plenary action in civil proceeding, seeking enforcement of the mehrieh as an independent contract (citing *Singer v. Singer*, 261 A.D.2d 531, 690 N.Y.S.2d 621 [2 Dept., 1999]).

Agreements - Validity - Domestic Relations Law § 236 (B) (3) - Attorneys - Disqualification of Counsel - Unexecuted Collaborative Law Agreement Which Does not comply with DRL § 236 [B][3] Not Enforceable in Matrimonial Action and Not a Basis for Disqualification.

In *Mandell v Mandell*, --- N.Y.S.2d ----, 2012 WL 2476675 (N.Y.Sup.) the Defendant moved to disqualify Ellen Jancko-Baken, Esq. as counsel for Plaintiff based on his contention that she represented Plaintiff in a "Collaborative Law" process prior to the commencement of the action. In late October of 2011, Plaintiff contacted Defendant to

notify him she had retained counsel to commence a divorce and was interested in pursuing a "Collaborative Law" process.

Supreme Court pointed out that this is a form of dispute resolution in which the parties retain counsel specially trained in collaborative law and enter into a contract to negotiate a settlement without involving the Court or a third party arbitrator. As part of the process the parties may agree to engage neutral experts to assist them, such as accountants or appraisers. One of the principal features of the process is that, if the matter is not resolved, the attorneys who represented the parties in the unsuccessful effort to collaborate upon a settlement may not represent the parties in the ensuing litigation. The theory is that pre-litigation posturing is eliminated and clients have a greater degree of influence in candid negotiations in which the clients participate directly. The prospective expense of having to hire new lawyers if the matter has to go to court will motivate the parties to continue working toward a mutually agreeable resolution. Having counsel agree to absent themselves from any future litigation makes it clear that counsel are committing themselves to the process of dispute resolution by limiting their engagement to that endeavor and counsel have an economic incentive to stick with the process.

On November 1, 2011, Ms. Jancko-Baken wrote to Defendant to advise him that the firm of Fredman Baken and Kosan had been retained by Plaintiff. Ms. Jancko-Baken's letter expressed her client's desire to resolve issues relating to the divorce using the Collaborative Law process. However, the letter also stated Plaintiff's insistence that her immediate interim financial concerns be addressed before moving forward with the process. The retainer agreement between Plaintiff and her attorneys expressly contemplated representation in settlement negotiations and representation in contested litigation. Defendant then retained counsel trained in collaborative law and signed a Collaborative Law retainer with the firm of Kramer Kozek. The retainer agreement between defendant and his counsel was entitled limited scope retainer for collaborative law. While it covered some litigation-related activities, such as the expenses of court reporters and stenographers, it specifically stated that the law firm "will not be permitted to represent you in any court-related matter against your spouse" and that the firm had no obligation to represent the defendant in any litigation or appeal.

The parties and their counsel met on November 17, 2011. Plaintiff's counsel prepared and circulated an agenda for the meeting. The Participation Agreement was not signed on November 17, 2011. Defendant conceded that he was advised prior to the start of the next meeting that Plaintiff's counsel would not sign the Participation Agreement because she wanted to reserve the option of moving for interim support if the collaborative process fell apart. Despite having knowledge of the position of Plaintiff's counsel, Defendant elected to proceed with a second meeting, on the theory that "we were clearly working within the collaborative process even without a signed Participation Agreement". The second meeting proceeded but the issue of temporary support was not resolved and the Participation Agreement was not signed. A third meeting was held with the same result. Plaintiff commenced the action for divorce on December 15, 2011.

In support of his motion to disqualify Plaintiff's counsel, Defendant argued that by attending meetings with lawyers trained in Collaborative Law and discussing matters that were to be part of the collaborative process, the parties engaged in the Collaborative Law process, notwithstanding the lack of a signed Participation Agreement. Defendant contended that the attorney for the plaintiff should be disqualified because entering into the Collaborative Law process necessitates that the lawyers retained for that purpose may not litigate the matter should the collaborative process break down. Defendant asserted that by participating in the collaborative process, Plaintiff's counsel learned confidential information and had to be disqualified.

Supreme Court denied the motion. It pointed out that the Collaborative Law process is a relatively new concept and there are few New York decisions touching on it (see *H.K. v. A.K.*, 35 Misc.3d 1210(A) [Sup Ct Monroe County 2012] [holding that a breach of the disclosure provisions of a collaborative law agreement does not provide a new or additional basis for voiding separation agreement beyond the legal standards which generally govern the validity of marital agreements]). The Court indicated that the real issue was whether there was an agreement between the parties, enforceable by Defendant, that Plaintiff's counsel may not represent her in a contested matrimonial action between the parties. The most distinguishing feature of collaborative law is the commitment of counsel not to represent their clients in future litigation. Disqualification of a party's chosen counsel is a severe remedy which is ordered by courts only in narrow circumstances where counsel's conduct would taint the trial (see *Matter of Dream Weaver Realty, Inc.*, 70 AD3d 941 [2d Dept 2010]). In general, disqualification is ordered only where a prior attorney-client relationship existed and the former and current representation is both adverse and substantially related or where the concerns of the advocate-witness rule are implicated (see *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437 [1978]). The courts are most reluctant to interfere with a party's selection of counsel: "A party's entitlement to be represented in an ongoing litigation by counsel of his or own choosing is a valued right which should not be abridged absent a clear showing on which the party seeking disqualification carries that burden that counsel's removal is warranted" (*Goldstein v. Held*, 52 AD3d 471, 472 [2d Dept 2008]).

Defendant argued that plaintiff and her counsel agreed to the terms of the Participation Agreement by their actions in participating in meetings with Defendant and his counsel. The Court held that since this is a matrimonial action, no agreement made before or during the marriage is enforceable within the action unless the agreement has been duly signed and acknowledged by the parties (DRL § 236, Part B, subd. 3; *Matisoff v. Dobi*, 90 N.Y.2d 127, 659 N.Y.S.2d 209, 681 N.E.2d 376 (1997). Courts cannot enforce provisions for alternative dispute resolution which are contained in writings executed without compliance with the formalities required by statute (citing *Arabian v. Arabian*, 79 AD3d 517 [1st Dept 2010] [provision for arbitration in rabbinical court unenforceable where not set forth in signed, acknowledged writing]). Nor may the courts enforce resolutions reached in mediation conducted during marriage where the resolutions are not embodied

in duly signed and acknowledged writings (citing *Wetherby v. Wetherby*, 50 AD3d 1226 [3d Dept 2008]). Though it is true that defendant did not here seek to compel plaintiff to engage in collaborative law, he was seeking to enforce the provision in the unsigned Participation Agreement requiring plaintiff's counsel to step aside from representing plaintiff in a future contested matrimonial action. This he may not do. The Court concluded that, because the Participation Agreement was not signed and acknowledged by the parties, it was unenforceable in this matrimonial action.

Agreements - Construction - College Education Provision - Court Construes Agreement Provision Requiring Parents to Contribute According to "Their Respective Means".

In *L.L. v R.L.*--- N.Y.S.2d ----, 2012 WL 2466971 (N.Y.Sup.) the parties made a provision for their children's undergraduate education in their separation agreement, requiring them to contribute according to "their respective means" if and when the children went to college. They had joint custody of their three children. They agreed that decision making would be shared "on all matters having a significant impact on the children's lives including ... education" and that they would finance the children's college education "according to their respective means at the time the child attends college, after grants and scholarships have been taken into consideration." The agreement also stated: The parents shall consult, in advance, with each other and their children concerning college education, costs, and the choice of colleges for the children, and each shall be encouraged to participate in the planning of said education. The parties shall cooperate in completing and filing any and all financial aid applications for the children in whatever manner shall maximize the children's financial entitlement.

In 2011, the parties' oldest son enrolled at Penn State University. Prior to his departure, the wife moved for an allocation of the college expenses under the agreement and other relief. The court granted a portion of the requested relief, but reserved on the question of the college expense allocation. Thereafter the couple's second son applied for college and the wife now sought an allocation of those expenses as well. The husband contended that his wife failed to consult him on the first son's college choice. He argued that he was never informed of the child's decision to enroll at Penn State until the wife sent him a bill for the tuition and other costs. He also argued that he did not have the "means" to pay what the wife requested for the child's college education. In 2012, the middle child applied to college, was accepted at Hofstra University and St. John's University, and was awarded scholarships at both schools. The expenses, as estimated by the wife, totaled \$33,000 per year for the middle child.

The court found no definition of the term "means." It held that for purposes of this proceeding, the term "means" implied that the parties would permit a review of their assets and liabilities in addition to their annual income before determining their "respective" shares of the obligation. The court interpreted the term "means" to be an amount of contribution by each parent that would support the child's college education, but not

unduly overburden either parent while maintaining a reasonable lifestyle. The amount of each parent's contribution would depend on their "respective" incomes, expenses, and assets. The court did not interpret the term "means" to include an obligation to borrow to finance the children's college expenses. The agreement made no provision that either party borrow money to finance their child's college education. The court found that the term "respective means" did not mandate borrowing by either party to finance their children's college education.

In 2010, the husband reported income of \$51,288. In 2011, his earnings were \$64,464. After paying his taxes and mandated child support, the husband had \$28,478 in "spendable income" in 2010 and \$40,024 in 2011. In the statement of net worth the husband had monthly expenses of approximately \$2,800 per month. His annual expenses totaled \$33,600. The court described his expenses as modest because he included less than \$300 per month for food (including dining out) and had a meager clothing, laundry, and vacation allowance. The statement included a \$400 per month retirement contribution, which seemed reasonable for a 54-year-old man. To allocate this sum to college expenses constituted a determination that college education expenses for the children were more important than retirement savings for the adult. The court declined to interpret the language of this agreement to require the husband or the wife to defer retirement savings and use the deferred resources to pay the child's college education. There was no language in this agreement that required this sacrifice by the parent. It found that the husband did not have any excess income or "means," to contribute to his oldest son's college education in 2010. His base expenses exceeded his net available income after paying taxes and child support. The circumstances changed in 2011, when his available net annual income increased to \$40,024 (based on his increase in income from \$51,288 in 2010 to more than \$64,000 in 2011). In view of expenses of \$33,600, and assuming he continued his child support contributions for all three children, he would have approximately \$6,500 (net annual income of \$40,023 minus the \$33,600 in annual expenses) available as excess income or "means" to contribute to his children's college expenses. In considering the husband's means, the court said it could also look to more than his income. (Citing *Crispino v. Crispino*, 30 Misc.3d 1214A (Sup.Ct. Queens Cty. 2010) (requirement to pay college expenses depends on "actual financial resources" and not just income). However, based on the statement of net worth, there was little to add to the husband's financial picture. The court concluded that he had to contribute up to \$3,500 from his 2011 income to cover out-of-pocket or other costs for his son's college education as described under the separation agreement. This amount represented more than 50% of his excess available resources for 2011 and would not require him to borrow or invade his retirement accounts.

The court noted that this analysis presumed that the husband would continue to contribute full child support for all three of his children. This amount was only for out-of-pocket college educational costs incurred by the children. In 2011, this amount was only \$600, paid by the wife. This would be the only amount subject to allocation to the father in 2011. In 2012, it appeared that the husband may have comparable income to what

he earned in 2011. If so, the husband had to contribute up to \$3,500 to the college costs of both of his children. The only "means" the husband had was the \$3,500 in available net resources, and this amount remained the same regardless of how many of his children need college assistance.

In considering the parties net available resources, the court declined to look to the income and assets of their current spouse to determine whether these resources free-up "means" of that party to pay college costs. The agreement provided that the contribution to the college expenses by the father will be based on "their respective means". There was no indication that in utilizing the term "their" in the agreement that the parents intended that the income of a future spouse would be utilized in calculating the parties's college contributions. The court reads the phrase "their respective means" to preclude the court from considering the income of any future spouse in deciding the "means" of each parent.

Although not formally before the court on motion, the parties asked the court to determine the wife's contribution to college costs as well. The Court applied the same net financial analysis of income and assets to the mother to determine her "respective means." In considering the wife's contribution, this court recognized that the child support payments are a statutory mandate for the minimal financial support of all three children and, to the extent that this court required the wife to make a college contribution, the court may be requiring the wife to invade her child support payments. In the court's view, the wife did have sufficient resources to make a contribution to her children's college education. The court determined that the wife had the means to afford \$5,000 annually to help finance the cost of her children's college education. As with the husband, this amount was a cumulative total for all the children and their expenses will be totaled, but their mother's annual contribution will not exceed \$5,000.

The court held that if the expenses exceeded \$8,500, the combined contribution required by the terms of the agreement, the parents would only be required to contribute their respective shares. If the expenses were less than \$8,500, as appeared to have been the case in 2011 when the out-of-pocket expenses totaled only \$600, these costs should be shared on a pro rata basis, with the husband paying 41% of the total and the wife paying 59%.

July 2, 2012

Appellate Division, First Department

Sanctions - 22 NYCRR 130-1.1 - Proper to Sanction Attorney and Client (An Attorney) for Deliberately Misleading Representations on Motion Concerning Material Facts with Regard to Marital Assets

In *Capetola v Capetola*, --- N.Y.S.2d ----, 2012 WL 2345140 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which, after a hearing, imposed sanctions upon defendant Anthony A. Capetola and non-party Eliot F. Bloom, Esq., in the amount of \$10,000 each to be paid to the Lawyers' Fund for Client Protection.

Defendant, a lawyer involved in his divorce proceedings, submitted an affidavit to the court that was intentionally misleading in that he stated that he opposed renting out an apartment that was a disputed marital asset because he needed to use it at times for work purposes. He failed to disclose that, at that time, he was renting the apartment to the daughter of his lawyer (Bloom) for an amount that was substantially below market rate. This deliberately misleading representation concerning marital assets was properly found to be sanctionable, as it related to material facts on a pending motion (see *Weisburst v. Dreifus*, 89 AD3d 536 [2011]; 22 NYCRR 130-1.1[c][3]). The court also properly found that Bloom had engaged in sanctionable conduct since he submitted the misleading affidavit, signing the certification on its back. The evidence also showed that Bloom proceeded to engage in frivolous conduct, including calling the police when plaintiff wife entered the apartment unaware that anyone might be there, and found Bloom's daughter there, and accusing plaintiff of trespass and violation of criminal laws. When plaintiff's counsel reminded Bloom that the apartment was held in plaintiff's name and that she was unaware of the secret rental arrangement, Bloom wrote letters to plaintiff's counsel that were insulting, legally incorrect, and characterized by the court as "shockingly unprofessional" and "unethical." Under the circumstances, the court properly found Bloom's conduct to be frivolous within the meaning of 22 NYCRR 130-1.1.

Child Support - Award - Direction to Pay Child's Unreimbursed Medical and Dental Expenses must Be to Pay "Reasonable" Expenses - Counsel Fee Award Proper

In *Schorr v Schorr*, --- N.Y.S.2d ----, 2012 WL 2299464 (N.Y.A.D. 1 Dept.) Supreme Court ordered defendant to pay, inter alia, 35% of the costs of the child's unreimbursed medical and dental expenses. The Appellate Division modified the order on the law, to describe the child's unreimbursed medical and dental expenses to be paid by defendant as "reasonable," and otherwise affirmed. The Appellate Division held that the court erred in omitting the word "reasonable" from the description of the unreimbursed medical and dental expenses to be paid by defendant (citing Domestic Relations Law 240[1-b][c][5][v]). It found that the court properly awarded plaintiff counsel fees upon consideration of the financial circumstances of the parties and all the circumstances of the case. Defendant had engaged in extensive motion practice, including motions that had

little merit. In responding to each of defendant's motions, as well as bringing her own, plaintiff incurred counsel fees, while defendant, a trained attorney, represented himself. Defendant's contention that he was the non-monied spouse was without support in the record. It held that Supreme Court also properly ordered defendant to pay 50% of the cost of the neutral forensic expert

Custody - Relocation - Mother Permitted to Relocate to North Carolina Where She Had No Control over Where She Would Be Placed, and She Had Been the Primary Custodial Parent - Counsel and Pro Se Litigants Should Be Given Access to the Forensic Report under Same Conditions

In *Sonbuchner v Sonbuchner*, --- N.Y.S.2d ----, 2012 WL 2300319 (N.Y.A.D. 1 Dept.), Supreme Court awarded defendant sole custody of the child, permitted defendant to relocate with the child to Connecticut and then North Carolina, and awarded defendant child support and counsel fees. The Appellate Division vacated the awards of counsel fees and child support, and remanded the matter for a proper determination of child support. It found that the court's determination that it was in the best interests of the child to grant defendant sole custody and permission to relocate had a sound and substantial basis in the record (see *Matter of Tropea v. Tropea*, 87 N.Y.2d 727, 741 [1996]). The defendant was the child's primary caregiver, her decisions centered around the child, and she would continue to foster a relationship between plaintiff and the child of the proof and the relevant factors. The question of whether defendant should be allowed to relocate to Connecticut was essentially moot because she would be moving to North Carolina shortly. The testimony established that defendant was pursuing postgraduate medical clinical training, and had been matched with a residency program located in North Carolina; defendant had no control over where she would be placed. Although her move to North Carolina would have an impact on plaintiff's visitation, the court properly allowed defendant to relocate because she had been the primary custodial parent, was moving to ensure that she could earn a living wage to help support the child, and was prepared to ensure that plaintiff continued to have access to the child.

During the direct examination of the forensic expert, the forensic report was introduced into evidence, and plaintiff, who was proceeding pro se, had access to it before his cross-examination. On appeal, plaintiff argued that the court improperly prevented him from reviewing the report in advance of the forensic expert's direct testimony. The Appellate Division found that although the court erred in not allowing plaintiff to read the report before the expert testified, plaintiff had an opportunity when he was represented by counsel at an earlier point in the case to review the report with counsel. He also had an opportunity, long before the trial commenced, to review the report with the court-appointed social worker in the case. The plaintiff questioned the forensic expert about a number of issues that were covered in the report. Most of the expert's testimony turned on his recollection of his numerous interviews with the parties and his opinion as to the parties'

parental fitness, and plaintiff had an opportunity to cross-examine him about those opinions. The court's reliance on the expert's testimony, as opposed to the report, was apparent from the fact that the court's decision cited to specific pages of that testimony. Plaintiff also was aware of the issues he had discussed during his interviews with the expert, and many of those issues were explored by plaintiff on cross-examination. The evidence about defendant's strong bond and parenting history with the child was substantial, and the court's decision on custody and relocation has ample record support. Thus, any error in not allowing plaintiff access to the report in advance was harmless, and provided no basis for reversal.

The Appellate Division reiterated, as it had previously, that counsel and pro se litigants should be given access to the forensic report under the same conditions (see *Matter of Isidro A.-M. v. Mirta A.*, 74 AD3d 673 [2010]). Because defendant's attorney had a copy of the report, the court should have given the report to pro se plaintiff, even if the court set some limits on both parties' use, such as requiring that the report not be copied or requiring that the parties take notes from it while in the courthouse.

The Appellate Division found that the record was insufficient to determine whether the court's award of child support was unjust or inappropriate (Domestic Relations Law 240 [1-b][f]). The child support award failed to specify any dollar amounts, and simply directed plaintiff to pay "17% of his current salary based on his current pay stubs and income tax return," as well as one half of child care expenses, unreimbursed medical bills and health insurance premiums. There was no mention of the parties incomes. Thus, the court failed to follow the specific steps set forth in Domestic Relations Law 240(1-b). In addition, the court failed to abide by the direction of Domestic Relations Law 240(1-b)(c)(4) to determine the reasonable cost of child care expenses and separately state each party's pro rata share of those expenses. Thus, this matter was remanded for a proper determination of plaintiff's child support obligation pursuant to all applicable provisions of Domestic Relations Law s 240(1-b).

The Appellate Division held that Plaintiff should not be required to pay defendant's counsel fees. Based on the parties' testimony at the time of the trial, their incomes were comparable, and defendant had not shown that plaintiff had the resources to pay her fees. The record showed that plaintiff could not continue with his own counsel and proceeded pro se at the trial.

Judge Saxe dissented in part. He believed that the custody award should be reversed and the matter remanded for a new custody trial before a different judge, based on the fundamental unfairness created by the denial of the pro se plaintiff's right to have sufficient access, before trial, to the 84-page report prepared by the court-appointed psychologist on the issue of custody.

Appellate Division, Second Department

Attorneys - Disqualification of Counsel - Waiver - Wife Waived Right to Move to Disqualify Father's Counsel Where She Brought Motion after Hearing Was Underway and She Was Aware of Possible Grounds for Disqualification Eight Months Before the Hearing.

In *Matter of Aaron W. v. Shannon W.*,--- N.Y.S.2d ----, 2012 WL 2330260 (N.Y.A.D. 2 Dept.) the Appellate Division the appeal, in this custody modification proceeding, brought up for review a Family Court order which denied the separate motions of the mother and the former attorney for the child to disqualify the father's counsel from representing him in this proceeding. The mother contended that the father's counsel should have been disqualified from representing the father because he also represented the children of the mother's live-in boyfriend in a separate proceeding to which neither the mother nor the father were parties. The Appellate Division observed that the disqualification of an attorney is a matter which rests within the sound discretion of the court. A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted, and the movant bears the burden on the motion. It held that Family Court properly denied the separate motions to disqualify the father's counsel. The mother brought this issue to the Family Court's attention after the hearing was already underway, even though various documents reflected that she was aware of the dual representation at least eight months before the hearing. Accordingly, the mother waived any objection to the father's dual representation. It agreed with the father and the child's current attorney that neither the mother nor the child suffered any prejudice under the specific circumstances of this case.

Equitable Distribution - Property Distribution - Marital Residence - Leasehold for Rent Controlled Apartment Constituting Former Marital Residence Is Not Property Distributable Pursuant to Domestic Relations Law § 236(b)(1). Supreme Court Has the Authority to Decide Which Party in a Matrimonial Action Is Entitled to Possess Nondistributable Property.

In *Cudar v Cudar*, --- N.Y.S.2d ----, 2012 WL 2330657 (N.Y.A.D. 2 Dept.) the defendant, Frank Cudar, resided in the rent-controlled apartment commencing in 1960. In 1969 the plaintiff moved into the apartment when the parties were married. They parties resided together in the apartment until August 2004, when the defendant was required to vacate the premises by court order. A final order of protection dated February 1, 2006, required the defendant to stay away from the plaintiff until January 31, 2009. Since 2004, the plaintiff has continued to reside in the apartment and to pay the rent. In the course of the matrimonial action, but prior to the finalization of the divorce, the defendant

specifically requested Supreme Court to make a determination as to which party was entitled to possession of the apartment. It concluded that, since the apartment leasehold was not a marital asset, it lacked the authority to make a determination as to the possession of the apartment. It indicated that the resolution of that issue could be made in a landlord-tenant proceeding. The parties were divorced by judgment entered on December 21, 2006. Neither the judgment of divorce, nor an oral stipulation made on the record in open court, which was incorporated into the judgment of divorce, addressed the issue of who was entitled to possession of the apartment or ownership of the apartment leasehold.

In April 2007, the defendant commenced a summary holdover proceeding against the plaintiff and her son in Civil Court to evict them from the apartment. The Appellate Division held, on an appeal, that there was no landlord-tenant relationship between the defendant and the plaintiff and, thus, the defendant was not entitled to a judgment of possession (*Matter of Cudar v. O'Shea*, 78 AD3d 1177).

In January 2011 the defendant moved by order to show cause in the matrimonial action for a determination that the leasehold interest in the former marital residence was his separate property, and for an award of sole possession of the apartment. The defendant asserted that the apartment was not marital property, and that the plaintiff had improperly refused to allow him to return to the apartment. The plaintiff contended that the defendant's motion with respect to the apartment was barred by the doctrines of collateral estoppel and res judicata. Supreme Court denied defendant's. It indicated that the defendant's contentions could no longer be considered and that it could not award the defendant sole possession of the apartment in light of the decision and order of the Appellate Division in the holdover proceeding.

The Appellate Division, in an opinion by Justice Leventhal, found that the defendant's arguments were not barred by the doctrine of collateral estoppel or res judicata. He observed that for collateral estoppel to apply three criteria must be met: (1) the issue must actually have been litigated and determined by a valid and final judgment in a separate action, (2) that determination must have been essential to the judgment and (3) either the party to be precluded had a full and fair opportunity to litigate the issue in the prior proceeding or other circumstances do not justify affording him an opportunity to relitigate it. (Citing *Braunstein v. Braunstein*, 114 A.D.2d 46, 52-53). Res judicata serves to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same 'factual grouping' or 'transaction,' and which should have or could have been resolved in the prior proceeding " (*Braunstein v. Braunstein*, 114 A.D.2d at 53). In the context of a matrimonial action, the Court of Appeals has recognized that a final judgment of divorce settles the parties' rights pertaining not only to those issues that were actually litigated, but also to those that could have been litigated (*Xiao Yang Chen v. Fischer*, 6 NY3d 94, 100). Justice Leventhal found no merit to the Supreme Court's determination that collateral estoppel or res judicata barred the defendant's motion for an award

of sole possession of the apartment. In the course of the matrimonial action, the Supreme Court expressly stated that it had no authority to decide who was to possess the apartment. The Supreme Court suggested that a determination as to the possession of the apartment would have to be made in the Housing Part of the Civil Court. Under these circumstances, since the issue of the possession of the apartment was raised by the defendant, and the Supreme Court stated that it could not decide which party was entitled to the apartment, neither collateral estoppel nor res judicata could bar the defendant's contention with respect to possession of the apartment.

The defendant contended that that the apartment leasehold should have been deemed his separate property. He argued that that since the Supreme Court stated that the apartment leasehold was not marital property, it must have determined that the apartment leasehold was his separate property. He also contended that because he resided in the rent-controlled apartment prior to the marriage, the apartment leasehold was his separate property and, therefore, could not be marital property and could not be subject to equitable distribution. The issue was whether the apartment leasehold could be defined as distributable property for purposes of equitable distribution. This issue was one of first impression for the Appellate Division, Second Department. However, other courts in the State have addressed similar situations, and the Court found those decisions instructive.

In *Fedoff v. Fedoff* (41 AD3d 114), the Appellate Division, First Department, stated "[w]here, as here, there is no expectation that a rental apartment will be converted into a condominium or cooperative, it is not distributable property, and therefore need not be appraised". The Court in *Fedoff* relied upon *Pulitzer v. Pulitzer* (134 A.D.2d 84), another decision of the First Department in a matrimonial action, explaining that the "cooperative apartment in Manhattan was not marital property since neither the wife nor the husband held any valuable property rights with respect to the apartment." The Court reasoned that the shares and proprietary leasehold referable to the apartment did not fit within the definition of marital property because they were not acquired by the parties during the marriage, and that the shares and leasehold did not fit within the definition of separate property because they were not acquired by the parties prior to the marriage. In *S.A. v. K.F.* (22 Misc.3d 1115 [A], 2009 N.Y. Slip Op 50141[U]), the Supreme Court, Kings County, also determined that equitable distribution was inapplicable to a former marital residence, a rental apartment, because the apartment was not owned by the parties. In *Schwimmer v. Schwimmer* (26 Misc.3d 1213[A], 2009 N.Y. Slip Op 52716[U]), the Supreme Court, New York County, denied a husband's application for an appraisal of the marital residence on the ground that there was no evidence that a conversion of the rental apartment into a cooperative apartment or condominium unit was imminent. Finally, in *Cenci v. Cenci*, (Supreme Court, Kings County) the husband resided in a rent-controlled apartment prior to the marriage, and the wife moved into the apartment only after the marriage. The husband was the tenant of record. The Supreme Court found that the apartment leasehold "had no value," but disagreed with the husband's contention that the wife had no rights to remain in the apartment because her name did not appear on the

lease. The Supreme Court concluded that even though the apartment leasehold was not readily distributable under the equitable distribution statute, the court could determine which party should retain possession of the apartment pursuant to Domestic Relations Law § 234, which permits courts to make directions concerning the possession of property. Ultimately, the Supreme Court found that the financial position of the parties and the wife's custody of the parties' son warranted the award of possession of the apartment to the wife.

Justice Leventhal observed that the crucial issue in deciding whether property is separate or marital is the date on which such property is acquired, i.e., either before or during the marriage. The term "acquired" merely means that a person gained possession. The Appellate Division held that obtaining a leasehold interest to use and occupy an apartment, regardless of when the interest is created, does not constitute an acquisition of property pursuant to the Domestic Relations Law. The Court was cognizant that rent-controlled apartments are relatively scarce in New York City and, rent-controlled tenants reap tangible benefits. However, this did not alter its determination. A leasehold interest in a rental apartment, even one subject to the rent control law, which is not expected to be converted into a form of ownership such as a cooperative, is neither marital nor separate property as defined by the Domestic Relations Law. Consequently, the apartment leasehold could not be classified as the defendant's separate property. Accordingly, the Appellate Division held that Supreme Court correctly denied defendant's motion which sought a determination that the apartment leasehold was his separate property.

The Appellate Division also held that while the apartment leasehold was not distributable pursuant to the equitable distribution provisions of the Domestic Relations Law, the Supreme Court has the discretion to fashion an appropriate award as to the possession of property not subject to equitable distribution. Domestic Relations Law § 234, specifically permits a court in an action for a divorce to make such direction, between the parties, concerning the possession of property, as in the court's discretion justice requires having regard to the circumstances of the case and of the respective parties. As a result, the court may, under Domestic Relations Law §234, award possession of virtually every kind of property to one party or the other, even if legal title to the property cannot be similarly transferred . It concluded that Supreme Court was authorized, contrary to its averments in the record, to exercise its discretion and award possession of the apartment to either the plaintiff or the defendant . It modified the order and remitted the matter to the Supreme Court, for further proceedings on the motion for an award of sole possession of the marital residence, and a new determination pursuant to Domestic Relations Law § 234.

Divorce - Domestic Relations Law § 170(7) - Irretrievable Breakdown - Res Judicata and Collateral Estoppel - Neither Res Judicata Nor Collateral Estoppel Bar Action for Divorce since New York's No-fault Divorce Statute Had Not Yet Been Enacted at Time of Prior Action in 2008.

In *Dayanoff v Dayanoff*,--- N.Y.S.2d ----, 2012 WL 2330615 (N.Y.A.D. 2 Dept.) the parties were married in 1985. In September 2008, the plaintiff husband commenced a divorce action against the defendant wife pursuant to Domestic Relations Law § 170(2), alleging constructive abandonment. Following the close of the plaintiff's case at a nonjury trial, the Supreme Court granted the defendant's motion to dismiss the complaint for failure of the plaintiff husband to make out a prima facie case. On appeal from the ensuing judgment in the defendant's favor, the Appellate Division affirmed (*Dayanoff v. Dayanoff*, 79 AD3d 1092). In 2011, the plaintiff commenced a divorce action pursuant to New York's no-fault divorce statute, Domestic Relations Law § 170(7), which became effective in 2010. The defendant wife moved, pursuant to CPLR 3211(a)(5), to dismiss the complaint on the ground that since the 2008 divorce action had been dismissed, this action was barred by the doctrines of res judicata and collateral estoppel. The Supreme Court denied the motion. The Appellate Division affirmed.

The Appellate Division observed that typically, res judicata, or claim preclusion, requires that once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. In the context of a matrimonial action, the Court of Appeals has recognized that a final judgment of divorce settles the parties' rights pertaining not only to those issues that were actually litigated, but also to those that could have been litigated. (*Xiao Yang Chen v. Fischer*, 6 NY3d 94). Similarly, 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 of collateral estoppel 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. (*Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349)

The Appellate Division held that the doctrine of res judicata did not bar this action, as the final judgment in the 2008 divorce action did not settle the parties' rights pertaining to the claims contained in this action (see *Xiao Yang Chen v. Fischer*, 6 NY3d at 98), as New York's no-fault divorce statute had not yet been enacted in 2008. Similarly, as to the doctrine of collateral estoppel, the issue of no-fault divorce was not litigated in the prior divorce action, nor could it have been, as that cause of action for pursuing a divorce was not recognized under the law in 2008. Accordingly, Supreme Court properly denied defendant's motion which was to dismiss the complaint pursuant to CPLR 3211(a)(5).

Family Court - Jurisdiction - Order of the Family Court May Be Enforced or Modified in That County or in the Family Court in Any Other County in Which the Party Affected by the Order Resides or Is Found

In Winter v. Karins, --- N.Y.S.2d ----, 2012 WL 2125832 (N.Y.A.D. 2 Dept.) the Appellate Division held that Family Court, Kings County, erred by, in effect, granting the father's motion to dismiss the mother's petition to modify a visitation order issued by the Family Court, Albany County, upon the ground that it lacked jurisdiction. Family Court Act § 171 provides that "[a] lawful order of the family court made in any county may be enforced or modified in that county or in the family court in any other county in which the party affected by the order resides or is found." The mother and the parties' son resided in Kings County, and the mother was a "party affected" by the prior order of visitation . Thus, the Family Court, Kings County, had jurisdiction to entertain the mother's petition to modify the prior order of visitation issued by the Family Court, Albany County.

It also held that the father correctly asserted that the proceeding should be determined in Albany County, as the proceeding could have been originated there (Family Ct Act §§ 171, 174), and he demonstrated "good cause" for its transfer (Family Ct Act § 174). The father resided in Albany County and the mother's petition for modification was based upon incidents which allegedly occurred in Albany County. It held that the convenience of the parties and potential witnesses would be best served by the transfer of the proceeding to Albany County.

Counsel Fees- Family Court Act § 438 - Hearing Waived By Failure to Proceed With Hearing

In Tuglu v. Crowley,--- N.Y.S.2d ----, 2012 WL 2125843 (N.Y.A.D. 2 Dept.) The Appellate Division affirmed an order of the Family Court which, without a hearing, granted the mother an attorney's fee of \$3,500. It held that Family Court properly determined that the father had caused the mother to incur additional legal fees by engaging in unnecessary litigation. Despite the Family Court's clear directive to the father to either stipulate to a fee award of \$3,000, or request an evidentiary hearing, the father failed to stipulate to the proposed fee award or to request a hearing on the issue. In light of the father's failure to appropriately respond to the Family Court's directive, the Family Court scheduled a hearing. On the scheduled date of the hearing, the father refused to proceed with the hearing. Accordingly, the father waived his right to a hearing on the matter. In light of the parties' financial circumstances and the other evidence in the record, the Family Court's award to the mother of an attorney's fee of \$3,500, which included the fee incurred in connection with the cancelled hearing to determine the amount of the fee award was a provident exercise of discretion.

Agreements - Child Support - Enforcement - Provision Waiving Right to Make Future Application to Modify Child Support Enforced

In *Singer v. Prizer*, --- N.Y.S.2d ----, 2012 WL 2125850 (N.Y.A.D. 2 Dept.) the Appellate Division affirmed an order of the Family Court which dismissed his petition to terminate his child support obligation. The father annexed to his petition a so-ordered stipulation settling certain prior litigation between the parties. By attaching the stipulation to the petition, the father made the stipulation "a part of" the petition "for all purposes" (CPLR 3014). In the stipulation, the father agreed to pay certain child support to the mother, who, pursuant to the parties' judgment of divorce, had sole custody of the parties' child. The father also agreed that he would not "bring on any application to ... modify" the child support obligation he agreed to. The Appellate Division found that the father was precluded from commencing a proceeding such as this. Therefore, the cause of action alleged in the petition was completely undermined and rendered legally insufficient by the very terms of the stipulation.

Agreements - Child Support - Domestic Relations Law 236[b][9][B] - Modification of Amount Fixed by Court - Change of Circumstances Standard - Parties Waiver, for Limited Period , of Right to Fix the Child Support Obligations under the Child Support Standards Act Upheld

In *Green v. Silver*, --- N.Y.S.2d ----, 2012 WL 2125915 (N.Y.A.D. 2 Dept.) the parties agreed in a stipulation of settlement incorporated but not merged into their judgment of divorce, to "waive their right to fix the child support obligations under the Child Support Standards Act for the period up to July 31, 2007," during which time the father, a licensed urologist who was attending law school, would make no payments to the mother for the support of the parties' child. The stipulation further provided: "Beginning August 1, 2007, the Husband agrees to pay the Wife child support pursuant to the Child Support Standards Act based upon his earnings at the time." In an April 2008, order, the father was directed to pay child support to the mother in the amount of \$818, twice per month, which was based upon the father's salary at the time of \$125,000 per year as a first year associate in a law firm. The mother commenced this proceeding in March 2010 for an upward modification, alleging that the father was now employed as a urologist earning approximately \$350,000 per year. The Support Magistrate dismissed the proceeding on the ground that the mother failed to state a cause of action for modification. The mother filed objections with the Family Court, some of which were denied.

The Appellate Division modified the order and remitted the matter to the Family Court for further proceedings on the mother's modification petition. A review of the stipulation revealed that, with the exception of the period during which the father was finishing law school, the parties clearly did not intend to 'opt-out' of the Child Support Standards Act guidelines, but intended to follow them. Accordingly, Family Court should have applied the standard for modification applicable to child support obligations set by the court and not by stipulation (former Domestic Relations Law 236[B][9][b], as superceded by L 2010, ch 182, §§ 7, 13), instead of the more burdensome standard

applicable to proceedings to modify child support obligations provided for in a stipulation of settlement incorporated but not merged into a judgment of divorce.

Where the original amount of child support was set by the court and not by stipulation, all that is required for modification is a substantial change in circumstances. Here, the father's nearly three-fold increase in earnings was sufficient to state a cause of action for modification and, therefore, the proceeding should not have been dismissed.

The Appellate Division also held that the Support Magistrate properly denied the mother's cross motion to limit the issues to the father's income, since the custodial parent's financial status is also a proper consideration for the court in making its determination.

Child Support - Modification - Downward - Parent Seeking Downward Modification Based upon Loss of Employment must Establish Termination Occurred Through No Fault of the Parent and That Parent Diligently Sought Re-employment

In *Atabay v Cinar*, --- N.Y.S.2d ----, 2012 WL 2125953 (N.Y.A.D. 2 Dept.) the Appellate Division observed that a parent seeking a downward modification based upon loss of employment must submit evidence demonstrating that the termination occurred through no fault of the parent and that the parent has diligently sought re-employment. The father failed to establish that his loss of employment driving a hazardous materials truck was through no fault of his own, or that he diligently sought re-employment. The father testified that he was prevented from seeking re-employment driving a truck because he suffered from sleep apnea, but he failed to provide any medical documentation to support this claim. Accordingly, the Family Court properly denied the father's objections to the Support Magistrate's finding that the father was not entitled to a downward modification of his child support obligation.

Child Abuse - Testimony of Child - Appellate Division Holds That it Is Proper to Allow Child to Testify via Closed-circuit Television

In *re Elisha M.W.* --- N.Y.S.2d ----, 2012 WL 2125840 (N.Y.A.D. 2 Dept.) the Appellate Division observed that the right of a respondent parent "to be present at every stage of a Family Court Act article 10 proceeding is not absolute, as such a proceeding is civil in nature" (*Matter of Q.-L. H.*, 27 AD3d 738, 739). The Family Court must balance the due process rights of an article 10 respondent with the mental and emotional well being of the child. Family Court properly weighed the respective

rights and interests of the father and the child Rebekah J.W., and thereafter providently exercised its discretion in permitting her to testify via closed-circuit television so that she did not have to testify in front of her father.

Appellate Division, Third Department

Equitable Distribution - Enhanced Earning Capacity - Distribution - Valuation - "Double Dipping"- Nontitled Spouse Required to Establish That a Substantial Contribution Was Made to the Acquisition of the Degree or License. Court Consider Spouse Altered His or Her Schedule And/or Took on Additional Household Duties That He or She Would Not Have Otherwise Performed. Not Necessary to Deduct Wife's Maintenance Payments to Husband from Award to Avoid Impermissible "Double Dipping".

In *Quarty v Quarty*, --- N.Y.S.2d ---, 2012 WL 2344664 (N.Y.A.D. 3 Dept.) Plaintiff (wife) and defendant (husband) were married in September 2000 and had a daughter (born in 2000). The wife also had a son (born in 1996) from a prior marriage. She had full custody of her son and did not receive support from the child's father. In 2009, the parties each commenced separate actions for divorce, which were subsequently consolidated. Supreme Court entered an order and judgment of divorce directing that the marital residence be sold and the marital debts be paid from the proceeds of said sale. The court also awarded the husband spousal maintenance of \$1,100 per month for 30 months, a share of the wife's pension and a distributive award in the amount of \$155,372, to be paid in 396 monthly installments, based on the wife's enhanced earnings as a nurse practitioner.

The Appellate Division pointed out that amount and duration of maintenance are generally within the trial court's discretion and it would not disturb the court's determination where, as here, the court has considered the statutory factors and set forth its reasoning and its determination is supported by the record. At the time of their marriage, the husband was "legally blind" and he used a guide dog, glasses and/or binoculars to assist him in certain tasks. At the time of the marriage, the husband was performing various odd jobs such as snowplowing and mowing with a tractor, as well as other types of property maintenance at a camp in exchange for free housing. When the parties first moved into the marital residence, the husband was responsible for maintenance of the exterior of the residence and assorted home improvement projects. The wife testified that the husband was also capable of performing certain household chores during the marriage, but that some tasks were very time-consuming for him. Although the husband admitted that he previously had employable skills, he claimed that his vision has since deteriorated, rendering him unable to maintain employment. The husband testified that, in September 2009, a "piece of calcium broke off from the aorta and went up into the back of the eye," blocking blood flow to his eyes. He further testified that he has bulging discs in his back and an unidentified problem with the arches of his feet.

He offered no medical evidence to support these contentions, nor did he testify regarding what efforts he made, if any, to obtain employment. The parties had been married for approximately 8 ½ years when the first action for divorce was commenced. At the time of trial, the husband was 57 years old and the wife was 34 years old. The husband was residing in a rented apartment and was receiving Social Security disability income of approximately \$10,920 per year. The wife was earning \$92,000 per year and was receiving Social Security benefits for the parties' daughter in the amount of \$440 per month. The wife testified that her base salary at the time of trial was \$70,000 per year and that she voluntarily worked additional "on-call" hours, which would increase her annual income to approximately \$92,000. The wife further testified that the amount of on-call hours fluctuated according to her employer's needs and her availability.

While the record evidence pertaining to the husband's medical conditions and ability to become self-supporting was sparse, the award of spousal maintenance to the husband of \$1,100 per month for 30 months was adequately supported by the record. The record revealed that the parties' predivorce standard of living was modest and the maintenance award was a reflection of that standard. There was no basis to disturb that court's implicit finding that the husband failed to convincingly demonstrate that he lacked the ability to work in some capacity. It held that the determination to award durational maintenance was a proper exercise of Supreme Court's discretion and provided a reasonable period of time to enable the husband to re-enter the work force and become self-sufficient.

The Appellate Division 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" (*Esposito-Shea v. Shea*, 94 AD3d 1215, 1217 (2102). In determining whether a nontitled spouse's contributions were substantial, the Court considers, among other things, whether that spouse altered his or her schedule and/or took on additional household duties that he or she would not have otherwise performed, in order to enable the titled spouse to obtain the license or degree (*Carman v. Carman*, 22 AD3d at 1006-1007; *Farrell v. Cleary-Farrell*, 306 A.D.2d 597, 599-600 [2003]). Where the attainment of the license or degree is more directly attributable to the efforts of the titled spouse, it is appropriate to limit the nontitled spouse's share of the enhanced earning capacity. The wife testified that she obtained two Associate's degrees prior to the marriage, in connection with which she had outstanding loans in the amount of approximately \$32,000 at the time of trial. She began pursuing her nursing degree in January 2000 and obtained a Bachelor's degree and R.N. certification in 2003. Throughout her schooling, the wife worked at least part time and often full time. She also earned merit scholarships and incurred additional student loans to pay for tuition and household expenses. In 2004, the wife began a part-time graduate program, while continuing to work full time as a nurse. She began attending graduate school full time in 2005, took the board

exams in the fall of 2007 and, after obtaining her license, began working full time as a nurse practitioner in 2008.

The wife testified that the husband did not assist her with her school work or clinicals. She testified that the family's sources of income were generally derived from her employment and the Social Security benefits of the husband and their daughter. She alleged that she requested the husband to obtain employment, which he denied. According to the wife, she performed a myriad of household duties throughout her schooling. Among other things, because the husband was unable to drive, she did all the grocery shopping, transported both children to their activities and appointments and transported the husband's guide dog to veterinarian appointments. She acknowledged that, at various times, the husband was responsible for significant child-care responsibilities and household duties, including outdoor home maintenance. In addition, the husband used his Social Security disability funds to pay the mortgage on their home for some periods of time. The husband similarly testified that he cared for the parties' daughter and the wife's son while the wife attended school, prepared the children for school, assisted with their homework and prepared meals for them. He also took care of the children during the summer and on weekends, except when they were with their grandparents.

Based on the totality of the circumstances, the Appellate Division could not say that Supreme Court's award to the husband of 25% of the value of the wife's enhanced earning capacity was an abuse of discretion. However, it found that Supreme Court erred in its valuation. The experts who testified on each party's behalf differed significantly in their calculations, with the husband's expert arriving at a value of \$841,383 and the wife's expert opining the value to be \$108,000. The husband's expert, William Blanchfield, premised his calculations on baseline earnings of \$11,290 per year (the wife's actual earnings from part-time employment in 2002), a "topline" (post-license) income of \$70,000 (as set forth in the wife's statement of net worth) and a work life expectancy of approximately 28 years (until the wife reached age 62). Blanchfield also applied a 4% discount rate, an additional 33% discount rate for taxes and a 2% annual enhancement increase. The wife's expert, T. Kevin Fahey, submitted a lengthy and detailed report. Fahey used baseline earnings of \$46,000 in order to reflect the average income of an individual, like the wife, with a high school degree and two Associate's degrees working full time. Fahey, like Blanchfield in his report, used \$70,000 as the wife's topline income. In addition, he applied a discount rate of 7% and an unspecified discount for taxes and assumed a work life expectancy of 33 years (until the wife reached the age of 67). Fahey also factored in the wife's probability of survival and of being employed for each year up to the age of 67.

In valuing the wife's enhanced earnings, Supreme Court appeared to have adopted all of the assumptions used by Fahey in his calculations, except the topline income figure, which the court determined to be \$92,000 based on the evidence of the wife's anticipated actual earnings in 2010. After deducting the balance of the wife's student

loans (in an amount which Supreme Court did not articulate), the court calculated one half of the total value of the wife's enhanced earnings to be \$376,744 and awarded the husband one half of that amount, less the total amount of the maintenance award, resulting in a net distributive award to the husband in the sum of \$155,372, to be paid at the rate of \$392.35 per month for 396 months.

The Appellate Division held that Supreme Court improperly valued the wife's license by using \$92,000 as her topline income. Neither expert used that amount in calculating the value of such asset, nor was there any expert testimony that it would be appropriate to do so or, even if appropriate, specifically how it would affect the present value of the wife's license. Moreover, enhanced earnings are generally valued as of the date of commencement of a matrimonial action, which in this case was 2009. In 2009, the wife earned approximately \$68,000. Even using the wife's base salary for 2010, the year in which the trial was primarily conducted, the amount would have been \$70,000, the amount used by both experts in their reports.

Inasmuch as Supreme Court relied primarily on all of the other assumptions underlying Fahey's valuation including, among other things, the discount rate, the wife's baseline earnings and her work-life expectancy, all of which had ample support in the record, it concluded that the court should have valued the wife's enhanced earnings at \$108,000. Its review of the record revealed that the total outstanding balance of the student loan incurred by the wife during the marriage was \$45,165.52, which had to be deducted from the total value, leaving the amount of \$62,834.48 subject to equitable distribution. Finding no basis to vary from Supreme Court's award to the husband of 25%, the distributive award was reduced to \$15,708.62. Given this reduced award, the Appellate Division directed that the distributive award shall be payable at the rate of \$400 per month until the termination of the wife's maintenance obligation to the husband and, thereafter, at the rate of \$1,000 per month until paid in full.

In a footnote the Court explained that it was not necessary to deduct the wife's maintenance payments to the husband from this award in order to avoid impermissible "double dipping" on the enhanced earnings derived from the wife's professional license (see *Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 704 [2000]). This was because it concluded that the amount of maintenance awarded was reasonable based upon the wife's prelicense income of \$46,000, combined with the \$22,000 difference between the \$70,000 topline earnings used in its determination of the value of the license and the \$92,000 annual income to which plaintiff testified at trial. Thus, the amount of enhanced earnings used to calculate the value of the wife's license (the difference between the \$46,000 baseline income and the \$70,000 topline income) was not considered in the maintenance award.

The Court also held that Supreme Court failed to properly determine each party's proportionate share of the wife's pension. Although the court directed that the pension be "split pursuant to the Majauskas formula," it did not provide any further guidance as to apportionment, as required. Thus, the matter had to be remitted to Supreme Court for a

determination of each party's proportionate share thereof. Supreme Court also failed to address the wife's request in her complaint for an award of child support. Accordingly, it also remitted the matter to the court for a determination of the parties' respective obligations, if any, for child support.

Appellate Division, Fourth Department

Agreements - Validity - Domestic Relations Law § 236 (B) (3) - Acknowledgment Insufficient Where it Does Not Provide That Person Taking Acknowledgment "Knows or Has Satisfactory Evidence, That the Person Making it Is the Person Described in and Who Executed Such Instrument - Fourth Department Holds That Defect Can Be Cured Rejecting Rules of First and Second Departments

In *Galetta v Galetta*, --- N.Y.S.2d ----, 2012 WL 2164527 (N.Y.A.D. 4 Dept.) after plaintiff commenced this divorce action, she moved for, inter alia, summary judgment determining that the parties' prenuptial agreement was invalid because it was not properly acknowledged. Supreme Court denied her motion. The Appellate Division observed that pursuant to Domestic Relations Law § 236 (B) (3), "[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." In order to satisfy the acknowledgment requirement, "there must be an oral acknowledgment before an authorized officer, and a written certificate of acknowledgment must be attached to the agreement" (*Filkins v Filkins*, 303 AD2d 934, 934; see *Matisoff v Dobi*, 90 NY2d 127, 137-138; see generally Real Property Law §§ 291, 306). The Appellate Division agreed with plaintiff that the written certificate of acknowledgment was insufficient because it did not contain the information required by Real Property Law § 303, i.e., that the person taking the acknowledgment "knows or has satisfactory evidence, that the person making it is the person described in and who executed such instrument."

The Court pointed out that contrary to defendant's contention, the certificate was not in "substantial compliance" with the statute, and thus the court's reliance on *Weinstein v Weinstein* (36 AD3d 797, 798) for that proposition was misplaced. In *Weinstein*, the language in the certificate failed to conform to the "precise language" of the Real Property Law. Here, however, the certificate failed to "stat[e] all the matters required to be done, known, or proved on the taking of such acknowledgment or proof" (§ 306). Inasmuch as the certificate was devoid of information required by the Real Property Law, the court concluded that it was insufficient on its face and did not establish that the prenuptial agreement was properly acknowledged.

However, the court agreed with defendant that a subsequently-filed affidavit from the notary who took defendant's acknowledgment raised a triable issue of fact whether the prenuptial agreement was properly acknowledged. The issue squarely before the Appellate Division was whether defects in such an acknowledgment are subject to cure, and it concluded that they could be cured. It observed that in *Matisoff v Dobi* (90 NY2d at 137), the Court of Appeals specifically declined to resolve the issue "whether and under what circumstances the absence of acknowledgment can be cured," and noted that other courts have been divided on the issue.

The court noted that it is well settled that defects in an acknowledgment required by EPTL 5-1.1-A (e) (2) (see EPTL 5-1.1 [f] [2]), concerning waivers of the spousal right of election, may be cured. Inasmuch as the language of the EPTL contains the same "restrictive acknowledgment language as the Domestic Relations Law under discussion in the *Matisoff* case". It concluded that the same reasoning should apply to Domestic Relations Law § 236 (B) (3) and that defects in the acknowledgment required by that section may be cured. The court recognized that there was a split of authority on the issue whether such defects may be cured, and that it had yet to take a position. However, in *Arizin v Covello* (175 Misc 2d 453, 457), the court held that "an unacknowledged nuptial agreement which is acknowledged on a subsequent date is enforceable in a matrimonial action as long as the subsequent acknowledgment complies with the statutory requirements of Domestic Relations Law § 236 (B) (3)" (see also *Hurley v Johnson*, 4 Misc 3d 616, 620). It noted that it had cited to *Arizin* in its decision in *Filkins* (303 AD2d at 934). In *Filkins*, however, there was no written certificate of acknowledgment attached to the parties' prenuptial agreement, and the Court held that "plaintiff's attempt to cure the defect by having the agreement notarized and filed after commencement of [the] divorce action fail[ed] because the agreement was never reacknowledged in compliance with Domestic Relations Law § 236 (B) (3)" (id. at 934-935). It concluded that by citing to *Arizin*, the Court implicitly endorsed the possibility that a defect in a technically improper acknowledgment accompanying a nuptial agreement could be cured .

The Fourth Department recognized that the Second Department in *D'Elia v D'Elia* (14 AD3d 477, 478) held that the defendant's "attempt to cure the acknowledgment defect by submitting a duly-executed certificate of acknowledgment at trial was not sufficient," but it was not clear from that decision whether there was a contemporaneous acknowledgment that was technically improper. It also recognized that the First Department in *Anonymous v Anonymous* (253 AD2d 696, 697) "would not permit [the] defendant to cure [the] defect in the [prenuptial] agreement by an alleged acknowledgment in affidavit form which was executed and which surfaced some 12 years after the fact in the midst of a contested matrimonial action in light of the required formalities of Domestic Relations Law § 236 (B) (3)." Inasmuch as the preamble to the decision in *Anonymous* refers to "the absence of an acknowledgment" , the court stated that its decision was not inconsistent with that of the Second Department. It reasoned that here the defendant was not attempting to cure the complete absence of a contemporaneous acknowledgment. Rather, he was attempting to submit evidence that there was, in fact, a proper and contemporaneous acknowledgment

at the time the prenuptial agreement was executed. In its view, the affidavit from the notary who took defendant's acknowledgment was sufficient to raise a triable issue of fact whether "the parties . . . contemporaneously demonstrated the deliberate nature of their agreement" (Schoeman, Marsh & Updike v Dobi, 264 AD2d 572, 573). The statements of the

notary, i.e., that it was his usual and customary practice to ask and confirm that the person signing the document was the same person named in the document and that he or she was signing said document, "constitute competent and admissible evidence concerning routine professional practice sufficient to raise a triable issue of fact"

The Appellate Division concluded that the court properly denied that part of plaintiff's motion for summary judgment seeking a determination as a matter of law that the parties' prenuptial agreement is invalid.

Full Faith and Credit - Florida Divorce Judgement - Entitled to Recognition Where Both Parties Were Subject to Personal Jurisdiction of Florida Court. Review by this State Is Limited to Determining Whether Rendering Court Had Jurisdiction.

In *Khallad v. Blanc*, --- N.Y.S.2d ----, 2012 WL 2164516 (N.Y.A.D. 4 Dept.) in 2002, defendant traveled to Morocco and conceived a child with plaintiff, a Moroccan native. The parties' child was born in Florida in July 2003 and, in March 2005, plaintiff and defendant were married in Florida. Thereafter, the parties resided together in Florida for one or two months before plaintiff moved to New York City. In January 2006, defendant filed a petition for dissolution of marriage in the Circuit Court for the Ninth Judicial Circuit, in and for Orange County, Florida, asserting that the marriage was "irretrievably broken" and that she and plaintiff had no children in common. Defendant submitted an "affidavit of diligent search and inquiry," in which she averred that plaintiff's current residence was unknown to her and that she had made a diligent search and inquiry to discover it. Defendant then served the petition upon plaintiff by publication in a local Florida newspaper. Plaintiff did not respond to the petition or appear in court, and a default judgment was entered against him. In April 2006, the Florida court granted a final judgment of dissolution of marriage

According to plaintiff, he first learned of the divorce judgment in or about June 2010, when deportation proceedings were commenced against him. On July 29, 2010, plaintiff moved to set aside the default judgment in the Florida court, asserting that he failed to appear in the divorce action because he did not receive a summons or petition. Plaintiff further alleged that defendant fraudulently obtained the divorce judgment inasmuch as she falsely stated that she did not know where plaintiff lived and that the parties did not have any children in common. After a hearing, the Florida court denied plaintiff's motion on the ground that it had been filed more than one year after entry of the divorce judgment (Fla Rules Civ Pro rule 1.540[b]).

Plaintiff thereafter commenced this action seeking a declaration that the divorce judgment is "invalid and of no force and effect" because it was fraudulently obtained. Supreme Court determined that the divorce judgment should be granted full faith and credit, and thus declared that the judgment was valid. The Appellate Division affirmed. It observed that a divorce judgment of a sister state made in an action in which both parties were subject to the personal jurisdiction of the court is entitled to full faith and credit by the courts of this state. Absent a jurisdictional challenge, a judgment entered upon a party's default is entitled to full faith and credit. The application of full faith and credit to the judgment of a sister State is the functional equivalent of interstate res judicata. As a matter of full faith and credit, review by the courts of this State is limited to determining whether the rendering court had jurisdiction, an inquiry which includes due process considerations. Thus, inquiry into the merits of the underlying dispute is foreclosed; the facts have bearing only in the limited context of the jurisdictional review. In determining whether the Florida court had jurisdiction over plaintiff, the Appellate Division noted that it had to "ascertain whether [Florida's] long arm statute has been complied with, and whether that court's exercise of jurisdiction comports with Federal constitutional principles of due process" (Mortgage Money Unlimited, 1 AD3d at 774).

Plaintiff did not contend that he lacked the requisite minimum contacts with Florida such that allowing the divorce action to proceed in that state deprived him of due process. The parties were married and thereafter lived together in Florida, and their child was born in Florida. The Appellate Division rejected Plaintiff's contention that the Florida court lacked personal jurisdiction because defendant failed to serve him personally with the summons and petition in the divorce action in accordance with Florida law.

Under Florida law, service of process by publication may be made in any court on any party identified in any action or proceeding for dissolution or annulment of marriage. Service of process by publication may be had upon any known or unknown natural person. As a condition precedent to service by publication, the plaintiff must file a sworn statement asserting that diligent search and inquiry have been made to discover the name and residence of such person," and "that the residence of such person is ... [u]nknown to the affiant". The notice must be published once per week for four consecutive weeks in a newspaper published in the county where the court is located, and proof of publication must be made by affidavit of an officer or employee, among others, of the newspaper. Defendant signed an "Affidavit of Diligent Search and Inquiry" swearing that she "ha[d] made a diligent search and inquiry to discover the name and current residence of" plaintiff. Defendant further averred therein that plaintiff's "current residence [wa]s unknown to [her]," and she signed the affidavit under penalty of perjury. A publisher's affidavit of publication confirmed that the notice was published for four consecutive weeks in a newspaper in Orange County, Florida, the situs of the Florida court. Thus, defendant established that she constructively served plaintiff by publication in accordance with Florida law.

Plaintiff contended that defendant committed fraud in procuring service of process by publication because defendant knew where plaintiff lived and how to contact

him. The Appellate Division noted that Plaintiff's contention may have merit in light of the undisputed fact that defendant visited plaintiff in New York and stayed at his apartment several months before she commenced the divorce action. Once it has been determined, however, that a sister state properly exercised jurisdiction over a party, review of the foreign judgment ends and we must accord full faith and credit to that judgment.

Plaintiff's further contention that the Florida court deprived him of his parental rights by failing to determine issues of custody, visitation and a parenting plan before dissolving the marriage was beyond the scope of review. The Court's inquiry was limited to whether the Florida court that rendered the divorce judgment had jurisdiction (see *Fiore*, 78 N.Y.2d at 577), and the merits of the divorce action, including issues of custody, visitation and support, were not properly before it. It pointed out that Florida law permits plaintiff to commence an independent action challenging the validity of the divorce judgment on the ground of fraud upon the court more than one year after entry of that judgment. Thus, plaintiff remained free to commence such an action in Florida to challenge the validity of the divorce judgment and to assert his rights to custody and visitation.

Child Support - Award - Income - Family Ct Act 413[1][B][5] [li] - Sums Expended in Connection with Investment must Be Deducted from Investment Income.

In *Fendick v Fendick*, --- N.Y.S.2d ----, 2012 WL 2164254 (N.Y.A.D. 4 Dept.) the Support Magistrate determined that the mother received investment income of \$17,400 per year. That finding was based on the fact that the mother received monthly loan payments of principal and interest from two individuals to whom she made personal loans. The Appellate Division held that this finding was in error. Only the interest portion of those monthly payments, rather than the entire payments of principal plus interest, should have been considered "income" for purposes of calculating child support, inasmuch as the principal amounts of those loans were "sums expended in connection with such investment" (Family Ct Act 413[1][b][5] [ii]). The mother's interest income on those two loans, as reflected in her tax return, was \$2,779 per year, and thus the calculations of the parties' adjusted gross income should have been amended to reflect that amount. Based on the revised calculations of the parties' adjusted gross income in light of those errors, the father's pro rata share of the child support obligation was 62%. It modified the child support order accordingly.

June 18, 2012

Court of Appeals

Termination of Parental Rights - Post Termination Visitation - Court of Appeals Holds That Family Court Lacks Authority to Direct Continuing Contact Between Parent and Child Once Parental Rights Have Been Terminated in a Contested Proceeding Pursuant to Social Services Law §384-b.

In the Matter of Hailey ZZ., No. 103, NYLJ 1202558306160, at *1 (June 7, 2012) the Court of Appeals resolved a conflict within the Appellate Divisions as to whether Family Court may direct continuing contact between parent and child once parental rights have been terminated in a contested proceeding pursuant to Social Services Law §384-b, and held that the Family Court lacks this authority.

Hailey ZZ., was born in 2007 and , initially resided with her birth mother and father and an older half-sister. The Father was sentenced to 5 to 15 years in prison in early 2008, when Hailey was three months old, and remained incarcerated ever since. On November 5, 2008, the Tompkins County Department of Social Services (DSS), effecting a removal under Family Court Act 1024, took Hailey and her half-sister away from their mother. The girls were placed in DSS's custody to reside with certified foster parents. On March 26, 2010, DSS filed petitions against both parents, seeking orders adjudicating Hailey to be permanently neglected, terminating parental rights and committing her guardianship and custody to DSS. On July 23, 2010, Hailey's mother surrendered her parental rights and signed a post-adoption visitation agreement. DSS withdrew its petition against mother, and proceeded with the fact-finding hearing against father. In a decision and order entered on August 12, 2010, Supreme Court adjudicated Hailey to be permanently neglected and ordered the requisite dispositional hearing. In its decision and order entered on October 29, 2010 after the dispositional hearing, Supreme Court concluded that it was in Hailey's best interests to terminate father's parental rights and free her for adoption so as to achieve permanency. Additionally, Supreme Court denied father's request for continuing visitation with Hailey. The Father cited several Fourth Department cases to support the availability of this option. The judge noted, though, that Third Department precedent did not allow for a court to mandate continuing contact between a parent and child after parental rights had been terminated pursuant to Social Services Law §384-b. He added that such contact would, in any event, not be in Hailey's best interests as there was no evidence of any emotional or lasting connection between Hailey and the father; they had spent only about 72 hours together in two years' time, or the equivalent of three out of 730 days. The Court ruled it was in Hailey's best interests to terminate father's parental rights, without post termination visitation "[e]ven if the Third Department allowed [it]," rather than suspend judgment. Father appealed.

The Appellate Division affirmed. The Court of Appeals granted the father leave to appeal (17 NY3d 709 [2011]), and affirmed. The father contended on appeal that the lower courts wrongly decided that the hearing court lacked authority to grant him post termination contact with Hailey, and asked the Court to remit the matter to the Appellate

Division for its review of Supreme Court's alternative ruling that post termination visitation would not be in Hailey's best interests.

The Court of Appeals observed that Fourth Department has held that Family Court is authorized to award post termination contact where parental rights have been terminated pursuant to Social Services Law §384-b. In *Matter of Kahlil S.* (35 AD3d 1164 [4th Dept 2006], lv dismissed 8 NY3d 977 [2007]), the court upheld termination of the mother's parental rights with respect to her two children, Kahlil S. and Terrell Z., on the ground that she presently and for the foreseeable future was unable, by reason of mental illness, to provide proper and adequate care for them. The Fourth Department declared that where "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 (see Social Services Law §384-b [4] [c], [d]), 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" (*id.* at 1165). Thus, the Fourth Department in *Matter of Kahlil S.* remitted the matter to Family Court for a hearing as to whether post termination contact with their mother was in the children's best interests (35 AD3d at 1165-1166). The court observed that in making this determination, Family Court was to "consider, *inter alia*, the ages of the children, the bond between [the mother] and the children, and the likelihood that the children will be adopted". Section 634 of the Family Court Act was the only statute cited by the Fourth Department to support its decision. This provision states merely that an order entered after a dispositional hearing committing a child's guardianship and custody to an authorized agency may be made "on such conditions, if any, as [the court] deems proper." Subsequent to *Matter of Kahlil S.*, the Fourth Department has handed down decisions reiterating or presuming that Family Court possesses authority to provide for post termination contact, and must, upon a parent's request, decide whether such a continuing relationship is in the child's best interests

The Court of Appeals surveyed the cases in the First and Second Department, which it pointed out were not clear. It then noted that the Third Department appears to have grappled with the issue on this appeal as early as 1994 in *Matter of Rita VV.* (209 AD2d 866 [3d Dept 1994], lv denied 85 NY2d 811 [1995]). There, Family Court's dispositional order in the permanent neglect proceeding conditioned adoption upon visitation with the child's biological mother and maternal grandparents. The court held this to be error, commenting that Social Services Law §384-b contemplates an adversarial proceeding. It does not contain a provision that upon a determination that parental rights should be terminated a court can require or permit contact by and between a biological parent and a child who has been adopted. While Family Court was correct that the Legislature amended Social Services Law 383-c to allow a parent to condition a voluntary surrender for adoption upon contact with the child or information concerning the child, the proceeding here did not involve such a voluntary surrender. Accordingly, the provisions of Social Services Law 383-c were wholly inapplicable and, therefore, Family Court was without authority in this adversarial proceeding to require such continued contact as a condition of adoption. In a string of subsequent cases, the Third Department has

steadfastly adhered to the position that Family Court may not direct post termination contact in a case where parental rights have been ended pursuant to Social Services Law §384-b.

Relying on section 634 of the Family Court Act, the father argued that if the disposition of a petition brought pursuant to Social Services Law §384-b "is to be termination of parental rights, then, the Family Court Act directs that termination is to be 'on such conditions, if any, as [the court] deems proper,' and what conditions, if any, to impose is to be decided solely on the basis of the child's best interests. Therefore, under the Family Court Act, if the child's best interests would be served by termination of parental rights on condition that the biological parent retain some right of contact with the child, then Family Court must so order." The Court pointed out that the flaw here is that father presupposed that this particular kind of condition — one preserving contact between parent and child notwithstanding the termination of parental rights — is a condition the court is empowered to mandate. There is concededly no statutory support for such authority outside the context of a voluntary surrender pursuant to Social Services Law §383-c, as the Third Department has repeatedly emphasized. The Father sought to overcome this obstacle by arguing, in effect, that Family Court possesses an inherent discretionary authority to provide for post termination contact in a dispositional order when determined to be in the child's best interests. This argument ran counter to the decision in *Matter of Gregory B.*, 74 NY2d 77 (1989). In that case, the Court the Court of Appeals "express[ed] no opinion as to whether such contacts generally would be helpful and appropriate once parental rights have been terminated and the child has been adopted into a new family or whether a court should have the discretionary authority to order such contacts" . Further, it observed, "the 'open' adoption concept would appear to be inconsistent with this State's view as expressed by the Legislature that adoption relieves the biological parent 'of all parental duties toward and of all responsibilities for' the adoptive child over whom the parent 'shall have no rights'". It then closed the discussion of this issue as follows: "Although adoptive parents are free, at their election, to permit contacts between the adopted child and the child's biological parent, to judicially require such contacts arguably may be seen as threatening the integrity of the adoptive family unit. In any event, 'open' adoptions are not presently authorized. If they are to be established, it is the Legislature that more appropriately should be called upon to balance the critical social policy choices and the delicate issues of family relations involved in such a determination" (74 NY2d at 91).

The Court concluded that the Legislature, the entity best suited "to balance the critical social policy choices and the delicate issues of family relations involved" in such matters (*Matter of Gregory*, 74 NY2d at 91), has not sanctioned judicial imposition of post termination contact where parental rights are terminated after a contested proceeding. Absent legislative warrant, Family Court is not authorized to include any such condition in a dispositional order made pursuant to Social Services Law §384-b.

Custody - Kidnaping - Custodial Interference - Court of Appeals Holds it Is Possible for a Parent with Custodial Rights to a Child to Be Guilty of Kidnaping That Child

In *People v Leonard*, --- N.E.2d ----, 2012 WL 1946724 (N.Y.) the Court of Appeals held that it is possible for a parent who has custodial rights to a child to be guilty of kidnaping that child, and that it happened here, where defendant used his baby daughter as a hostage, threatening to kill her if the police approached him.

Defendant had a romantic relationship with a woman called Mary, which ended a few days after their daughter was born. Mary then moved with the baby from Brooklyn, where she and defendant had both been living, to Ulster County. There was no court order affecting the custody of the child, so defendant and Mary were equally entitled to custody. When the baby was six weeks old, defendant paid an unexpected visit to Mary's new home. He and Mary had an argument, in the course of which he abused her verbally, threatened her with a knife, and cut her. He then calmed down and permitted Mary to leave for work, while the baby remained with him. Mary called her mother and a friend from her car, and the friend called the police. Some time later, Mary's mother and stepfather came to Mary's home and found defendant outside the house, holding the baby. Shortly after that, Mary, her employer and several police officers arrived on the scene. At the sight of the police, defendant took out a knife and gestured toward the baby with it; still holding the baby, he retreated into the house. There followed a lengthy discussion in a bedroom between defendant and the police officers, during which defendant held the knife near the child's chest and throat, and told the officers that if they came closer he would kill the child. He was finally persuaded to give the baby, unharmed, to the police.

Defendant was convicted of Kidnaping in the second degree, as well as burglary, endangering the welfare of a child and two weapons offenses. The Appellate Division affirmed, and so did the Court of Appeals. The Court, in an opinion by Judge Smith observed that Penal Law 135.20 says simply: "A person is guilty of kidnaping in the second degree when he abducts another person." But the statutory definition of "abduct" is more complicated: " 'Abduct' means to restrain a person with intent to prevent his liberation by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly physical force." (Penal Law s 135.00[2].) And the statutory definition of "restrain" is more complicated still: " 'Restrain' means to restrict a person's movements intentionally and unlawfully in such manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent and with knowledge that the restriction is unlawful. A person is so moved or confined 'without consent' when such is accomplished by (a) physical force, intimidation or deception, or (b) any means whatever, including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and the parent, guardian or other person or institution having lawful control or custody of him has not acquiesced in the movement or confinement." (Penal Law

135.00[1].) A final layer of complexity is added by Penal Law 135.30, which says: "In any prosecution for kidnaping, it is an affirmative defense that (a) the defendant was a relative of the person abducted, and (b) his sole purpose was to assume control of such person."

The decisive question was whether defendant "restrain[ed]" the child, according to the statutory definition of that term. Judge Smith pointed out that he intentionally moved the child from one place to another (from the outside of the house to the inside), and also confined her to the place (the bedroom) to which she had been moved. Defendant argued that he did not "restrict" her "movements" or "interfere" with her "liberty" because a six-week-old child is not capable of going or remaining anywhere voluntarily. This argument was rejected as untenable: "it implies that no infant could ever be kidnaped. A restriction on movement, and an interference with "liberty," should be deemed to exist whenever the lawful movement of a person, including the lawful movement of a child by adults, is hindered."

In addressing the issue whether defendant restricted the child's movements "unlawfully," "without consent" and "with knowledge that the restriction was unlawful," he argued that it was impossible for him, a custodial parent with as much right to control the child as Mary had, to act unlawfully or without consent, or to know that he was acting unlawfully, either by moving the child or by preventing her from being moved. As the custodial parent he could lawfully take the child anywhere he wanted, and the only consent he needed was his own. Under the statute, he pointed out, "consent" exists when "the parent, guardian or other person ... having lawful control or custody" has "acquiesced in the movement or confinement"(Penal Law 135.00 [1][b]).

The Court of Appeals rejected the idea that he could lawfully move or prevent the movement of the child in the way he did here, or that he could give "consent" to his own act in doing so. Judge Smith wrote that "there comes a point where even a custodial parent's control over a child's movements is unlawful, and indeed obviously so." Although she found no New York decision that shed much light on the issue she observed that courts in other states have faced similar problems. In *State v. Viramontes* (163 Ariz. 334, 788 P.2d 67 [1990]), the Supreme Court of Arizona upheld a kidnaping conviction under a statute that contained a definition of "restrain" much like New York's . The defendant in that case had put his newborn child in a cardboard box, driven it to a restaurant and abandoned it in a parking lot. The court held that, though the defendant was the child's custodial parent, he lacked legal authority to "consent" to his own act of abandonment, observing: "under no imaginable circumstances could the legislature have intended that defendant's ... taking the child to abandon it be legally authorized". In *Muniz v. State* (764 So.2d 729 [Fla 2d DCA 2000]), a Florida District Court of Appeal confronted a set of facts almost exactly like this case: The defendant there, confronted by police officers demanding that he hand over his month-old child, reacted by picking up a razor and threatening the baby with it, thus holding the officers at bay for hours. The Muniz court reversed the defendant's conviction for kidnaping, holding that someone who was a

"parent" under Florida law could not be guilty of kidnaping his child when there was no court order depriving him of custody. In a later decision, however, the Florida Supreme Court overruled *Muniz* and held "that a parent is not exempt from criminal liability for kidnaping his or her own child" (*Davila v. State*, 75 So.3d 192, 197 [Fla. 2011]; see also *State v. Siemer*, 454 N.W.2d 857 [Iowa 1990]).

Judge Smith concluded, like the Supreme Courts of Arizona, Florida and Iowa, that a kidnaping by a custodial parent of his own child is not a legal impossibility. It is possible, though only in cases, like this one, where a defendant's conduct is so obviously and unjustifiably dangerous or harmful to the child as to be inconsistent with the idea of lawful custody. The Court pointed out that its holding "should not be too readily extended." It held that on the facts found by the jury with support in the record, defendant's restriction of his daughter's movements was unlawful; that he could not consent to it, because at the time of the crime he did not have "lawful control or custody" of his daughter; and that the unlawfulness was blatant enough to justify the inference that he knew he was acting unlawfully. The evidence that he committed second-degree kidnaping was legally sufficient.

Chief Judge Lippman and Judges Graffeo and Read concurred. Judge Jones dissented in part and voted to modify in an opinion in which Judges Ciparick and Pigott concurred.

Appellate Division, First Department

Appellate Division Affirms Civil Contempt Order Sanctioning Defendant Instead of Fining Him.

In *Kosovsky v Zahl*, --- N.Y.S.2d ----, 2012 WL 1987411 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order and judgment which adjudged defendant in civil contempt, and ordered him to pay \$10,000 to plaintiff, pursuant to 22 NYCRR 130-1.1. It found that the Special Referee's findings regarding counsel fees (as corrected) and retroactive child support arrears were amply supported by the record. Domestic Relations Law § 237(b) authorizes the court to award counsel fees in enforcement actions. In addition, the parties' so-ordered 2000 stipulation provided that plaintiff would be entitled to an award of counsel fees for fees incurred in connection with effecting payment of add-on expenses. Defendant's argument that no definitive order was issued that judicially determined that plaintiff was entitled to counsel fees is without merit. It found the record clearly supported a finding of civil contempt based upon defendant's failure to comply with court-ordered child support payments, which, as the Special Referee found, was undertaken primarily to harass plaintiff. The court's direction that defendant reimburse plaintiff for costs occasioned by his frivolous conduct was an appropriate exercise of discretion (citing *Matter of Beiny*, 164 A.D.2d 233 [1990]).

Equitable Distribution - Marital Residence - Appreciation of Separate Property -Husband Denied Share of Appreciation of Marital Apartment Although He Contributed to Renovations Where Appraiser Made No Findings That Renovations Had Any Effect on Value of the Apartment

In *Linda D. v Theo C.*, --- N.Y.S.2d ----, 2012 WL 1988429 (N.Y.A.D. 1 Dept.) the Appellate Division modified a judgment which, inter alia, denied defendant any portion of the marital apartment's appreciation, distributed the marital estate, directed that defendant pay child support of \$1,200 per month, and awarded plaintiff counsel and expert fees, to the extent of vacating the award of counsel and expert fees. It held that Defendant failed to show that the marital apartment, which plaintiff purchased before the marriage, appreciated as a result of his contributions. Although defendant performed, and marital funds helped pay for, some renovations to the apartment, the court-appointed appraiser made no findings that the renovations had any effect on the value of the apartment. In any event, the trial court adequately compensated defendant for his contributions by giving him a credit for one-quarter of the renovation costs. It held that the trial court improvidently exercised its discretion in awarding plaintiff \$100,000 for attorneys' fees and \$12,850 for expert fees. The parties' financial situations were not so disparate as to render this award appropriate.

Custody - Visitation - Modification - Hearing Is Generally Required Before a Judge May Award a Temporary Change of Custody in a Non-emergency Situation

In *Rodger W v Samantha S.*,--- N.Y.S.2d ----, 2012 WL 1913878 (N.Y.A.D. 1 Dept.) the Appellate Division reversed on the law an order which granted petitioner father's application for temporary custody of the child and granted alternate weekend visitation to respondent mother. It reinstated the original custody arrangement granting primary custody to the mother and visitation to the father. Pursuant to a 2010 judgment of divorce the mother was awarded primary physical custody of the child, while the petitioner father was allowed liberal access in the form of visitation. On March 11, 2011, petitioner filed a petition to enforce his visitation rights. After respondent was diagnosed with a brain tumor in June 2011, petitioner filed an order to show cause on September 19, 2011 seeking temporary custody of the child, which the Family Court denied on September 23, 2011. At the time of the November 3, 2011 court appearance, the only matter pending before the court was the father's petition to enforce visitation. The father made a sua sponte application seeking a temporary change of custody, which the court granted that same day without holding an evidentiary hearing.

The Appellate Division observed that it had previously noted that a hearing is generally required before a judge may award a temporary change of custody in a

non-emergency situation (Matter of Martin R.G. v. Ofelia G.O., 24 AD3d 305, 3055]). It held that Respondent was deprived of her fundamental rights when the Family Court sua sponte converted the hearing on the petition for visitation into one concerning custody and then transferred custody of the child without notice and without affording her a hearing with the opportunity to present evidence and to call and cross-examine witnesses. As reports issued by two professional organizations confirmed that there were no immediate safety concerns or other risks concerning respondent's care of the child, there was no emergency situation to warrant Family Court's decision not to hold a hearing.

In addition the finding did not have a sound and substantial basis in the record. At the time of the hearing, Family Court did not take any testimony from the parties or collateral witnesses, and the limited information presented in the home evaluation reports indicated that there were significant factual disputes as to whether the child was subjected to a stressful situation in respondent's home, or as to what effect, if any, respondent's illness had on the child's schooling. Petitioner, as the non-custodial parent, failed to satisfy his significant burden of demonstrating that the child's best interests under the totality of the circumstances warranted a modification of the previously entered custody order.

Custody - Conditions on Visitation - Considering 'Economic Realities' of the Case" Non-custodian Mother Should Not Be Made to Bear the Full Burden for Visitation Transportation

In re Jasmine L v Ely G., --- N.Y.S.2d ----, 2012 WL 1868615 (N.Y.A.D. 1 Dept.) the Appellate Division held that the Family Court's imposition upon the petitioner-mother of full responsibility for transporting the child to and from all exchanges at the home of respondent-father, the custodial parent, did not have a sound and substantial basis in the record. The mother, was of limited financial means and lived in lower Manhattan without access to a car. She testified that transporting herself, her other minor child, and the child to and from the father's home in Yonkers for alternate weekend visitation subjected her to a significant financial expense that was several times her monthly child support obligation. In contrast, it was significantly less of a burden for the father, who worked only one weekend per month and had access to two cars, to pick the child up at the Woodlawn subway station in the Bronx, which was only a few miles and a relatively short drive from his home, and which is where the exchanges had been conducted for several months without incident prior to the fact-finding hearing. It held that upon consideration of the " 'economic realities' of the case" (Ingarra v. Ingarra, 271 A.D.2d 573, 574 [2000]), the mother should not be made to bear the full burden for such transportation. It directed that the exchanges resume at the Woodlawn subway station during the weekends when respondent was not working.

Agreements - Prenuptial - Absent a Provision to Contrary, Waiver of Maintenance and Counsel Fee Does Not Bar Pendente Lite Award.

In *Vink v Lee*, --- N.Y.S.2d ----, 2012 WL 2094382 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which directed defendant to pay \$6,000 per month in unallocated interim support, and awarded plaintiff \$25,000 in counsel fees, and an order, which, awarded plaintiff an additional \$25,000 in counsel fees. It observed that while the parties' premarital agreement limited their rights to obtain spousal support and waived their rights to counsel fees, the Agreement did not bar temporary relief, including temporary maintenance and interim counsel fees. Since the parties' agreements did not address custody and child support, the waiver of counsel fees did not apply to counsel fees related to litigating child custody and support issues. (Citing *Kessler v. Kessler*, 33 AD3d 42, 45 [2006]; *Alvares-Correa v. Alvares-Correa*, 285 A.D.2d 123, 128 [2001]).

Child Custody - Relocation - Denied Where Mother Not Honest With Father About Her Location and Record Showed Pattern of Deception.

In *Koegler v. Woodard*,--- N.Y.S.2d ----, 2012 WL 2036460 (N.Y.A.D. 1 Dept.) the parties lived in New York. The mother was unemployed for 18 months, during which time she searched for a job in both the New York metropolitan area and Texas. She started a job with First American Bank in Dallas, Texas in July 2009, but did not inform the father or the court that she was working in Texas. This came to light after the father noticed that the mother was often not at her home, and was told by the child's grandmother that she did not know when the mother would return.

The father made a motion to the court in August 2009 for more visitation time with the child. The parties entered into a stipulation that the father could have additional visitation with his daughter when the mother was in Texas. The mother sought to relocate with the child to Texas. Family Court granted the parties joint custody and appointed a parent coordinator. The mother was awarded residential custody, provided that she maintained adequate housing in New York. The father was awarded parenting time with the child. While the mother was in Texas working, the father had residential custody of the child and the mother had residential custody while she was in New York, subject to the father's weekend parenting time.

The Appellate Division found that there was a sound and substantial basis in the record for the Family Court's determination to deny the mother's request to relocate to Texas, and there was no reason to disturb the findings of the court. The court gave due consideration to the Tropea factors (*Matter of Tropea v. Tropea*, 87 N.Y.2d 727 [1996]) in concluding that the best interests of the now six-year-old girl would not be served by relocation to Texas. Family Court found that the mother had not honest with the father when she first obtained the Texas job and was out of town for extended periods, and that with respect to her work schedule in Texas, she had been "either misleading or not

forthright in giving [the father] information to which he was entitled," it appearing that the mother "has been trying to hinder [the father] from having the additional visits to which he is entitled by virtue of the Court order." The court concluded that it was hard to imagine that the mother would be truthful and forthcoming with the father as to the child's activities and general well-being if she lived in Texas.

The Appellate Division observed that the custodial parent must be able to place the child's needs first while fostering a continued relationship between the child and the noncustodial parent". Family Court had a sound basis for concluding that, were the mother and child to live in Texas, the mother would not foster and facilitate a relationship with the father, and that was a relevant factor when assessing the best interests of the child. Despite the court order requiring the mother to inform the father of her schedule regarding her time in Texas and her time in New York, which order provided that the father was to have additional visitation with the child when the mother was in Texas, the record showed a pattern of deception by the mother, who admittedly lied to the father that she was in New York when she was actually in Texas, thus depriving him of the visitation time to which he was entitled by court order.

The Appellate Division also noted that Family Court indicated that its decision on the relocation petition was based, in part, on the bona fides of the request, as the record demonstrated that it was always the mother's intention to move to Texas, and she did not really want to find employment in New York.

Appellate Division, Second Department

Custody - Visitation - Suspension - Error to Suspend Visitation Without a Hearing to Determine Best Interests of Child.

In *Walker v Diaz*, --- N.Y.S.2d ----, 2012 WL 1859942 (N.Y.A.D. 2 Dept.) the Appellate Division reversed on the law an order which, sua sponte, suspended the father's visitation with the child, and remitted for further proceedings on the issue of visitation consistent with the child's best interests. It observed that a noncustodial parent is entitled to meaningful visitation. Denial of that right is so drastic that it must be based on substantial evidence that visitation would be detrimental to the welfare of the child. When adjudicating visitation issues, a court must determine the best interests of the child. Supreme Court failed to determine the best interests of the child before suspending the father's visitation with the child.

Appellate Division, Third Department

Agreements - Construction - Child Support - Where No Termination, Provision Unallocated Child Support For Two Children Continues Despite One Child Reaching

In Matter of Katz v Dotan, --- N.Y.S.2d ----, 2012 WL 1940576 (N.Y.A.D. 2 Dept.) the parties' stipulation of settlement required the father to pay the sum of \$300 per week in child support for the couple's two children, Brooke and Caroline, "until the emancipation of Brooke and Caroline." Shortly after the older child reached 21 years of age, the father filed a petition seeking to terminate his support obligation as to that child, and for a credit of 50% for all child support "charged" after that child's college graduation, on the ground that the older child was emancipated. The Support Magistrate interpreted the stipulation as terminating the father's support obligation only upon both children becoming emancipated, which had not occurred. Family Court denied the father's petition.

The Appellate Division observed that a separation agreement or stipulation of settlement which is incorporated but not merged into a judgment of divorce is a contract, the terms of which are binding on the parties. 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. Stipulations and separation agreements that provide for an unallocated child support payment may only be reduced or terminated on conditions that are expressly provided for in the stipulation or agreement (Matter of Winokur v. Winokur, 31 A.D.3d 653, 654, 819 N.Y.S.2d 282). Noticeably absent from the stipulation was any express provision allowing the father to reduce his support payments as each child becomes emancipated. Thus, it had to be concluded that the emancipation of an individual child has no bearing on the petitioner's support obligation. Accordingly, the Family Court properly denied the father's objections to the Support Magistrate's order.

Appellate Division Holds That in a Paternity Suit Party Raising the Defense of Equitable Estoppel Bears the Initial Burden of Proof, and Application of the Doctrine Does Not Involve the Equities Between the Adult Participants

In Matter of Starla D. v Jeremy E., --- N.Y.S.2d ----, 2012 WL 1948004 (N.Y.A.D. 3 Dept.) petitioner, a resident of Alabama, commenced proceeding in January 2011, pursuant to the Uniform Interstate Family Support Act (Family Ct Act art 5-B) against respondent, a New York resident, seeking a DNA test to establish that respondent was the biological father of the child (born in 2001) and, an award of child support. At the initial appearance, a Support Magistrate concluded, based upon a notation contained in the underlying petition, that the proceeding should be transferred to Family Court to determine whether equitable estoppel would bar petitioner from seeking the requested relief (Family

Ct Act 439[b]). Following respondent's unsuccessful motion to dismiss, a hearing was held, at the conclusion of which Family Court dismissed respondent's equitable estoppel defense and ordered respondent to undergo DNA testing.

The Appellate Division affirmed. It observed 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 party raising this defense, here, respondent, bears the initial burden of proof, and application of the doctrine does not involve the equities between the adult participants. In the context of a paternity proceeding, it is the child's justifiable reliance on a representation of paternity that is considered and, therefore, the doctrine of equitable estoppel will be applied only where its use furthers the best interests of the child.

Based upon its review of the record as a whole, the Appellate Division could not say that Family Court erred in dismissing respondent's equitable estoppel defense. Petitioner testified that "Eddie," her long-time friend, fleeting romantic interest and occasional roommate, has served as a "father figure" for the child since the child was three months old. Petitioner acknowledged that Eddie had called the child "his son", as had various members of Eddie's family, and that the child, in turn, had referred to Eddie as "dad". Petitioner testified that she previously told both the child and other individuals that Eddie was the child's father. he record also reflects that Eddie and the child have engaged in a number of activities together over the years and that, despite the fact that both petitioner and Eddie were, as of the time of hearing, involved in relationships with other people, the child and Eddie still enjoyed regular and frequent telephone contact with one another and saw each other approximately every three weeks. Although respondent asserted that the foregoing was sufficient to make a prima facie showing of "a recognized and operative parent-child relationship" the Appellate Division disagreed. Noticeably absent from the record was any indication that Eddie played a significant role in raising, nurturing or caring for the child, provided food, clothing and shelter for the child for most of [his] life, or otherwise carried out all the traditional responsibilities of a father. While the record established that Eddie served as a father figure for the child, petitioner identified three other individuals, her boyfriend, her father and a family friend, as father figures for the child, noting that her boyfriend and the child also addressed each other as "son" and "dad," respectively. The record did not support a finding that the child truly believed Eddie to be his biological father, as evidenced by petitioner's testimony that the child asked for permission to call Eddie "dad" . The record failed to establish that the child would suffer irreparable loss of status, destruction of his family image, or other harm to his physical or emotional well-being if this proceeding were permitted to go forward.

Domestic Relations Law §76-h [3] - Where it Is Alleged by Petitioner in a UCCJEA Proceeding That Child Resides in Another State it Is Error for Family Court Not to Take

Sworn Testimony Regarding Child's Residence Prior to Reaching Determination That it Lacked Jurisdiction.

In Metz v Orta, --- N.Y.S.2d ----, 2012 WL 1948025 (N.Y.A.D. 3 Dept.) the parties were the unmarried parents of a daughter born in 2003. Petitioner (father) commenced a proceeding seeking joint custody and visitation by filing a verified petition in June 2011. He averred that the child and respondent (mother) had lived at an address in the Schenectady for the past four years and that he also lived in Schenectady. When the mother appeared telephonically at the initial appearance and claimed that she had been living in Florida for five years, Family Court stated that it did not have jurisdiction and that the father would have to file a petition in Florida. After further discussion between the court and the parties, the court reversed its position and concluded that it was not going to dismiss the petition. The court then scheduled a hearing date, advised the father that he would be assigned an attorney and concluded the appearance. Three days later the court issued an order of dismissal stating that no one had appeared on the petition, dismissing the petition due to lack of jurisdiction and canceling the previously scheduled hearing.

The Appellate Division reversed. It agreed with the father that Family Court erred in failing to take sworn testimony regarding the child's residence prior to reaching any determination that it lacked jurisdiction. Family Court's jurisdiction is controlled by the Uniform Child Custody Jurisdiction and Enforcement Act, which provides specific grounds as the basis for jurisdiction in an initial child custody proceeding (Domestic Relations Law 75-a [4]; 76[1]). Pursuant to Domestic Relations Law s 76-h (1), every party to a child custody proceeding must, in the first pleading or in an affidavit attached to that pleading, give information under oath as to the child's present address, the places where the child has lived within the five years immediately preceding the case and the names and addresses of the persons with whom the child has lived. Here, the father alleged that the child was a resident of New York. Although there was no responsive pleading in the record from the mother, her statement at the initial appearance that she lived in Florida for the past five years raised an issue that should have caused the court to "examine the parties under oath as to the details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case" (Domestic Relations Law 76-h [3]).

Although the attorney for the child argued that the father did not dispute that the child resided in Florida for the past five years, the initial petition listed a New York address as the child's most recent residence, the court did not ask the father for any response to the mother's statement and, by the end of the brief appearance, the father had no reason to dispute the issue of jurisdiction as the court had stated on the record that the petition was not being dismissed. Based on this record, the Appellate Division was unable to conclude that New York did not have jurisdiction over the child custody proceeding and remitted for a hearing on this issue.

**Agreements - Construction - Life Insurance Provision - Where No Termination Provision
Life Insurance Requirement Continues Despite Children Reaching Age of Majority**

In *Barlette v Barlette*, --- N.Y.S.2d ----, 2012 WL 1948161 (N.Y.A.D. 3 Dept.) the parties, who were divorced in 1995, were the parents of twin daughters (born in 1989). In November 2010, plaintiff moved by order to show cause to hold defendant in contempt unless he provided evidence that he was in compliance with a provision of the parties' stipulation, which was incorporated but not merged into the judgment of divorce, that required him to annually provide proof to plaintiff that he maintained life insurance in the amount of \$100,000 for the benefit of each child. Finding that defendant's obligation to maintain life insurance for the benefit of the parties' children expired when the children reached the age of 21, Supreme Court denied the motion.

The Appellate Division modified and remitted for a hearing. It observed that where, as here, a stipulation of settlement is incorporated but not merged into a judgment of divorce, it constitutes an independent contract by which both parties are bound. The parties' agreement must be "construed in accordance with the principles of contract interpretation" and, if the "language is clear and unambiguous, the intent of the parties must be gleaned from the agreement without resort to extrinsic evidence". Here, the contract provision by which defendant agreed to maintain life insurance in the amount of \$100,000 for the benefit of each child was clear and unambiguous, and did not contain any language stating, or even implying, that his obligation to maintain such was related to his child support obligation or would otherwise expire in the future. The stipulation specifically provided that all issues regarding child support, custody and visitation were previously and separately determined by an order of Family Court. In view of these two separate obligations, the stipulation could not be construed as relieving defendant from his agreed-to obligation to maintain life insurance for the benefit of his daughters when they turned 21 years of age (*Matter of Meccico v. Meccico*, 76 N.Y.2d 822, 824 [1990]; *Coloney v. Coloney*, 80 A.D.3d 840, 843 [2011]). It had to be presumed that had the parties intended for that result, the stipulation would have included language to that effect. While defendant contended that the obligation automatically expired, by operation of law, when the children turned 21, pursuant to Domestic Relations Law § 236 [B][8][a]), that statutory provision applies to obligations imposed by the court, and does not affect or restrict the terms of a stipulation that defendant freely negotiated and agreed upon with the advice of counsel.

Having determined that defendant's obligation to maintain life insurance for the benefit of his children did not expire, the Appellate Division remitted the matter to Supreme Court for further proceedings inasmuch as no hearing was held on plaintiff's motion. Although defendant apparently admitted that he had not maintained life insurance as required by the stipulation, he alleged that he was unaware that the policy he had obtained would decrease in value over time, and further alleged, but provided no actual proof, that he was currently uninsurable due to his allegedly poor health. To the extent that plaintiff requested this Court to award damages based upon defendant's apparent concessions,

there was insufficient evidence on this record to determine whether defendant's failure to maintain insurance in the amount set forth in the stipulation constituted contempt and what, if any, an appropriate remedy may be, keeping in mind that "civil contempt penalties should be remedial, not punitive" in nature.

Appellate Division, Fourth Department

Domestic Relations Law § 170(7) - Irretrievable Breakdown - Fourth Department Holds That Pleadings Requirements of CPLR 3016 (c) Are Inapplicable and Cause of Action Is "Continuing" for Purposes of Statute of Limitations - Observes Defendants Right to Contest Allegations at Jury Trial

In *Tuper v Tuper*, --- N.Y.S.2d ----, 2012 WL 2053770 (N.Y.A.D. 4 Dept.) the parties were married in 1973 and had been separated since November 1996, when plaintiff wife moved out of the marital residence. Her complaint for a divorce action based on allegations of cruel and inhuman treatment was dismissed after a nonjury trial. In February 2011, approximately five months after the no-fault statute took effect, plaintiff commenced this action. The complaint alleged in conclusory fashion that the parties' relationship has been irretrievably broken for at least six months. No facts were alleged in support of that assertion. Defendant contended that the complaint fails to comply with CPLR 3016(c), which provides that, "[i]n an action for separation or 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..." The Appellate Division rejected that contention holding that because a cause of action for divorce under Domestic Relations Law § 170(7) does not require a showing of any "misconduct" by either party, the requirements of CPLR 3016(c) are inapplicable. In any event, the affidavit submitted by defendant in support of his amended motion to dismiss cured any alleged pleading defects in the complaint. Defendant stated that he and plaintiff have been separated since 1996 and that they have not communicated with each other within the past five years. Those allegations, accepted as true, clearly established that the parties' relationship has been irretrievably broken for far more than the required six months.

The Appellate Division agreed with defendant that a cause of action under the no-fault statute is subject to the five-year limitations period set forth in Domestic Relations Law §210. However, it did not agree with defendant that the action was time-barred inasmuch as plaintiff failed to commence it within five years of the date that the parties' relationship initially became irretrievably broken. In its view, a cause of action for divorce under the no-fault statute should be treated similarly to a cause of action for divorce based upon imprisonment of a spouse (DRL § 170[3]), which is also governed by the five-year statute of limitations set forth in section 210. It observed that in *Covington v. Walker* (3 NY3d 287, 291) , the Court of Appeals held that a

cause of action for divorce based on 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." It concluded that like a spouse serving a life sentence, an irretrievable breakdown in a married couple's relationship is a continuing state of affairs that, by definition, will not change. The breakdown is "irretrievable." It thus stands to reason that a cause of action under the no-fault statute may be commenced at any time after the marriage has been broken down irretrievably for a period of at least six months.

The Court noted that a contrary ruling would force a spouse such as plaintiff to unwillingly remain in a dead marriage. That is inconsistent with the general intent of the Legislature in enacting the no-fault statute, which was to enable parties to legally end a marriage which is, in reality, already over and cannot be salvaged. (Senate Introducer Mem in Support, Bill Jacket, L 2010, ch 384, at 13).

Interestingly, the Appellate Division pointed out in a footnote, that during the debate in the New York State Assembly over the bill that became the no-fault statute, the Assembly sponsor of the legislation, Assemblyman Jonathan Bing, was asked directly by a fellow member of the Assembly whether a defendant in a no-fault case would have a right to contest the plaintiff's allegations at a jury trial. "Yes," Assemblyman Bing responded. "I can't imagine that happening frequently, but yes, technically, that possibility would exist" (N.Y. Assembly Debate on Assembly Bill A9753-A, July 1, 2010, at 238). Bing repeatedly stated "that the legislation does not take away any grounds or any procedural maneuver or anything that currently exists under the law"(id. at 231, 237), and that the allegation of an irretrievable breakdown in the marital relationship can be "contested" (id. at 236). Bing's representations appeared consistent with the fact that the Legislature, upon enacting the no-fault statute, did not amend Domestic Relations Law § 173, which reads: "In an action for divorce there is a right to trial by jury of the issues of the grounds for granting the divorce."

Supreme Court

Domestic Relations Law § 244 - Pre-Judgment Interest - "Wilful Defined" - Agreements - Construction of Life Insurance Provision.

In *MM v TM*, 2012 WL 1939970 (N.Y.Sup.), 2012 N.Y. Slip Op. 50962(U) the parties oral stipulation, and December 2005 agreement provided that the maintenance provision in the separation agreement merged into the divorce decree. The maintenance was \$41,600 a year. The husband admitted that he failed to make his monthly maintenance payments from November 2006 through December 2010. In November 2008, the wife commenced a

proceeding to collect unpaid maintenance and enforce the life insurance provision of the agreement. She alleged that the husband should be held in civil contempt because of the failure to pay maintenance and to put in place what she alleges is required life insurance coverage. She also sought prejudgment interest on the missed maintenance payments and attorneys fees.

The husband did not dispute that the maintenance for this time was never paid. The husband's primary defense was that he could not afford to pay maintenance because he lost his job in March 2006 through no fault of his own. He also alleged that he paid substantial sums to put his youngest son through college, and he took issue with the initial maintenance determination. None of these defenses constituted a basis to reduce or eliminate maintenance arrears. The Supreme Court held that the wife, who was previously awarded a money judgment for arrears from November 2006 to November 2008, was entitled to a judgment for the maintenance arrears for the months of December 2008 and January 2009. The court finds that the modification petition was filed on January 14, 2009, and therefore, the amount awarded would be a full month's maintenance for December 2008, and half a month's maintenance for January 2009.

The wife also sought pre-judgment interest on the unpaid maintenance, both on an amount previously awarded as arrears upon which decision had been reserved, and upon the amount awarded by this decision. The Supreme Court observed that under Domestic Relations Law §244, the court can award pre-judgment interest if the default was wilful and the husband "knowingly, consciously and voluntarily disregarded the obligation." The statute appeared to define "wilful" as a "knowing, conscious and voluntary" failure to comply with a court's directive. There was no doubt that the husband's failure to pay maintenance in this case was "wilful" from the time of November 2006 through January 14, 2009, when he filed his cross-motion to modify the maintenance. It was undisputed that he knew he had an obligation, under the agreement and judgment, to pay maintenance during this time. He consciously disregarded this obligation. He made no effort to make partial payments. There was abundant evidence that he had access to funds during this period of time. The husband admitted that he sold stocks, cashed in money from retirement accounts, maintained a household, owned a condominium in New Jersey through a solely-owned limited liability company, paid substantial real estate taxes (on a property he did not own which benefitted his second family), had access to a promissory note in which the debtor owed him \$100,000, and paid his son's \$30,000 college tuition. In all of these instances, he found money to pay for housing, life expenses, and other expenditures, but he never even made a partial payment on his maintenance obligation. Based on these facts, the wife proved by clear and convincing evidence that the husband's failure to pay maintenance from November 2006 through January 14, 2009, was wilful under DRL § 244, and she was entitled to prejudgment interest on those payments.

The Court determined that once he cross-moved to modify his maintenance obligation, the husband's conduct could not be considered wilful. At the time of his application, he was unemployed, had attempted to find employment, and his income had

suffered a reduction. Under these circumstances, and because of his court-application, the husband's conduct in failing to pay maintenance, commencing on January 14, 2009, could not be considered wilful because he had a reasonable belief, articulated in cross-moving papers, that he was entitled to a reduction. The court found that his lack of maintenance payments, commencing in January 2009, was not willful.

The wife argued that the husband's "wilfulness" was again present when he obtained new employment at a salary that she alleged was roughly comparable with his salary at the time of the divorce. The evidence established that the husband returned to work in March 2010, but did not inform his wife that he had secured new employment. She only found out about it shortly before issuing an income execution in December 2010. Despite his apparent deceit in failing to report his new income, the court declined to find that his failure to pay maintenance during this time (from March 2010 through December 2010) was a "wilful" violation of his obligations. The husband still had a valid prima facie application to modify his maintenance pending before the court at the time, and although his new source of income made it unlikely that he would be relieved completely of his maintenance obligations, nonetheless, he had some justifiable basis for failing to make these payments. The court concluded that the missed payments from January 2009 through December 2010, were not wilful, and therefore, prejudgment interest was not awarded on these payments under DRL §244.

The judgment of divorce and the agreement contained identical language regarding the provision of life insurance: "In the event the Husband predeceases the Wife, the Husband shall make provisions for the Wife to receive either from life insurance on his life and/or from his estate a sufficient sum of money to make up any shortfall from the amount of \$800 per week maintenance, pursuant to Article VI of this agreement, that the wife has from monies received by her from the Husband's pension plans pursuant to Article III, J, 4, 5, and 76 of this agreement and social security payments that she is entitled to receive at that time."

The facts established at the hearing indicated the husband has no life insurance for the benefit of the wife, and has made no provisions for her under any testamentary documents. He testified that he had \$266,000 in term life insurance through his employer, but the wife was not a beneficiary under any policy. The wife interpreted the agreement as requiring her designation as a beneficiary to the extent required to make up any shortfall in the maintenance payments. She argued that the husband's failure to comply with this portion of the agreement is wilful and contemptuous. The husband argued that the provision was unenforceable because by its terms the language had no effect unless the husband predeceased the wife, and, that even if the language created an enforceable obligation, the benefits paid to the wife under the pension benefits and social security will exceed her anticipated maintenance benefits.

The court declined to read the prefatory phrase "in the event that the husband predeceases the wife" as a condition precedent to the husband's obligation to obtain the

required insurance coverage. This condition precedent was a condition to the requirement to pay over the insurance coverage to the wife. The rationale for the court's interpretation was that if the husband outlives the wife, then the entire life insurance clause is meaningless. The agreement and the judgment of divorce provide that maintenance terminates upon the wife's death. Therefore, the phrase "in the event that the husband predeceases the wife" does not set up a condition precedent to the husband's obligation. This court read this clause as a declaration of the circumstances in which the life insurance payments must be paid to the wife: the obligation only arises when the husband predeceases the wife.

The Court found that the life insurance provision was enforceable, but that did not justify the conclusion that the husband should be held in contempt for violation of the clause. The language of the clause, agreed to by both husband and wife, had an inartfully drafted prefatory clause that mitigated against a finding that the insurance requirement was a "clear and unequivocal mandate." In the court's judgment, the language, by itself, failed to meet the "clear and unequivocal mandate" sufficient to justify a finding of contempt, and it found that the wife has failed to prove by clear and convincing evidence that the husband, by failing to comply with his contractual obligations under the life insurance clause, was guilty of contempt. The court ordered the husband to procure the insurance coverage required by the agreement within ten (10) days of an order incorporating the decision.

Domestic Relations Law § 234 - Supreme Court Reiterates Oft-Stated Rule That There Is No Authority in the Domestic Relations Law for an Advance or Interim Distribution of Marital Assets

In *J.E. v T.E.*, 2012 WL 1971141 (N.Y.Sup.), 2012 N.Y. Slip Op. 50989 (U), Supreme Court denied plaintiff's pendente lite motion to require payment to him of \$51,863.00 for the purpose of paying his creditors. The parties were married on April 25, 2001 and had three children. They lived separate and apart with defendant having residential custody of the children and plaintiff having parental access. Just prior to the commencement of the action, defendant wife won a substantial amount of money in the New York State Lottery, and pursuant to the parties' written stipulation most of the winnings were placed in accounts with an investment company subject to mutual restraints against withdrawal or other use of the Fund. Tax free income from a portion of the Fund was payable to defendant and, pursuant to the Stipulation, she deferred plaintiff's obligation for child support, pending trial. Plaintiff was given permission by defendant to withdraw \$50,000.00 from the Fund for his personal use, with an additional \$10,000.00 that was paid to plaintiff's attorney. In a more recent stipulation defendant was granted permission by plaintiff to withdraw monies from the Fund to pay income taxes and legal and accounting fees arising in connection with her lottery winnings. In this application, plaintiff claimed that he needed monies to pay various judgment creditors, some of whom had attached his wages. Plaintiff was a "Union Ironworker" reporting income from wages

and interest of \$81,332.00 in 2011, and claiming the three children as exemptions. His net worth statement listed 14 accounts payable which added up to the \$51,863.00 requested. Plaintiff submitted two recent credit reports which showed a plethora of debts in various stages of collection. However, he did not submit any judgments, details or records showing when, to whom, by whom or for what purpose the debts were incurred. This lack of information was a sufficient basis, alone, for denial of the motion because the Court was not able to discern whether the debts were incurred in furtherance of the marriage. It observed that outstanding financial obligations incurred during the marriage, which are not solely the liability of either spouse, may be deemed marital obligations. However, a financial obligation incurred by one party in pursuit of his or her separate interests should remain that party's separate liability. Moreover, there is no authority in the Domestic Relations Law for interim distribution of marital assets, especially where, as here, numerous economic issues remain for consideration. The Court cited *Damon v. Damon*, 34 AD3d 416 (2d Dept.2006), which supports the necessity of withholding even partial equitable distribution until the trier of fact has heard all of the evidence at a trial.

Family Court

Child Support - Modification - Imputed Income - Not All Union Fringe Benefits Should Be Considered as Income for Calculating Support. To Be Considered as Part of Gross Income They must Be Regularly or Periodically Received by the Recipient or Reduce the Recipient's Living Expenses.

In *Matter of K.W. v. M.W.* --- N.Y.S.2d ----, 2012 WL 1858976 (N.Y.Fam.Ct.) petitioner filed an application seeking to modify the parties' divorce decree signed on September 1, 2011, alleging that the Judgment of Divorce stated that he had a right to apply for a modification of child support within 30 days of the divorce if he was not employed; and the petitioner was working for less than he did in 2010, as 2010 was an exceptional year. The petitioner requested a downward modification of the support order. The Support Magistrate found that the petitioner did not demonstrate that his income for 2011 was less than his income was in 2010 when factoring his fringe benefits into his hourly rate of pay. The Support Magistrate also found that the petitioner did not provide proof of his actual business expenses. Based upon these findings, the Support Magistrate concluded that the petitioner had not demonstrated a sufficient change in circumstances such that a modification of the support order was warranted and dismissed the petition with prejudice.

The petitioner argued before the Family Court that the fringe benefits provided to the petitioner through his union were not a part of his salary in that he did not receive these monies. Petitioner's W-2 statements, which were received into evidence, indicated

that he received only the union base rate of \$28.55 per hour and not the amount in excess of \$45.00 per hour ascribed to him by the Support Magistrate. Family Court observed that the Child Support Standards Act does not limit a parent's income to the amount reported as taxable income on the income tax return. Section 413(1)(b)(5)(iv)(C) of the Family Court Act provides that the court may impute to gross income an amount which considers "fringe benefits provided as a part of compensation for employment."

The evidence of benefits from the petitioners union showed that the base rate was \$28.55 per hour with additional hourly rates for the following benefits: pension fund, welfare fund, annuity fund, apprenticeship fund, industry advancement fund, and LMCT. When the base rate and the fringe benefits were added, the total was \$45.35 per hour, which was the amount cited by the Support Magistrate.

In this case of first impression, the Family Court agreed that not all union fringe benefits should be counted as income for the purposes of calculating child support. As a general rule, the Court found that such benefits must be regularly or periodically received by the recipient or must reduce the recipient's living expenses to be considered as a part of a parent's gross income. It found the reasoning of Kansas Court of Appeals decision to be persuasive on this subject. (See *Woolsey v. Woolsey*, 153 P.3d 570, WL 806022 (Kan.App.)). For example, the amount contributed by an employer to the employee's pension fund, 401k account, or health insurance premium would not be imputed to gross income for the purpose of calculating child support. However, an allowance for a vehicle or cell phone which is used for personal use would be considered for inclusion in the gross income amount. Such a rule would be applied by the court on a case-by-case basis taking into consideration the evidence adduced at trial on that particular proceeding.

There was insufficient information in the record before the Court to determine which, if any, of the petitioner's union fringe benefits should be counted as gross income for the purpose of calculating child support. However, the Court found there was sufficient basis to affirm the decision of the Support Magistrate. Irrespective of his employment status, the Court found that the petitioner did not demonstrate an adequate change of circumstances in support of a downward modification of his child support obligation. A downward modification of child support is granted when a party demonstrates that there has been a change in circumstances since the entry of the last support order which necessitates a reduction of the child support award. Child support is determined by the parent's assets and ability to provide for the child rather than the parent's current economic situation. While the evidence showed that the petitioner earned less money in 2011 than in 2010, there was no indication that he made any effort to make up for the loss of earnings by seeking other, or additional, employment. Petitioner testified that he was not eligible to receive unemployment compensation for a five-week period in 2011 as he chose to take a "vacation" during those weeks. He testified that during that period he took his children on a cruise, spent a week in Canada, and spent the rest of the time at home. Although the loss of employment or the reduction in employment may constitute a change in circumstances warranting the modification of the child support

amount, the moving parent must demonstrate a good-faith effort to obtain employment commensurate with that parent's qualifications and experience. The record was devoid of any such proof.

Family Court Act 216-c - Duty of Person Who Assists Pro Se Litigant in Preparation to Include All Allegations Presented by the Petitioner - Court Suggests it May Be Appropriate Modify Statute.

In Matter of Adefunke A v Adeniyi A, --- N.Y.S.2d ----, 2012 WL 1948798 (N.Y.Fam.Ct.) between June 21, 2011 and January 26, 2012 Adefunke A. filed three family offense petitions against her brother, Adeniyi A.

The June 21, 2011 family offense petition alleged that the parties reside together in Corona, and that: The most recent event was on June 1, 2011 at home. Petitioner states the respondent was verbally derogatory to her. Petitioner also states that the respondent wanted her to wear dirty clothing. The respondent also made an inappropriate call to 911 * * * Petitioner was taken by ambulance to Elmhurst Hospital and she was hospitalized in the psychiatric ward for three (3) days against her will. Petitioner also states that on April 19, 2011 the respondent slapped her in the chest. Petitioner also states that back in 2009 the respondent illegally cashed a check made out to her. Petitioner also states that the respondent illegally held her passport until he returned it to her in February 2011. * * * I have filed a criminal complaint concerning this incident. At the conclusion of the hearing the Court dismissed the petition as not proven by a preponderance of the evidence.

On December 7, 2011 Ms. A. filed a family offense petition against her brother, in which Ms. A. alleged that the parties continue to reside together in Corona, and that: On or about November 27, 2011 at my home in Corona, N.Y. the respondent slapped me on both sides of my face and repeatedly hit me all over my upper body with my slippers. The respondent then stepped on my glasses causing them to break. On or about mid-to-late November 2011 the respondent took my passport and repeatedly refused to return my passport to me. My passport was returned to me yesterday. The respondent has withheld my passport from me on more than one occasion. The Court granted respondent's motion to dismiss this petition based upon petitioner's failure to appear and prosecute the petition.

The third petition, filed by Ms. A. on January 26, 2012, alleged that she and her brother continue to reside together and that: The most recent incident was on December 29, 2011. Petitioner states "Note presence of assaults on other dates after the original case (see 1st line for dated entry). Respondent is aggressive and inappropriate with bodily insult, deform verbal expressions [sic] and derogatory comments and inappropriate courtesy [sic]. There have been multiple fights with bodily involvement-upper body (see hits and slaps to the upper body); other bodily assaults-see

push/pull and wrestling; verbal insults with derogatory remarks and intention to psychological assault [sic] see inappropriate and unruly comments about guest relations and co-living expenses. Defendant/ Respondent is responsible for damages/Hetch values [sic]. Petitioner further states in June 2010, "911 call to psychiatric ward at East Elmhurst after a laundry/load dispute [sic]; has been to same court w/o appropriate resolution; physical aggression and inappropriate response/affect about courtesy, right and age-relations-note date sequences (see 911 reports after 06/01/2011; also note 12/29/2011) [sic] and the history of explanations connected to date sequence. Respondent recently broke a pair of new glasses (see need for reimbursement); also review docket No.O-12688/11 connected to this file for damages that were not properly treated for awards and right of collection see history of documents. I have filed a criminal complaint concerning these incidents: petitioner states that she wrote a letter.

During the proceedings upon the third family offense petition, Mr. A. presented the Court Attorney-Referee and this Court with documentation relating his sister's mental condition demonstrating that she was suffering from psychosis and needed anti-psychotic medication. She had refused medication on a sufficient number of occasions to materially affect her condition" and her "illness interferes with her ability to make reasoned decisions with respect to her treatment" and "[l]eft untreated, the patient's mental illness will continue to deteriorate ."

The Court dismissed this third family offense proceeding at the same time that the second family offense petition was dismissed due to the failure of the petitioner to appear and prosecute the proceeding. Based upon the Court's review of the records of the three family offense petitions filed in the Court, and the information concerning petitioner's psychiatric condition, the Court's order of dismissal provided that the petitioner was prohibited from filing any further family offense petitions against her brother without prior court authorization.

The Family Court observed that Family Court which was envisioned as a unified statewide tribunal equipped to determine every symptom of familial dysfunction. It noted that "Family Court is frequently characterized as a pro se tribunal, i.e., a court whose doors are open to any member of the public who believes that she has a justiciable claim against any other individual. Filing fees are non-existent. The large number of unrepresented litigants adds to the chaotic and anarchic atmosphere in the Family Court, and providing assistance to the many unrepresented litigants adds tremendously to the burden placed upon court personnel. The Court noted that free access to the court was not always the prevailing practice. In the late 1970s it was alleged that probation officers and court officials had adopted a pattern and practice of attempting to discourage the filing of family offense petitions by unrepresented persons, and of delaying the presentation of family offense petitions to a judge for prompt action, even where the prospective litigant had made allegations of immediate danger. In 1977 amendments were made to the Family Court Act "to prohibit officials from discouraging or preventing any person who wishes to file a petition from having access to the court for that purpose. The legislation amended

Family Court Act 812(3) to provide that "[n]o official or other person designated pursuant to subdivision two of this section shall discourage or prevent any person who wishes to file a petition or sign a complaint from having access to any court for that purpose" (L 1977, ch 449). In 1981 (L 1981, ch 416) the Legislature again amended the Family Court Act, adding Family Court Act 216-b and 216-c, which provide procedures intended to ensure that unrepresented litigants have access to the court. Family Court Act 216-c provides specific procedures which court personnel must observe in preparing petitions on behalf of unrepresented litigants. Family Court Act 216-c, provides: (a) Whenever a petitioner is not represented by counsel, any person who assists in the preparation of a petition shall include all allegations presented by the petitioner. (b) No clerk of the court or probation officer may prevent any person who wishes to file a petition from having such petition filed with the court immediately. (c) If there is a question regarding whether or not the family court has jurisdiction of the matter, the petition shall be prepared and the clerk shall file the petition and refer the petition to the court for determination of all issues including the jurisdictional question. (d) This section shall not be applicable to juvenile delinquency proceedings.

Family Court observed that in this case court personnel were assigned to assist Ms. A. in filing all three of her family offense petitions and an application for leave to file a fourth petition. With respect to the third family offense petition, court personnel faithfully complied with the mandate of Family Court Act 216-c, and every allegation made by the petitioner was included in the petition, without regard for whether the allegations were intelligible or whether the allegations set forth a cause of action for a cognizable family offense. The petition was then filed and referred to this Court on the same day, as required by Family Court Act s 153-c, which provides that a person filing a petition in the Family Court in which a temporary order of protection is requested "shall be entitled to file a petition without delay on the same day such person first appears at the family court, and a hearing on that request shall be held on the same day or the next day that the family court is open following the filing of such petition.

The Court observed that Family Court Act 216-c was enacted 30 years ago because court clerks and probation officers were seen as unresponsive to the needs and desires of unrepresented petitioners, and the statute "totally divests clerks of the power to regulate the content and filing of petitions" (*Weiner v. State of New York*, 273 A.D.2d 95, 97 *Allen v. Black*, 275 A.D.2d 207, 209). The Court concluded that the concerns which led to the enactment of these statutory provisions no longer exist, and the number and complexity of the cases coming before the Family Court have increased exponentially since 1981. The strict construction afforded to Family Court Act 216-c has reduced experienced Family Court clerks to "scribes", and as applied, the provisions of this section make it quite likely that many petitions will be filed that lack legal merit or that contain unnecessary or improper allegations. Given the heavy caseload of the Family Court, the shortage of available resources, and the inconvenience and cost which result from the filing of meritless petitions, the court pointed out that it may be appropriate for the Legislature and court administrators to consider whether Family Court Act 216-c should

be modified to improve the efficiency of the Family Court without denying access to unrepresented litigants.

Given petitioner's demonstrated proclivity to engage in vexatious and baseless litigation against her brother, and the strong suggestion that she may be presently afflicted with untreated mental illness, the Court's prior order directing that Ms. A. obtain permission of a Family Court Judge prior to initiating any further family offense petitions against Adeniyi A. was continued.

June 1, 2012

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 Dexter 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][1]) - 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][1]). 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 had 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 unmaturing 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 husband's 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 Court 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 the 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. Dutchess 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. Zurich 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 husband's 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. Scopetta*, 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 husband's 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 husband's 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 husband's 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][1]; 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 marital 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 mother's 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 defendant's 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 cliché "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 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 child's 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 Alexis 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 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 from 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-l (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-l (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 pre-separation 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 marital 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 (see 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 be 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" (*Matson 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 nonwaivable 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 a 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 defendant's 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 father's 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 Cisse 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 husband's 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 things, 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 brevity 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 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), lv 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 dispositional

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 local 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" (*Princhip v. Princhip*, 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 thoroughly 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 health 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 reversed 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 supervised 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) Jacquilin 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 Division 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 Though 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 out 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 Division 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 Division 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 Division 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 Division 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" , undoubtedly 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 the 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 defendant's 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 Division 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 defendant's 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 Division 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 Division 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 Division 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 Aloï 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 Division 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 Sage* 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 Division rejected the father's 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 Division 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 found 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

Division 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 Division 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 Division 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 Division 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

decendent'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 habeas 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 Division 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 Division 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 Division 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. It 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 Division 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

Division 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 Division 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 an 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 precluded 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 § 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, *Buoniello* 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 assets 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 § 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 feasibility 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 the 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 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. See 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 was 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 that marriage. At issue was the father's obligation to support his child with the petitioner mother, born February 21, 2008 (subject child). The mother worked 30 hours per week. After deducting social security and medicare taxes from the annual income of the mother and the father, the Family Court determined that the combined parental income for the subject child was \$37,844.45, the basic child support obligation 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 an additional \$220 every two weeks. In determining whether the father's child support obligation was unjust or inappropriate in light of his obligation 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 annual household 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 the household income of the subject child, the father was denied any adjustment for his obligations to his other two children. Thereafter, in written findings of fact, the Support Magistrate stated that she denied the father any "deviation from the presumptively correct amount" of child support based upon his obligations to his other two children, on the ground that the father failed to present evidence that he had a legal obligation to support those children, and failed to submit proof that he was, in fact, providing support for them. The Support Magistrate 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, the Family 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 to Family 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 from income pursuant to subclause (D) of clause (vii) of subparagraph five of paragraph (b) of this subdivision [child support actually paid pursuant to a court order], and the financial resources of any person obligated to support such children, provided, however, that this factor may apply only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action" (Family Ct Act s 413[1][f][8]). If the basic child support amount computed pursuant to Family Court Act 413(1)(c) is unjust or inappropriate, child support is to be determined pursuant to Family Court Act 413(1)(g), based upon "such amount of

child support as the court finds just and appropriate." Further, additional expenses for child care and medical expenses which must be awarded when child support is determined pursuant to Family Court Act 413(1)(c), need not be awarded if child support is determined pursuant 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 could only take the needs of the father's other two children into account if the resources available to support them were less than the resources available to support the child who was the subject of the proceeding. However, in reaching this threshold determination as to how the father's resources should be utilized, the Support Magistrate should not have considered the father's resources in determining the resources 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 her written findings of fact, the Support Magistrate made what was, essentially, a finding contrary to her prior conclusion that the father's income constituted resources of the children of the marriage, when she found that their needs could not be considered because the father failed to establish that he was, in fact, providing support for them. Since these children were the children of his marriage, he clearly had a legal obligation to support them. Further, the father stated in open court that he gave his wife \$150 biweekly in cash for their support. It reversed the order and sustained the father's objections to the extent that the provisions of the order dated January 29, 2009, directing the payment of basic child support, child care expenses, and arrears, were vacated, and remitted the matter to the Family Court, for a new hearing and determination, and for findings of fact as to whether the child support obligation imposed was unjust or inappropriate in light of the father's obligation to support the children of his marriage.

An Order Directing Genetic Testing Should Not Be Entered Prior to a Hearing on the Child's Best Interests

In *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 plaintiff former husband's motion to the extent of ordering genetic marker testing be performed on defendant and her child. The parties were granted an uncontested divorce on the grounds of constructive abandonment, based on the plaintiff's sworn statement that defendant refused to have sexual relations with him for a period of one year prior to commencement of the divorce action. Just over a year after the divorce judgment was entered, plaintiff brought the an application seeking to establish his paternity of defendant's child, alleging that he was 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. It 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 Division 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 husband 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.

* * *

"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 "right[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 "right 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 Rapporteur'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 fiancée 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 its 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 decision making 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 this interpretation 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 parent under 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. Virginia 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 Division 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 separate plenary 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 Antenuptial 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 contended 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 the 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 husband's 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 payment 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 High Income Cases child Support on Parental Income in Excess of \$80,000 Should Be Based on the Child's Actual Needs

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-I 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

Only 10% 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 Marital 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 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 encumbering 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 Down payment 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 counter top 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 or the commencement of 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 husband's 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" (Hamsch 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 respondent's 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 defendant's 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 Properly 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. The 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 ½ 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. Conceitedly, 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 its 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 defendant's 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 by the 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 husband's 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 husband's argument that the 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. The 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 husband's 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 un rebutted 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 Family Court 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 in the second degree, the Family Court improperly bootstrapped the PINS adjudication onto one 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 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. 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 January 9, 1992. The defendant was represented by an attorney in connection with the negotiation of the separation agreement, 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 prepared by counsel contained the general terms previously agreed upon 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 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 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 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 (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 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.

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 earned roughly \$60,000 per year working for a manufacturer of heavy equipment. Supreme Court directed plaintiff to pay maintenance of \$500 per month until defendant is eligible for Social Security retirement 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 monthly maintenance of \$500 until 2019, when she reaches age 62, and \$250 until 2022, when she reaches age 65. Defendant was awarded monthly maintenance of \$500 for a period five years from the date of entry of 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 necessary to 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 essentially divided 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 reason that she shouldn't be able to obtain a modest and sustainable level of income within a reasonable time. Her purported health problems were not supported by competent medical proof. She had no responsibility for any unemancipated 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. The 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 [Grinfeld] 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 Grinfeld 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 dischargeability 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 rescission 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

In *Petosa v Petosa*, --- N.Y.S.2d ----, 2008 WL 4952770 (N.Y.A.D. 4 Dept.) the Appellate Division held that 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. 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.

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.

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 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.

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 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 Public 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 public 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 its 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 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 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 children's] 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 necessities. 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 marital 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 valuing 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 valuing "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 spouse'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; 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 during 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

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 an 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 un rebutted 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 children's college tuition and expenses until they reach the age of 21.

Court May Award Maintenance upon Annuling 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 ½ 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 situation made 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 defendant's 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 *Schwab v Schwab*, 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 Prenuptial 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 Division 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 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 to 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 marital residence or November 30, 2006. The Appellate Division 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 Division 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 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 of 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 a \$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 Division 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 husband's 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 Prenuptial 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 ... which governed 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 Division 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.

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 to 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 ½ 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 Referee 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 pre-separation 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 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 decree, 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]).

Willful 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 ½ 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 ½ 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 \$50,000. 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 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 enjoining 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 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 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 Trial 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 Division 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 Manual.)

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 marital 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 (2d Dept., 2007) the Appellate Division affirmed orders 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 USTC ¶36,100 [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 divorce, 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 *Michaels v. Michaels*, 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 husband's 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 Division 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 would 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 v. 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 meet 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 Effectuated

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 defendant 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 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) 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, 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 unconscionable. 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 Prenuptial 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 Prenuptial 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 Prenuptial or post-nuptial 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-nuptial (“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, otherwise 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 Division 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 husband's 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, 2007

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 Division 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 husband's 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 Evidentiary 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)(l). CPLR 5241(b)(2)(l) 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][l]), was not met. Therefore, the court properly determined that petitioner lacked authority pursuant to CPLR 5241(b)(2)(l) 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 Ukrainian 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 federal 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 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 its 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 husband's 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 in 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: (l) 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 agreement 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 fact-finding 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 defendant's motion for a new trial. The Appellate Division reversed the judgment insofar as appealed from, on the law, and granted the defendant's 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 the 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 *Bernton 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 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. Moreover, 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 un rebutted, 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 its 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 the 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 Maksimydass v. Maksimydass*, 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 *Kessler v. Kessler*, 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 *Pagliari 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 that 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 Dept., 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 Transmuted 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 11 occupied 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 were 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 that 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 support 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 v 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 Court 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.) after 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, it 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

çThe 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 father's 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 its 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 its 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 embraced 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 Department's 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 child's 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 child's 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 the 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.) the parties married in February 1999. Supreme Court granted defendant a divorce, directed 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.

Incontrovertible 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 Division 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 than 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 construction began, 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 husband's 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 [§ 240\[1-b\]\[4\]](#), [§ 240\[5\]\[vii\]\[C\]](#)). 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 marital 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 its 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 plaintiff's request for counsel fees as a motion for costs or sanctions. Supreme Court's award was adequately supported by the affidavit of plaintiff's 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 that 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 Marital 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 defendant's 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.

November 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 Dischargeable 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, the 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 *Wiesel v Wiesel-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 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 defendant's 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 children 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 known 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 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 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 deny plaintiff'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'avano 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' pre-separation 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 defendant's 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

Equitable Distribution

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.

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."

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 Renunciation of Life Insurance in 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.

Equitable Distribution Decisions

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 condominium'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 court's 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

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 trial 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

Judgment of Divorce and QDRO Awarding Interest in Husband's Pension Do Not Automatically Include Preretirement Death Benefits Available under Plan. If the Intent Is to Distribute Such Benefits, That Should Be Separately and Explicitly Stated.

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.

Cause of Action for Divorce on Ground of Imprisonment Brought 16 Years after Commencement of Defendant's Confinement, Not Barred by the Five-year Statute of Limitations

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, i.e., 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, Hamsch 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

Divorce Lawyer Discharged Without Cause by Client Can Still Make an Application for Counsel Fees Against Other Spouse Pursuant to DRL §237(a) after Discharge

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."

Court of Appeals Affirms Order Which Granted Parents' Request to Terminate Grandparents Visitation Where Terminating Visitation Was in Child's Best Interest

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.]

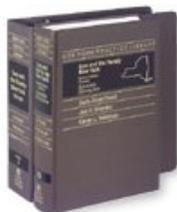
Separate Property Becomes Marital Property For No Apparent Statutory Reason

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.]

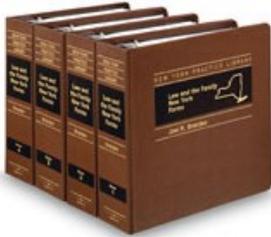
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**Law and the Family New York, 2d (New York Practice Library, 9 Volumes)
By Joel R. Brandes. (Updated December 2016 by Joel R. Brandes, Bari Brandes Corbin and Evan B. Brandes).**

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Description. This set provides you with practitioner-tested forms for a wide variety of family law matters. It includes forms relating to the creation of the marriage relationship, the attorney-client relationship, matrimonial agreements, and matrimonial litigation. Specific topics covered include antenuptial agreements, separation agreements, modification agreements, and matters relating to infants and incompetents, and service of process.

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ⁱ Became Public Law No: 115-97 on December 22, 2017. It is known as an Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018 and was originally introduced in Congress as the Tax Cuts and Jobs Act of 2017 (TCJA).

ⁱⁱ IRC §24

ⁱⁱⁱ Public law No. 115-97. (2017) See Conference Report at <http://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>

iv See Act Sec. 11041. Suspension of Deduction for Personal Exemptions. Before the Act, taxpayers subtracted \$4,150 from income for each person claimed.

v IRC §§ 61, 71, and 215.

vi IRC §§ 215(a), 61(a)(8) and 71(a).

vii IRC § 71(c).

viii Public Law No: 115-97.

ix Sec. 11051. Repeal of Deduction for Alimony Payments.

x Former 26 U.S.C.A. § 215

xi Former I.R.C. § 215 (a)

xii Former I.R.C. § 215 (b)

xiii Former 26 U.S.C.A. § 71, I.R.C. § 71.

xiv Former I.R.C. § 71(a).

xv Former I.R.C. § 71(b).

xvi Former 26 U.S.C.A. § 61, I.R.C. § 61

xvii Former 26 U.S.C.A. § 62, I.R.C. § 62 (a)

xviii Former 26 U.S.C.A. § 62, I.R.C. § 62 (a) (10)

xix Public law No. 115-97. (2017) See Conference Report at <http://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>

xx Sec. 11022. Increase in And Modification of Child Tax Credit provides:

(a) IN GENERAL. —Section 24 is amended by adding at the end the following new subsection:

“(h) SPECIAL RULES FOR TAXABLE YEARS 2018 THROUGH 2025.—

“(1) IN GENERAL. —In the case of a taxable year beginning after December 31, 2017, and before January 1, 2026, this section shall be applied as provided in paragraphs (2) through (7).

“(2) CREDIT AMOUNT. —Subsection (a) shall be applied by substituting ‘\$2,000’ for ‘\$1,000’.

“(3) LIMITATION. —In lieu of the amount determined under subsection (b)(2), the threshold amount shall be \$400,000 in the case of a joint return (\$200,000 in any other case).

“(4) PARTIAL CREDIT ALLOWED FOR CERTAIN OTHER DEPENDENTS. —

“(A) IN GENERAL. —The credit determined under subsection (a) (after the application of paragraph (2)) shall be increased by \$500 for each dependent of the taxpayer (as defined in section 152) other than a qualifying child described in subsection (c).

“(B) EXCEPTION FOR CERTAIN NONCITIZENS. —Subparagraph (A) shall not apply with respect to any individual who would not be a dependent if subparagraph (A) of section 152(b)(3) were applied without regard to all that follows ‘resident of the United States’.

“(C) CERTAIN QUALIFYING CHILDREN. —In the case of any qualifying child with respect to whom a credit is not allowed under this section by reason of paragraph (7), such child shall be treated as a dependent to whom subparagraph (A) applies.

“(5) MAXIMUM AMOUNT OF REFUNDABLE CREDIT. —

“(A) IN GENERAL. —The amount determined under subsection (d)(1)(A) with respect to any qualifying child shall not exceed \$1,400, and such subsection shall be applied without regard to paragraph (4) of this subsection.

“(B) ADJUSTMENT FOR INFLATION. —In the case of a taxable year beginning after 2018, the \$1,400 amount in subparagraph (A) shall be increased by an amount equal to—

“(i) such dollar amount, multiplied by

“(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting ‘2017’ for ‘2016’ in subparagraph (A)(ii) thereof.

If any increase under this clause is not a multiple of \$100, such increase shall be rounded to the next lowest multiple of \$100.

“(6) EARNED INCOME THRESHOLD FOR REFUNDABLE CREDIT. —

Subsection (d)(1)(B)(i) shall be applied by substituting ‘\$2,500’ for ‘\$3,000’.

“(7) SOCIAL SECURITY NUMBER REQUIRED. —No credit shall be allowed under this section to a taxpayer with respect to any qualifying child unless the taxpayer includes the social security number of such child on the return of tax for the taxable year. For purposes of the preceding sentence, the term ‘social security number’ means a social security number issued to an individual by the Social Security Administration, but only if the social security number is issued—

“(A) to a citizen of the United States or pursuant to subclause (I) (or that portion of subclause (III) that relates to subclause (I)) of section 205(c)(2)(B)(i) of the Social Security Act, and

“(B) before the due date for such return.”.

(b) EFFECTIVE DATE. —The amendment made by this section shall apply to taxable years beginning after December 31, 2017.

xxi Public law No. 115-97. (2017) See Conference Report at <http://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>

xxii Public law No. 115-97. (2017) See Conference Report at <http://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>

xxiii Public law No. 115-97. (2017) See Conference Report at <http://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>

xxiv Public law No. 115-97. (2017) See Conference Report at <http://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>

xxv Public law No. 115-97. (2017) See Conference Report at <http://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>

xxvi Public law No. 115-97. (2017) See Conference Report at <http://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>

xxvii The act uses an indexing convention that rounds the \$1,400 amount to the next lowest multiple of \$100.

xxviii Additionally, a qualifying child who is ineligible to receive the child tax credit because that child did not have a Social Security number as the child's taxpayer identification number may nonetheless qualify for the non-refundable \$500 credit.

xxix Public law No. 115-97. (2017) See Conference Report at <http://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>

xxx Public law No. 115-97. (2017) See Conference Report at <http://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>

xxxi Public law No. 115-97. (2017) See Conference Report at <http://docs.house.gov/billsthisweek/20171218/CRPT-115HRPT-466.pdf>