

# **LAW AND THE FAMILY NEW YORK 2021-2022**

## **By Joel R. Brandes**

### **TABLE OF CONTENTS**

#### **Chapters in Volumes**

#### **Volume 1 DIVORCE, SEPARATION AND ANNULMENT**

- Chapter 1. Definitions, Nature, and Control of Marriages
- Chapter 2. Creation of Marriage Relationship
- Chapter 3. Validity of Marriages
- Chapter 4. Proof of Marriages
- Chapter 5. Jurisdiction, Venue, and Procedural Requirements
- Chapter 6. Nature of, Ground for, and Effect of, Absolute Divorce
- Chapter 7. Defenses Against Divorce
- Chapter 8. Vacation and Setting Aside of Judgments of Divorce; Collateral Attack
- Chapter 9. Recognition of Foreign Divorces (Ex Parte and Bilateral)
- Chapter 10. Declaratory Judgments and Injunctions Against Divorce Actions
- Chapter 11. Dissolution of Marriage for Absence
- Chapter 12. Dissolution of Marriage for Incurable Mental Illness
- Chapter 13. Dissolution by Civil Death
- Chapter 14. Jurisdiction, Venue, and Procedural Requirements
- Chapter 15. Nature of, Grounds for, and Effect of, Judicial Separation
- Chapter 16. Defenses Against Judicial Separation
- Chapter 17. Modification and Revocation of Judgments of Separation
- Chapter 18. Jurisdiction, Venue, and Procedural Requirements
- Chapter 19. Nature of, Grounds for, and Effect of, Annulment Actions and Declarations of Nullity of Marriages
- Chapter 20. Defenses Against Actions for Annulment or Declarations of Nullity of Marriages
- Chapter 21. Setting Aside Judgments of Annulment; Appeals; Collateral Attack

#### **Volume 2 ALIMONY, ETHICAL CONSIDERATIONS AND PROPERTY**

- Chapter 22. Alimony Pendente Lite
- Chapter 23. Permanent Alimony
- Chapter 24. Enforcement of Alimony Orders and Judgments
- Chapter 25. Modification of Alimony Orders and Judgments

Chapter 26. Rules of Professional Conduct and Ethical Considerations for Family Law Attorneys  
Chapter 27. Attorney's Liens  
Chapter 28. Marital Property of Husbands and Wives  
Chapter 29. Counsel Fees as Necessaries  
Chapter 30. Conflict of Laws: Classification of Property and Choice of Law  
Chapter 31. Constructive Trusts  
Chapter 32. Interspousal Gifts  
Chapter 33. Joint Bank Accounts  
Chapter 34. Property Settlements and Agreements Between Spouses

### **Volume 3 EQUITABLE DISTRIBUTION**

Chapter 35. The Equitable Distribution Law: An Overview  
Chapter 36. Marital Property and Separate Property: Definitions  
Chapter 37. The Equitable Distribution System  
Chapter 38. Matrimonial Agreements  
Chapter 39. Requisites of Separation and Postnuptial Agreements  
Chapter 40. Enforcement and Modification of Domestic Relations Law § 236, Part B Agreements  
Chapter 41. Conflicts of Law, Constitutional Issues, and Related Problems

### **Volume 4 EQUITABLE DISTRIBUTION (CONTINUED)**

Chapter 42. Discovery and Expert Fees  
Chapter 43. Matrimonial litigation practice and procedure  
Chapter 44. Order of Protection  
Chapter 45. Summary Judgment, Injunctions and Property Determinations under Domestic Relations Law § 234  
Chapter 46. Nature of Proceedings Under Domestic Relations Law § 236, Part B  
Chapter 47. Maintenance or Distribution of Marital Property—Jurisdiction and Service of Process  
Chapter 48. Procedure  
Chapter 49. Property Distribution  
Chapter 50. Businesses and Closely-Held Corporations  
Chapter 51. Professional Practices  
Chapter 52. Enhanced Earning Capacity from Professional License, Degree, Celebrity Goodwill, Or Career Enhancement  
Chapter 53. Pensions and Retirement Benefits

Chapter 54. Marital Home

## **Volume 5 EQUITABLE DISTRIBUTION (CONTINUED)**

Chapter 55. Maintenance

Chapter 56. Temporary Maintenance

Chapter 57. Tax Aspects of Maintenance, Support, and Property Distribution

Chapter 58. Insurance Coverage and Medical Support Orders

Chapter 59. Child Support

## **Volume 6 DISTRIBUTIVE AWARDS (CONTINUED)**

Chapter 60. Counsel Fees

Chapter 61. Modification of Orders and Judgments

Chapter 62. Enforcement of Orders and Judgments

## **Volume 7 CHILD CUSTODY, CHILD SUPPORT AND INTERNATIONAL CHILD ABDUCTION**

Chapter 63. Child Custody and Visitation

Chapter 64. Visitation and Joint Custody

Chapter 65. Factors Considered in Custody Disputes

Chapter 66. Child Custody and Visitation Practice & Procedure

Chapter 67. Uniform Child Custody Jurisdiction Act—In Effect until April 28, 2002.

## **Volume 8 CHILD CUSTODY, CHILD SUPPORT AND INTERNATIONAL CHILD ABDUCTION (CONTINUED)**

Chapter 68. The Uniform Child Custody Jurisdiction and Enforcement Act—In Effect April 28, 2002

Chapter 69. The Parental Kidnapping Prevention Act

Chapter 70. Children's Passports

Chapter 71. The International Parental Kidnapping Crime Act

Chapter 72. Hague Convention on the Civil Aspects of International Child Abduction

Chapter 73. Hague Convention and International Child Abduction Remedies Act ("ICARA") Practice and Procedure

Chapter 74. Hague Convention Practice and Procedure in New York State Courts

## **Volume 9 APPELLATE PRACTICE, EQUITABLE DISTRIBUTION CASE SUMMARY TABLE AND APPENDICES**

Chapter 75. Matrimonial and Family Law Appellate Practice

Appendix 1. Summary of Equitable Distribution

Decisions

Appendix 2. McKinney’s Domestic Relations Law § 236

Appendix 3. McKinney’s Domestic Relations Law § 240

Appendix 4. Statement of Net Worth (Gender Neutral)

Appendix 5. Findings of Fact and Conclusions of Law  
and Matrimonial Judgements

Appendix 6. Table of Court Filing Fees

Appendix 7. Table of Poverty Income Guidelines

Amount, Self-Support Reserve, Combined

Parental Income and Income Cap

## **Volume 10 FAMILY COURT PROCEEDINGS**

Chapter 76. Powers and Procedures of Family Court

Chapter 77. Custody Proceedings in Family Court

Chapter 78. Support Proceedings—Overview

Chapter 79. Child Support Standards Act

Chapter 80. Uniform Interstate Family Support Act

Chapter 81. The Convention On The International Recovery Of  
Child Support And Other Forms Of Family  
Maintenance (“Family Maintenance Convention”)

## **Volume 11 FAMILY COURT PROCEEDINGS (CONTINUED)**

Chapter 82. Paternity Proceedings

Chapter 83. Conciliation Proceedings

Chapter 84. Guardianship and Foster Care

Chapter 85. Adoption

Chapter 86. Family Offenses

Chapter 87. Persons in Need of Supervision

## **Volume 12 FAMILY COURT PROCEEDINGS (CONTINUED)**

Chapter 88. Juvenile Delinquency

Chapter 89. Child Protection Proceedings

Chapter 90. Termination of Parental Rights

Chapter 91. Appeals—Appeals from family court—Practice and Procedure

# **LAW AND THE FAMILY NEW YORK TABLE OF CONTENTS**

## **VOLUME 1 DIVORCE, SEPARATION AND ANNULMENT**

### **PART ONE FORMATION OF THE FAMILY UNIT; MARRIAGE**

#### **CHAPTER 1. DEFINITIONS, NATURE, AND CONTROL OF MARRIAGES**

§ 1:1 Generally

§ 1:2 Changes in the American family, marriage and divorce

§ 1:3 Governmental regulation

## **CHAPTER 2. CREATION OF MARRIAGE RELATIONSHIP**

### **I. IN GENERAL**

§ 2:1 Generally

§ 2:2 Requirements as to age

§ 2:3 Requirements as to mental capacity

§ 2:4 Requirements as to health—Physical examinations—  
Health information

§ 2:5 Intention and consent of the parties

§ 2:6 Consent to marriage of a minor—In general

§ 2:7 —Applicant under 18 years of age

§ 2:8 Publication of banns

§ 2:9 Marriage by person, or spouse of person, sentenced to  
life imprisonment or death

§ 2:10 Parties to a marriage

### **II. MARRIAGE LICENSES**

§ 2:11 Generally—Failure to obtain license

§ 2:12 Application for license

§ 2:13 —Adoption or change of surname

§ 2:14 —False statements

§ 2:15 Issuance of license

xvii

§ 2:16 —Form and contents

§ 2:17 —As affected by prior marriage

§ 2:18 License for subsequent ceremony

### **III. CELEBRATION OR SOLEMNIZATION OF MARRIAGE**

§ 2:19 Generally

§ 2:20 Authority to solemnize marriage

§ 2:21 —Public officials, magistrates, judges, and justices

§ 2:22 —Duties of city clerk of first-class city of over one  
million inhabitants—Marriage ceremony for persons  
under the age of 18

§ 2:23 —Marriage officers

§ 2:24 —Where a party is under 18

§ 2:25 —Registration of persons performing marriages

§ 2:26 Solemnization by written contract

§ 2:27 Presence of parties and witnesses; form of ceremony;  
proxy marriages

§ 2:28 Time of solemnization

§ 2:29 Liability for unlawful solemnization

### **IV. CERTIFICATES, RECORDS, AND TRANSCRIPTS**

§ 2:30 Generally

§ 2:31 Certification of marriage; state commissioner of health  
may furnish

§ 2:32 Filing and recording—Records to be kept by town and  
city clerks—Search and inspection

§ 2:33 Supervision of town and city clerks' records outside the  
City of New York

§ 2:34 Penalty for violation

- § 2:35 Records to be kept by the State Department of Health and the city clerk of the City of New York
- § 2:36 Registration of marriage of New York City resident while at sea
- § 2:37 Certified Transcripts

## **CHAPTER 3. VALIDITY OF MARRIAGES**

### **I. IN GENERAL**

#### § 3:1 Generally

LAW AND THE FAMILY NEW YORK  
xviii

#### § 3:2 Void marriages

#### § 3:3 Voidable marriages

#### § 3:4 Alienage of party

#### § 3:5 Law governing validity

#### § 3:6 —Marriages while at sea

### **II. WHERE PARTIES ARE RELATED**

#### § 3:7 Generally

#### § 3:8 Marriages contracted outside state

#### § 3:9 Incestuous marriage as an offense

### **III. WHERE SPOUSE BY PRIOR UNDISSOLVED MARRIAGE IS LIVING**

#### § 3:10 Generally

#### § 3:11 Marriage after interlocutory judgment dissolving or annulling former marriage

#### § 3:12 Marriages contracted outside state

#### § 3:13 Marriage where spouse is imprisoned for life or receives a death sentence

#### § 3:14 Marriage where spouse is absent and believed dead

#### § 3:15 Equitable distribution law: alimony, maintenance, marital property

## **CHAPTER 4. PROOF OF MARRIAGES**

### **I. PRESUMPTIONS AND BURDEN OF PROOF**

#### § 4:1 Generally

#### § 4:2 As to continuance of marriage

#### § 4:3 Validity of marriage

#### § 4:4 Validity as between prior and subsequent marriages

#### § 4:5 —Presumption of death of former spouse

#### § 4:6 —Presumption as to divorce

#### § 4:7 Cohabitation and repute as raising presumption of marriage

#### § 4:8 —After removal of impediment to marriage

#### § 4:9 —Common-law marriage states today

#### § 4:10 —Effect of ignorance of impediment or its removal

#### § 4:11 —Where purpose is to have illicit relationship

### **II. ADMISSIBILITY, WEIGHT, AND SUFFICIENCY OF EVIDENCE**

#### § 4:12 Generally

#### § 4:13 Marriage records and other documentary evidence

#### § 4:14 Testimony of parties

#### § 4:15 Testimony of third persons

- § 4:16 Admissions and declarations
- § 4:17 —Of nonmarriage
- § 4:18 Presumption of validity of marriage
- § 4:19 Overcoming presumption of validity of marriage—  
Second marriage
- § 4:20 Proof of common-law marriage when it was permitted  
in New York
- § 4:21 —Cohabitation and reputation
- § 4:22 Overcoming presumption of continuance of illicit  
relations when common-law marriage was permitted  
in New York
- § 4:23 Proof of foreign marriage
- § 4:24 New York’s recognition of common-law marriage
- § 4:25 Same-sex marriage—Historical evolution of present  
law
- § 4:26 —New York’s marriage equality act
- § 4:27 —US v. Windsor and Obergefell v. Hodges

### **III. NON-MARITAL PARTNERS**

- § 4:28 Generally—Express contract (oral or written)

## **PART TWO ABSOLUTE DIVORCE**

### **CHAPTER 5. JURISDICTION, VENUE, AND PROCEDURAL REQUIREMENTS**

#### **I. IN GENERAL**

- § 5:1 Generally
- § 5:2 Jurisdiction as a legal concept
- § 5:3 In personam or personal jurisdiction
- § 5:4 Long-arm jurisdiction—CPLR 302(a)
- § 5:5 —CPLR 302(b)
- § 5:6 —Equitable distribution and independent action for  
child support
- § 5:7 —Equity jurisdiction over property located out of new  
york
- § 5:8 In rem and quasi in rem jurisdiction
- § 5:9 Custody jurisdiction
- § 5:10 Subject matter jurisdiction

#### **II. SERVICE OF SUMMONS**

- § 5:11 Generally
- § 5:12 Index number affixed to summons—CPLR 304
- § 5:13 Service of automatic orders with summons
- § 5:14 Filing requirement—CPLR 304
- § 5:15 Purchase of index number—CPLR 306-a
- § 5:16 120-day service requirement—CPLR 306-b
- § 5:17 Contents of summons or summons and complaint
- § 5:18 Filing proof of service
- § 5:19 Service of process—Requirement of notice of nature of  
matrimonial action on summons
- § 5:20 —Ancillary relief—Notice of nature of ancillary relief  
demanded Under Domestic Relations Law § 232
- § 5:21 Pleadings—Nature of ancillary relief

§ 5:22 Ancillary relief after dismissal of action after trial—  
Continuation or award of ancillary relief prior to  
entry of judgment

§ 5:23 Methods of personal service—CPLR 308

§ 5:24 Methods of personal service in a matrimonial action

§ 5:25 Service of summons upon infant

§ 5:26 Proof of service

§ 5:27 Service by publication in matrimonial action—CPLR  
315

§ 5:28 Publication costs paid by local government—No  
constitutional right to counsel

§ 5:29 Service outside the State—CPLR 313 and 314

§ 5:30 The Hague Convention on the service abroad of  
judicial and extrajudicial documents—In general

§ 5:31 Appearance by defendant in matrimonial action—In  
general

§ 5:32 —Informal appearance

§ 5:33 Dismissal for failure to serve complaint

### **III. RESIDENCE WITHIN STATE AS CONDITION OF ACTION**

§ 5:34 Generally

§ 5:35 “Residence” defined as “Domicile”

§ 5:36 Domicile of wife may be separate from that of husband

§ 5:37 Marriage within the state

### **IV. PARTIES**

§ 5:38 Generally

§ 5:39 Incompetents

§ 5:40 Infants

§ 5:41 Co-respondent

§ 5:42 —Status as a party

§ 5:43 Effect of death of party

### **V. VENUE**

§ 5:44 Venue—Generally

§ 5:45 —Change of venue

### **VI. THE PLEADINGS**

#### **A. THE COMPLAINT**

##### **1. In General**

§ 5:46 Generally

§ 5:47 Joinder of causes of action

§ 5:48 Third parties—Joinder of parties and intervention

§ 5:49 Motion to make more definite and certain

§ 5:50 Bill of particulars

§ 5:51 Amended and supplemental pleadings

§ 5:52 Extension of time to serve a complaint or answer

##### **2. Necessary Allegations**

§ 5:53 Generally

§ 5:54 Jurisdictional allegations

§ 5:55 An existing valid marriage

§ 5:56 Grounds for divorce—Adultery

§ 5:57 —Name of co-respondent

- § 5:58 —Cruel and inhuman treatment
- § 5:59 —Abandonment
- § 5:60 —Confinement to prison
- § 5:61 —Living separate and apart pursuant to decree of separation
- § 5:62 —Living separate and apart pursuant to separation agreement
- § 5:63 —Irretrievable breakdown for a period of at least six months

## B. THE ANSWER

- § 5:64 The Answer
- § 5:65 Verification
- § 5:66 Forgiveness or condonation
- § 5:67 Adultery
- § 5:68 Insanity
- § 5:69 Statute of limitations

## C. COUNTERCLAIMS

- § 5:70 Generally
- § 5:71 Effect of failure to serve complaint
- § 5:72 Verification
- § 5:73 Joinder of counterclaims
- § 5:74 Abatement
- § 5:75 Voluntary discontinuance—Effect upon right to serve answer and counterclaim
- § 5:76 Discontinuance by court order—Former rule
- § 5:77 —Current rule—In general
- § 5:78 Sealing information as to details of action
- § 5:79 Confidentiality
- § 5:80 Omission or redaction of confidential personal information

## D. PRE-TRIAL DISCLOSURE UNDER CPLR ARTICLE 31 - USE OF DISCLOSURE DEVICES

- § 5:81 Disclosure—In general—CPLR 3101
- § 5:82 —Limitations upon disclosure—Material and Necessary
- § 5:83 —Limitations prior to enactment of former Domestic Relations Law § 250:
- § 5:84 —Financial examinations before trial prior to enactment of Domestic Relations Law § 250:
- § 5:85 —Compulsory financial disclosure after enactment of Domestic Relations Law § 250
- § 5:86 —Compulsory financial disclosure—Net worth statement—Domestic Relations Law § 236(B)(4)
- § 5:87 —Calendar control of financial disclosure—22 NYCRR 202.16
- § 5:88 —Disclosure under Article 31 of the Civil Practice Law and Rules—In general
- § 5:89 Deposition upon oral questions—Procedure
- § 5:90 —Deposition by telephone or other remote electronic means
- § 5:91 —Rulings
- § 5:92 —Preparation of the deposition

TABLE OF CONTENTS

xxiii

§ 5:93 Deposition upon oral examination—Filing transcript

§ 5:94 —Exhibits

§ 5:95 —Use of deposition

§ 5:96 —Limitations upon use

§ 5:97 —Effect of using deposition

§ 5:98 —Rules of evidence

§ 5:99 Deposition on written questions—Procedure

§ 5:100 —When available

§ 5:101 Deposition upon written questions—Notice

§ 5:102 —Preparation of the deposition

§ 5:103 —Use and limitations

§ 5:104 Discovery and production of documents and things for inspection, testing, copying or photographing—  
Procedure

§ 5:105 Discovery and production—Notice or motion

§ 5:106 —Amended or supplemental response

§ 5:107 —Objection—Response to notice

§ 5:108 —Notice of withheld documents

§ 5:109 —Palpably improper notice

§ 5:110 Disclosure—Non-party witness—CPLR 3101(a)(4)—  
Procedure

§ 5:111 —Nonparty witness—Discovery and inspection—  
Procedure

§ 5:112 — — —Business records

§ 5:113 —Interrogatories—Procedure

§ 5:114 — —Non-party witness

§ 5:115 — —Procedure

§ 5:116 — —Use of interrogatories

§ 5:117 —Demand for address—Procedure

§ 5:118 —Physical, mental, or blood examination—Procedure

§ 5:119 — —Notice

§ 5:120 — —Objection and response to notice for examination

§ 5:121 — —Privilege

§ 5:122 —Notice to admit—Procedure

§ 5:123 — —Penalties for refusal to admit

§ 5:124 —Notice to identify experts—CPLR 3101(d)

§ 5:125 —Remedy for failure to disclose

§ 5:126 —Penalties for willful failure to disclose

§ 5:127 Uniform court rules regarding videotape of depositions—22 NYCRR 202.15

§ 5:128 —Notice of taking deposition

§ 5:129 —Conduct of the examinations

§ 5:130 —Certification

§ 5:131 —Copies

§ 5:132 —Filing and objections

§ 5:133 —Use at trial or on appeal

§ 5:134 —Audiotaping of deposition

§ 5:135 Uniform rules regulating conduct of depositions—22 NYCRR Part 221

§ 5:136 —Permitted objections

§ 5:137 —When refusal to answer permitted after objection  
made

§ 5:138 —When interrupting a deposition permitted

§ 5:139 Service of trial subpoena upon attorney for party  
§ 5:140 Compliance with trial subpoena duces tecum  
§ 5:141 Admission of documents produced in response to litigation demand—Rebuttable presumption of authenticity

## **E. STAY OF ACTION AND ABANDONMENT**

§ 5:142 Stay—CPLR 2201  
§ 5:143 —Domestic Relations Law § 239—Impact on divorce action  
§ 5:144 Abandoned Actions

## **VII. TRIAL**

§ 5:145 Generally—Preferences—Motion for Adjournment  
§ 5:146 Trial by Jury  
§ 5:147 Trial by jury—Findings of jury as conclusive or advisory  
§ 5:148 —Waiver of jury trial  
§ 5:149 Reference to referee or judicial hearing officer—In matrimonial actions—In general  
§ 5:150 Reference to a referee or judicial officer to determine—Procedure  
§ 5:151 Reference to referee or judicial hearing officer to hear and report—Procedure  
§ 5:152 Reference to referee or judicial hearing officer—Authority to act, effect of order in excess of upon jurisdiction  
§ 5:153 —Equitable distribution

## **VIII. EVIDENCE**

### **A. NECESSITY OF PROOF AND SUFFICIENCY**

§ 5:154 Generally  
§ 5:155 Proof of adultery—Caution  
§ 5:156 Proof of adultery  
§ 5:157 —By circumstantial evidence  
§ 5:158 —By testimony of third persons  
§ 5:159 —By proof of divorce and remarriage  
§ 5:160 Confessions  
§ 5:161 Proof of an existing valid marriage  
§ 5:162 Residence  
§ 5:163 Cruel and inhuman treatment  
§ 5:164 Confinement in prison  
§ 5:165 Abandonment  
§ 5:166 Living separate and apart—Domestic Relations Law § 170 (5) and (6)  
§ 5:167 Irretrievable breakdown

### **B. ADMISSIBILITY; COMPETENCY OF WITNESSES**

§ 5:168 Generally  
§ 5:169 Evidence illegally obtained  
§ 5:170 Illegal interception of electronic evidence—Electronic evidence in general  
§ 5:171 —Social networking sites  
§ 5:172 —Admissibility of evidence

§ 5:173 —Authentication of instant message  
§ 5:174 —Authentication of text message  
§ 5:175 —Authentication of blogs and websites  
§ 5:176 —Authentication of email  
§ 5:177 —Spyware  
§ 5:178 —Applicability of CPLR 4506 to Spyware and its  
Fruits  
§ 5:179 —Computer related crimes—In general  
§ 5:180 —Unauthorized use of a computer  
§ 5:181 —Computer trespass  
§ 5:182 —Defenses to unauthorized use of a computer and  
computer trespass  
§ 5:183 —Defenses to offenses involving computers  
§ 5:184 —Unlawful duplication of computer related material  
§ 5:185 —Unauthorized possession of computer data  
§ 5:186 —Federal criminal laws related to computers  
§ 5:187 Testimony of one spouse against the other—  
Confidential communications  
§ 5:188 —Action founded upon adultery  
§ 5:189 — —As to nonaccess  
§ 5:190 — —Waiver  
§ 5:191 Testimony of one spouse for the other—Action  
founded upon adultery  
§ 5:192 Confessions and admissions—Action founded upon  
adultery  
§ 5:193 Conduct prior to marriage—Action founded upon  
adultery

## **IX. JUDGMENTS**

§ 5:194 Generally  
§ 5:195 In case defendant defaults in action for a divorce  
§ 5:196 Default judgment of divorce  
§ 5:197 Default judgments—Submission or inquest  
§ 5:198 —Relief from a default judgment  
§ 5:199 Stay of action where person in military service  
§ 5:200 The servicemembers Civil Relief Act—Stay pursuant  
to 50 App. U.S.C.A. § 521  
§ 5:201 —Stay pursuant to 50 App. U.S.C.A. § 522  
§ 5:202 Stay of action where person in military service—  
Military Law § 304  
§ 5:203 Where defendant defaults in action for a divorce  
§ 5:204 Default judgment where person in military Service—  
Mil. Law § 303  
§ 5:205 Default judgments—Requirement of inquest  
§ 5:206 Default judgment—Relief from a default judgment  
§ 5:207 Interlocutory judgment  
§ 5:208 Final judgment—Submission, entry, operation and  
effect  
§ 5:209 Signature of judge or referee  
§ 5:210 Costs  
§ 5:211 Summary judgment

## CHAPTER 6. NATURE OF, GROUND FOR, AND EFFECT OF, ABSOLUTE DIVORCE

### I. IN GENERAL

- § 6:1 Historical perspective—Until 1824
- § 6:2 —Since 1787
- § 6:3 —The Divorce Reform Law of 1966
- § 6:4 —1967–2010
- § 6:5 Nature of action for divorce
- § 6:6 Necessity for judicial proceedings
- § 6:7 Agreements conducive to divorce
- § 6:8 Agreements designed to prevent divorce

### II. GROUNDS FOR DIVORCE

- § 6:9 Generally
- § 6:10 Adultery—In general
- § 6:11 —Definition—Domestic Relations Law § 170(4)
- § 6:12 Cruel and inhuman treatment—Historical perspective
- § 6:13 —Domestic Relations Law § 170(1)
- § 6:14 —Prior decisions involving legal separations
- § 6:15 —Infidelity and lock out
- § 6:16 Abandonment—Historical perspective
- § 6:17 —Domestic Relations Law § 170(2)
- § 6:18 —Intent
- § 6:19 —Effect of consent or offer to return
- § 6:20 —Mutual consent
- § 6:21 —Constructive abandonment
- § 6:22 —Justification
- § 6:23 —Failed reconciliation attempt
- § 6:24 —Refusal to live at husband’s choice of domicile
- § 6:25 —Effect of support of wife after separation
- § 6:26 —Period of absence
- § 6:27 —Social abandonment
- § 6:28 —Conflict of laws
- § 6:29 Imprisonment—Domestic Relations Law § 170(3)
- § 6:30 Living separate and apart pursuant to separation decree—Domestic Relations Law § 170(5)
- § 6:31 —Constitutionality and the Gleason Case
- § 6:32 —Decrees of sister states
- § 6:33 —Decrees of separate maintenance
- § 6:34 —Substantial performance of terms of decree
- § 6:35 Living separate and apart pursuant to separation agreement—Domestic Relations Law § 170(6)—  
Christian v Christian
- § 6:36 —Filing of agreement with county clerk
- § 6:37 —Substantial performance of terms of agreement
- § 6:38 Irretrievable breakdown—Domestic Relations Law § 170(7)—In general
- § 6:39 Prior action pending—Amendment of pleadings to assert cause of action under Domestic Relations Law § 170(7)
- § 6:40 Irretrievable breakdown—Pleading requirements
- § 6:41 —No judgment pending resolution of other issues
- § 6:42 —Sufficiency of proof and defenses

§ 6:43 —Effect of preliminary conference order

### **III. EFFECT OF JUDGMENT OF DIVORCE**

#### **A. IN GENERAL**

§ 6:44 Dual divorce

§ 6:45 Interlocutory judgment

§ 6:46 Final judgment

§ 6:47 —Effect on name of wife

§ 6:48 —Effect on name of children

§ 6:49 —Effect on co-respondent

§ 6:50 —Issue of legitimacy of child

§ 6:51 Presumption of legitimacy of child of marriage

#### **B. RIGHT TO REMARRY**

§ 6:52 Marriage after final judgment of divorce—Historical perspective—The former “Paramour Act”—In general

### **CHAPTER 7. DEFENSES AGAINST DIVORCE**

#### **I. IN GENERAL**

§ 7:1 Generally

§ 7:2 No valid marriage

§ 7:3 Pendency of prior matrimonial action

§ 7:4 Prior divorce

§ 7:5 Prior judgment in separation action; separation agreement

§ 7:6 Insanity and incompetency

§ 7:7 Limitation of action

§ 7:8 Laches

#### **II. AFFIRMATIVE DEFENSES TO ADULTERY**

##### **A. RECRIMINATION**

§ 7:9 Adultery of the plaintiff

§ 7:10 Application to other grounds for divorce

##### **B. CONDONATION**

§ 7:11 Generally

§ 7:12 By voluntary cohabitation

§ 7:13 —Necessity of knowledge of offense

§ 7:14 Revival of condoned offense

§ 7:15 Application to grounds for divorce

##### **C. CONNIVANCE AND COLLUSION**

§ 7:16 Connivance or procurement

§ 7:17 Application to grounds for divorce

§ 7:18 Collusion

### **CHAPTER 8. VACATION AND SETTING ASIDE OF JUDGMENTS OF DIVORCE; COLLATERAL ATTACK**

#### **I. IN GENERAL**

§ 8:1 Generally

§ 8:2 Opening default judgments of divorce—CPLR 5015

§ 8:3 Effect of death of party

§ 8:4 Effect of remarriage of party

## **II. GROUNDS FOR VACATING OR SETTING ASIDE JUDGMENT**

§ 8:5 Generally; Civil Practice Law and Rules—CPLR 5015

§ 8:6 Final judgments

§ 8:7 —Fraud and collusion

## **CHAPTER 9. RECOGNITION OF FOREIGN DIVORCES (EX PARTE AND BILATERAL)**

### **I. RECOGNITION UNDER FULL FAITH AND CREDIT**

§ 9:1 Generally

§ 9:2 Reform legislation: The Divorce Reform Law of 1966  
and the Equitable Distribution Law of 1980

§ 9:3 General principles as to conclusiveness of foreign decree

§ 9:4 Validity of divorce where nonresident defendant  
appeared or was served in the state

LAW AND THE FAMILY NEW YORK

xxx

§ 9:5 —Unauthorized, fraudulent, or coerced appearance

§ 9:6 —Appearance by guardian ad litem

§ 9:7 —Appearance after judgment is entered

§ 9:8 Judgment obtained upon constructive service

§ 9:9 —Domicile of party

### **II. PRINCIPLES CONTROLLING COLLATERAL ATTACK**

§ 9:10 Generally

§ 9:11 Collateral estoppel and preclusion

§ 9:12 Want of domicile in divorce state

§ 9:13 Burden of proof and presumption of jurisdiction

§ 9:14 Attack by party; estoppel

§ 9:15 —Where neither party is resident of New York

§ 9:16 —Obtaining or acquiescing in divorce

§ 9:17 —Effect of fraud, coercion, or duress exerted upon  
party

§ 9:18 Attack by stranger

§ 9:19 —Effect of estoppel of party

### **III. DECREE OF FOREIGN NATION; RECOGNITION BY COMITY**

§ 9:20 Generally

§ 9:21 Ex parte and “mail-order” decrees

§ 9:22 Mexican divorce

§ 9:23 Haitian and Dominican divorces

§ 9:24 Estoppel to assert invalidity of foreign decree of  
divorce

### **IV. EFFECT UPON PRIOR ORDERS FOR MAINTENANCE, SUPPORT AND CUSTODY**

§ 9:25 Generally

§ 9:26 Where wife has appeared or participated in action

§ 9:27 —Foreign decree as ipso facto termination of support  
order

§ 9:28 Orders for maintenance or alimony pendente lite

§ 9:29 Orders for support and custody of children

## **CHAPTER 10. DECLARATORY JUDGMENTS AND INJUNCTIONS AGAINST DIVORCE ACTIONS**

### **I. DECLARATORY JUDGMENTS**

§ 10:1 Generally

§ 10:2 Jurisdictional requirements

§ 10:3 Laches

§ 10:4 Summary judgment

### **II. INJUNCTIONS AGAINST SECURING FOREIGN DIVORCE**

§ 10:5 Generally

§ 10:6 For lack of jurisdiction

§ 10:7 —Where bona fide domicile is established

§ 10:8 Upon ground of res judicata

§ 10:9 Where matrimonial action pending in this state

§ 10:10 Enjoining divorce pending in foreign nation

§ 10:11 Threat of foreign suit as basis for relief

§ 10:12 Enjoining nonresident

§ 10:13 Independent action for injunction as proper remedy

§ 10:14 Necessity of personal service within injunction forum

## **PART THREE DISSOLUTION OF MARRIAGE FOR ABSENCE OR INCURABLE MENTAL ILLNESS OR BY CIVIL DEATH**

### **CHAPTER 11. DISSOLUTION OF MARRIAGE FOR ABSENCE**

#### **I. IN GENERAL**

§ 11:1 Generally

§ 11:2 History and purpose of the statute

§ 11:3 Jurisdictional requirements

§ 11:4 Lack of knowledge that absent spouse is alive

§ 11:5 Effect of order of dissolution

§ 11:6 Vacation of, and collateral attack on, order

#### **II. PRACTICE AND PROCEDURE**

§ 11:7 Petition

§ 11:8 —Allegation that diligent search has been made for absent spouse

§ 11:9 Publication of notice of presentation of petition

§ 11:10 The hearing

§ 11:11 Order dissolving marriage

### **CHAPTER 12. DISSOLUTION OF MARRIAGE FOR INCURABLE MENTAL ILLNESS**

#### **I. IN GENERAL**

§ 12:1 Generally

§ 12:2 Jurisdictional requirements

§ 12:3 Nature and degree of mental illness

§ 12:4 Support of defendant by plaintiff

§ 12:5 —Security

§ 12:6 —Modification

§ 12:7 —Obligation as surviving death of obligor

## **II. PRACTICE AND PROCEDURE**

§ 12:8 Summons

§ 12:9 Pleadings

§ 12:10 Special guardian or guardian ad litem

§ 12:11 Examination by physicians

§ 12:12 —Where plaintiff prosecutes as poor person

§ 12:13 Trial and judgment

## **CHAPTER 13. DISSOLUTION BY CIVIL DEATH**

§ 13:1 Generally

§ 13:2 Effect of pardon or parole of spouse sentenced to life imprisonment

§ 13:3 Availability of equitable distribution upon civil death

## **PART FOUR JUDICIAL SEPARATION**

## **CHAPTER 14. JURISDICTION, VENUE, AND PROCEDURAL REQUIREMENTS**

### **I. JURISDICTIONAL REQUIREMENTS**

§ 14:1 Generally

§ 14:2 Both parties are residents of state

§ 14:3 Residence of one party where marriage within the state

§ 14:4 Residence of one party where marriage outside the state

§ 14:5 Alien party

### **II. SERVICE OF SUMMONS**

§ 14:6 Generally

§ 14:7 Service of summons with or without complaint

§ 14:8 Proof of service

### **III. PARTIES**

§ 14:9 Generally

§ 14:10 Where spouse is an incompetent or an infant

§ 14:11 Correspondent as party

### **IV. VENUE**

§ 14:12 Generally

§ 14:13 Meaning of “Residence”

### **V. THE PLEADINGS**

#### **A. IN GENERAL**

§ 14:14 Generally

§ 14:15 Durational residence requirements

§ 14:16 A valid and subsisting marriage

§ 14:17 Amending complaint to bring action for divorce

#### **B. ACTS RELIED UPON AS GROUND FOR ACTION**

§ 14:18 Generally

§ 14:19 Cruel and inhuman treatment

§ 14:20 —Supplemental complaint

§ 14:21 Nonsupport

§ 14:22 Adultery

§ 14:23 Abandonment

### **C. THE ANSWER; COUNTERCLAIM**

§ 14:24 Generally

§ 14:25 Misconduct of plaintiff

§ 14:26 Counterclaims

### **VI. TRIAL**

§ 14:27 Generally

§ 14:28 Preferences

§ 14:29 Reference to referee

§ 14:30 Disclosure

§ 14:31 Stay

§ 14:32 Effect of death of party

§ 14:33 Excluding public; sealing information

§ 14:34 Decision

### **VII. EVIDENCE**

§ 14:35 Generally

§ 14:36 In cases of cruel and inhuman treatment

§ 14:37 In cases of abandonment

### **VIII. JUDGMENTS**

§ 14:38 Generally

§ 14:39 No judgment by consent

§ 14:40 Judgment by default

§ 14:41 Upon referee's report

§ 14:42 Separation forever or for limited time

§ 14:43 Costs

§ 14:44 Motion for summary judgment

## **CHAPTER 15. NATURE OF, GROUNDS FOR, AND EFFECT OF, JUDICIAL SEPARATION**

### **I. IN GENERAL**

§ 15:1 Introduction

### **II. GROUNDS FOR ACTION**

#### **A. IN GENERAL**

§ 15:2 Generally

#### **B. CRUEL AND INHUMAN TREATMENT**

§ 15:3 Generally

§ 15:4 Course of conduct; one act as cruelty

§ 15:5 Physical harm

§ 15:6 —To children of complainant

§ 15:7 Mental harm

§ 15:8 —Charge of insanity; commitment or attempt to commit to asylum

§ 15:9 —Charge of infidelity; charge of crime

§ 15:10 Incompatibility of temperament; temperamental outbursts

§ 15:11 Instituting action for annulment or divorce

§ 15:12 Procuring invalid decree of divorce

§ 15:13 Interference or abuse by relatives

§ 15:14 Insistence on living with relatives

- § 15:15 Sexual relations between the spouses
- § 15:16 Adultery and indiscreet conduct
- § 15:17 Intoxication and drunkenness
- § 15:18 Religious differences
- § 15:19 Producing abortion
- § 15:20 Conduct rendering cohabitation unsafe or improper
- § 15:21 —Course of conduct
- § 15:22 —Intentional and unintentional acts

### **C. ABANDONMENT**

- § 15:23 Generally
- § 15:24 Intent to abandon
- § 15:25 Period of absence
- § 15:26 Departure without justification
- § 15:27 Constructive abandonment
- § 15:28 —Refusal of intercourse
- § 15:29 Refusal to live at husband's choice of domicile
- § 15:30 Adultery
- § 15:31 Effect of support of wife after separation
- § 15:32 Effect of bringing of matrimonial action
- § 15:33 Effect of offer or consent to return

### **D. NONSUPPORT**

- § 15:34 Generally
- § 15:35 Effect of abandonment of husband or separation by consent

### **E. ADULTERY**

- § 15:36 Generally

### **F. IMPRISONMENT**

- § 15:37 Generally

## **III. EFFECT OF JUDGMENT OF SEPARATION**

- § 15:38 Generally
- § 15:39 Judgment of limited separation
- § 15:40 Property rights
- § 15:41 —Joint bank accounts
- § 15:42 —Rights in estate of deceased spouse
- § 15:43 Res judicata

## **CHAPTER 16. DEFENSES AGAINST JUDICIAL SEPARATION**

- § 16:1 Generally
- § 16:2 Valid and subsisting separation agreement
- § 16:3 Void marriage
- § 16:4 Voidable marriage
- § 16:5 Divorce dissolving marriage of parties
- § 16:6 Pendency of prior matrimonial action
- § 16:7 Provocation
- § 16:8 Spouses still living together
- § 16:9 Insanity
- § 16:10 Antenuptial agreement
- § 16:11 Misrepresentation of number of prior marriages
- § 16:12 Misconduct of plaintiff
- § 16:13 —Adultery

- § 16:14 —Refusal to cohabit
- § 16:15 Condonation
- § 16:16 —Cohabitation as condonation
- § 16:17 —Revival of condoned offenses
- § 16:18 Connivance
- § 16:19 Order in support proceeding
- § 16:20 Statute of limitations; laches
- § 16:21 Critique of legal separation—From the second edition

## **CHAPTER 17. MODIFICATION AND REVOCATION OF JUDGMENTS OF SEPARATION**

- § 17:1 Modification
- § 17:2 —Provisions for occupancy of real property
- § 17:3 Revocation
- § 17:4 Effect of reconciliation alone
- § 17:5 Opening or vacating default judgments of separation

## **PART FIVE ANNULMENTS AND DECLARATIONS OF NULLITY OF MARRIAGES**

### **CHAPTER 18. JURISDICTION, VENUE, AND PROCEDURAL REQUIREMENTS**

#### **I. JURISDICTIONAL REQUIREMENTS**

- § 18:1 Generally
- § 18:2 Residence requirements

#### **II. SERVICE OF SUMMONS**

- § 18:3 Generally
- § 18:4 Service by publication
- § 18:5 Service without the state
- § 18:6 Proof of service

#### **III. PARTIES**

- § 18:7 Annulment for nonage
- § 18:8 Annulment for physical incapacity
- § 18:9 Annulment for mental illness or mental retardation
- § 18:10 —Next friend
- § 18:11 Annulment for fraud, force, or duress
- § 18:12 In case of void marriage

#### **IV. THE PLEADINGS**

##### **A. THE COMPLAINT**

- § 18:13 Generally
- § 18:14 Allegations negating cohabitation
- § 18:15 In cases of bigamous marriages
- § 18:16 In cases of nonage
- § 18:17 In cases of physical incapacity
- § 18:18 In cases of want of understanding
- § 18:19 In cases of fraud
- § 18:20 In cases of force or duress

##### **B. THE ANSWER; COUNTERCLAIMS**

- § 18:21 Generally
- § 18:22 Statute of limitations

§ 18:23 Counterclaims

## **V. THE TRIAL**

§ 18:24 Generally

§ 18:25 References

§ 18:26 Stays

§ 18:27 Abatement and effect of death of party

§ 18:28 Disclosure

§ 18:29 Sealing information as to details of action

§ 18:30 Dismissal of actions brought by next friend

§ 18:31 Physical examinations

§ 18:32 Decision

## **VI. EVIDENCE**

§ 18:33 Generally

§ 18:34 Where fraud is alleged as ground

§ 18:35 In cases of bigamous marriages

§ 18:36 Physical Examinations

§ 18:37 In case defendant defaults

§ 18:38 Corroboration

§ 18:39 —Amount and character of corroboration

## **VII. JUDGMENTS**

§ 18:40 Default judgments

§ 18:41 Interlocutory and final judgments

§ 18:42 Upon referee's report

§ 18:43 Summary judgment

# **CHAPTER 19. NATURE OF, GROUNDS FOR, AND EFFECT OF, ANNULMENT ACTIONS AND DECLARATIONS OF NULLITY OF MARRIAGES**

## **I. IN GENERAL**

§ 19:1 Generally

§ 19:2 As distinguished from other matrimonial actions

§ 19:3 Annulment of marriages contracted outside the state

## **II. CIRCUMSTANCES RENDERING MARRIAGE VOID**

§ 19:4 Generally

§ 19:5 Incestuous marriages

§ 19:6 Marriage where prior marriage undissolved

§ 19:7 Marriage following divorce without permission

## **III. GROUNDS FOR ANNULMENT OF VOIDABLE MARRIAGES**

### **A. IN GENERAL**

§ 19:8 Generally

§ 19:9 Scope of judicial discretion

### **B. NONAGE**

§ 19:10 Generally

§ 19:11 Effect of consent of parents

§ 19:12 Marriage where man was between 18 and 21

§ 19:13 Marriages contracted outside state

§ 19:14 Effect of birth of children

## C. FRAUD

### 1. In General

- § 19:15 Generally
- § 19:16 Misrepresentation of material facts
- § 19:17 Concealment of material facts
- § 19:18 Promissory misrepresentations
- § 19:19 Reliance on misrepresentation

### 2. Particular Misrepresentations

- § 19:20 Generally
- § 19:21 As to having children
- § 19:22 As to chastity and continence
- § 19:23 As to religion
- § 19:24 —Religious ceremony
- § 19:25 As to love
- § 19:26 As to prior marital status and marital dissolutions
- § 19:27 As to physical ailments or disease
- § 19:28 As to character, habits, and criminal activities
- § 19:29 As to citizenship and ancestry
- § 19:30 As to sexual relations with spouse
- § 19:31 As to age
- § 19:32 As to paternity of child and pregnancy
- § 19:33 As to financial condition and earnings
- § 19:34 As to providing home and support

## D. FORCE OR DURESS

- § 19:35 Generally
- § 19:36 Particular cases of force or duress

## E. WANT OF UNDERSTANDING

- § 19:37 Generally
- § 19:38 Requisite degree of mental incapacity

## F. PHYSICAL INCAPACITY

- § 19:39 Generally
- § 19:40 What constitutes physical incapacity
- § 19:41 Incurability

## IV. EFFECT OF JUDGMENTS OF ANNULMENT

### A. IN GENERAL

- § 19:42 Interlocutory judgments
- § 19:43 Final judgments
- § 19:44 —As to use of name
- § 19:45 Property rights
- § 19:46 —Rights in estate of deceased former spouse
- § 19:47 Res judicata

### B. LEGITIMACY OF CHILDREN

- § 19:48 Children of annulled marriage
- § 19:49 Children of marriages declared a nullity
- § 19:50 Effect of annulment or nullity of marriage on children born out-of-wedlock

## **CHAPTER 20. DEFENSES AGAINST ACTIONS FOR ANNULMENT OR DECLARATIONS OF NULLITY OF MARRIAGES**

### **I. IN GENERAL**

- § 20:1 Equitable defenses
- § 20:2 Prior judgment of separation
- § 20:3 Ratification of marriage contract
- § 20:4 —In cases of nonage
- § 20:5 Knowledge of physical incapacity or mental illness of spouse

### **II. COHABITATION**

- § 20:6 In cases of fraud
- § 20:7 In cases of force or duress
- § 20:8 In cases of nonage
- § 20:9 In cases of mental illness
- § 20:10 In cases of void marriages

### **III. LAPSE OF TIME AND STATUTE OF LIMITATIONS**

- § 20:11 Generally
- § 20:12 In cases of fraud
- § 20:13 In cases of force or duress
- § 20:14 In cases of nonage
- § 20:15 In cases of physical incapacity
- § 20:16 In cases of mental illness or mental retardation
- § 20:17 In cases of void marriages

## **CHAPTER 21. SETTING ASIDE JUDGMENTS OF ANNULMENT; APPEALS; COLLATERAL ATTACK**

- § 21:1 Vacation or setting aside of judgment
- § 21:2 Appeals
- § 21:3 Collateral attack

## **VOLUME 2 ALIMONY, ETHICAL CONSIDERATIONS AND PROPERTY**

### **PART ONE ALIMONY UNDER DRL § 236 PART A**

#### **CHAPTER 22. ALIMONY PENDENTE LITE**

##### **I. IN GENERAL**

- § 22:1 Introduction—Domestic Relations Law §§ 236 and 236 Part A
- § 22:2 History of alimony statutes in New York—Domestic Relations Law §§ 236 and 236 Part A
- § 22:3 Nature and purpose of alimony pendente lite
- § 22:4 At what time may alimony pendente lite be granted
- § 22:5 Discretion to award and as to amount
- § 22:6 Duration of alimony pendente lite award
- § 22:7 Effect of award on further support
- § 22:8 Recovery of alimony pendente lite paid where action terminated in favor of opposite spouse

## **II. FACTORS AFFECTING AWARD OF ALIMONY PENDENTE LITE**

- § 22:9 Refusal to grant relief requested
- § 22:10 Spouse's lack of meritorious defense
- § 22:11 Misconduct of spouse seeking support
- § 22:12 Foreign ex parte decree of divorce granted to spouse
- § 22:13 Foreign matrimonial action participated in by spouse seeking support
- § 22:14 Nonexistence of marital relationship
- § 22:15 Lack of need of spouse seeking support
- § 22:16 Existence of other support agreement
- § 22:17 Spouse's means
- § 22:18 Parties living together
- § 22:19 Spouse served outside of state

## **III. PROCEDURE FOR OBTAINING ALIMONY PENDENTE LITE**

- § 22:20 Generally
- § 22:21 Reference to referee or Family Court
- § 22:22 Examination before trial as to spouse's finances

## **CHAPTER 23. PERMANENT ALIMONY**

### **I. IN GENERAL**

- § 23:1 Overview
- § 23:2 Significance of Orr v. Orr on New York alimony law
- § 23:3 Alimony—In general
- § 23:4 Purpose of alimony
- § 23:5 Duration of alimony—Death of spouse
- § 23:6 —Effect of remarriage
- § 23:7 Effect of pendente lite awards
- § 23:8 Maternity expenses
- § 23:9 Lump sum awards
- § 23:10 Payment to third party or agency
- § 23:11 Effect of separation agreements on alimony award
- § 23:12 Effect of separation agreement alimony provision on judgment of divorce
- § 23:13 Alimony awards where matrimonial relief denied
- § 23:14 Assignability of alimony or maintenance
- § 23:15 Effect of other provisions for support

### **II. GUIDELINES AS TO DURATION AND AMOUNT**

- § 23:16 Discretion of the Court—Factors for exercise of discretion
- § 23:17 Standard of living during marriage
- § 23:18 Alimony award—Means of obligor—Earning capacity
- § 23:19 —Ability to be self supporting—Means of wife
- § 23:20 Alimony Awards—Long-Term Marriages
- § 23:21 Alimony award—Short-term marriages
- § 23:22 Awards held to be inadequate

### **III. DEFENSES AND OTHER CONSIDERATIONS**

- § 23:23 Defenses, generally
- § 23:24 Marital misconduct—In general
- § 23:25 —Dual divorces
- § 23:26 —Waiver of bar to alimony by obligor

- § 23:27 Inability to pay alimony
- § 23:28 Remarriage of recipient
- § 23:29 Cohabitation post-divorce and dum casta clauses, Domestic Relations Law § 248
- § 23:30 Death of either party
- § 23:31 Time when terminates
- § 23:32 Collateral estoppel and res judicata
- § 23:33 Lack of jurisdiction and void judgments

## **CHAPTER 24. ENFORCEMENT OF ALIMONY ORDERS AND JUDGMENTS**

### **I. IN GENERAL**

- § 24:1 Generally
- § 24:2 Enforcement by Family Court or Supreme Court
- § 24:3 Provisions for security
- § 24:4 Reconciliation as affecting enforcement of alimony in separation action
- § 24:5 Effect of death of spouse
- § 24:6 Separation agreements incorporated into divorce judgment

### **II. DOCKETING MONEY JUDGMENT**

- § 24:7 Generally
- § 24:8 Against nonresidents
- § 24:9 Discretion of the Court
- § 24:10 Service of process; notice to spouse
- § 24:11 As an additional remedy
- § 24:12 Venue of motions
- § 24:13 Matters affecting and in defense of enforcement
- § 24:14 —Violation of visitation provisions
- § 24:15 —Waiver of alimony provisions
- § 24:16 —Termination of matrimonial action
- § 24:17 Additional defenses to a money judgment

### **III. CONTEMPT PROCEEDINGS**

#### **A. IN GENERAL**

- § 24:18 Generally
- § 24:19 Failure to furnish security
- § 24:20 Where spouse has left the state
- § 24:21 Procedural prerequisites
- § 24:22 —Notice
- § 24:23 Impossibility of enforcement
- § 24:24 Hearing
- § 24:25 Stay of matrimonial proceedings

#### **B. DEFENSE OF CONTEMPT PROCEEDINGS**

- § 24:26 Generally
- § 24:27 Waiver of alimony provisions
- § 24:28 Delay in bringing contempt proceedings
- § 24:29 Violation of visitation provisions
- § 24:30 Termination of matrimonial action
- § 24:31 Inability to make payments

## **C. PUNISHMENT**

§ 24:32 Generally

§ 24:33 Suspension of payments during imprisonment

§ 24:34 Effect of settlement of dispute

## **IV. SEQUESTRATION, INCOME EXECUTION AND DEDUCTION ORDERS**

### **A. SEQUESTRATION**

§ 24:35 Generally

§ 24:36 Sequestration

§ 24:37 Property subject to sequestration

§ 24:38 —Determination of property belonging to spouse

§ 24:39 Substitution of security for property sequestered

### **B. BEFORE RENDITION OF ORDER OR JUDGMENT FOR ALIMONY—DOMESTIC RELATIONS LAW § 233**

§ 24:40 Generally

§ 24:41 Nature and effect of sequestration order

§ 24:42 Necessity for strict compliance with statute

§ 24:43 —Defendant must be absent from state or whereabouts unknown

§ 24:44 Spouse must have meritorious cause of action

§ 24:45 Procedure

§ 24:46 The receiver

§ 24:47 Return of property sequestered

### **C. AFTER RENDITION OF ORDER OR JUDGMENT FOR ALIMONY—DOMESTIC RELATIONS LAW § 243**

§ 24:48 Generally

§ 24:49 Necessity for strict compliance with statute

§ 24:50 The receiver

## **V. AWARDS IN FOREIGN JUDGMENTS**

§ 24:51 Generally

§ 24:52 Execution

§ 24:53 Security, sequestration, and contempt

§ 24:54 Authority to enforce foreign judgments or decrees

§ 24:55 Security, sequestration, and contempt—Judgments of foreign nations

§ 24:56 Recognition of sister state judgments and orders

§ 24:57 —Where sister state judgment is subject to modification

§ 24:58 —Uniform support of dependents law

§ 24:59 Registration of foreign judgments—CPLR Article 54

§ 24:60 Registration of foreign country judgments and orders—CPLR Article 53

§ 24:61 Sister-state support judgments and orders—The full faith and credit obligation

§ 24:62 —Divisible incidents of divorce

§ 24:63 Foreign country judgments and orders—Comity

§ 24:64 —Res judicata, estoppel, and standing

## **CHAPTER 25. MODIFICATION OF ALIMONY ORDERS AND JUDGMENTS**

### **I. IN GENERAL**

- § 25:1 Generally
- § 25:2 Proper forum for modification
- § 25:3 Effect of spouse's departure from state
- § 25:4 Notice to spouse
- § 25:5 Modification of awards in arrears
- § 25:6 Effect of remarriage of recipient
- § 25:7 Modification by agreement of parties
- § 25:8 Awards made by agreement between the parties
- § 25:9 Modification of awards in sister-state judgments

### **II. MODIFICATION OF PROVISIONS FOR SUPPORT OF SPOUSE**

- § 25:10 Generally
- § 25:11 Factors considered by Court on application to modify
- § 25:12 —Change in paying spouse's financial condition
- § 25:13 —Change in recipient's financial condition
- § 25:14 —Remarriage of paying spouse
- § 25:15 —Increase in cost of living
- § 25:16 —Subsequent misconduct of recipient—Domestic Relations Law § 248
- § 25:17 —Shifting of tax burden
- § 25:18 Effect of spouse's default in payment
- § 25:19 Proof required for modification
- § 25:20 Where no provision for support made in final judgment

### **III. MODIFICATION OF CHILD SUPPORT**

- § 25:21 Generally
- § 25:22 Factors considered by Court on application to modify
- § 25:23 Where no provision for support made in final judgment
- § 25:24 Modification of arrears of child support

## **PART TWO ETHICAL CONSIDERATIONS**

## **CHAPTER 26. RULES OF PROFESSIONAL CONDUCT AND ETHICAL CONSIDERATIONS FOR FAMILY LAW ATTORNEYS**

### **I. RULES OF PROFESSIONAL CONDUCT**

- § 26:1 Ethical Considerations—Rules of professional conduct for family law attorneys
- § 26:2 Rules of Professional Conduct—In general
- § 26:3 Rules of Professional Conduct for Domestic Relations Matters—In General
- § 26:4 Rules of Professional Conduct—Terminology
- § 26:5 Rule 1.5—Fees and division of fees—Illegal or excessive fees or expenses
- § 26:6 — — —Special rules for lawyers in domestic relations matters
- § 26:7 — — —Nonrefundable fee and minimum fee
- § 26:8 — — —Contingent fee
- § 26:9 — — —Requirement of written retainer
- § 26:10 — — —Security interest, confession of judgment or

lien

§ 26:11 — — — Prohibition of foreclosure of mortgage

§ 26:12 — — — Arbitration of fee disputes

§ 26:13 — — — Division of fees

§ 26:14 Rule 1.6—Confidentiality of information

§ 26:15 Rule 1.8—Current clients: specific conflict of interest

rules—Financial assistance by lawyer

§ 26:16 — — Compensation from third persons for representing a client

§ 26:17 — — Sexual relations with client

§ 26:18 Rule 1.9 duties to former clients

§ 26:19 Rule 1.12—Specific conflicts of interest for former judges, arbitrators, or other third-party neutrals

§ 26:20 Rule 1.18—Duties to prospective clients

§ 26:21 Rule 2.4—Lawyer serving as third-party neutral

§ 26:22 Rule 3.5—Maintaining and preserving the impartiality of tribunals and jurors

§ 26:23 Rule 3.7—Lawyer as witness

§ 26:24 Rule 4.4—Respect for rights of third persons

§ 26:25 Rule 5.4—Professional independence of a lawyer

§ 26:26 Rule 7.1—Advertising

§ 26:27 Rule 7.3—Solicitation and recommendation of professional employment

§ 26:28 Rule 7.5—Professional notices, letterheads, and signs—Internet web sites

§ 26:29 — — Domain name

§ 26:30 Rule 3.5—Maintaining and preserving the impartiality of tribunals and jurors

§ 26:31 Rule 4.2—Communicating with a person represented by counsel

§ 26:32 Rule 4.3—Communicating with unrepresented persons

§ 26:33 Rule 7.4—Identification of practice and specialty

## **II. REGULATIONS GOVERNING CONDUCT OF ATTORNEYS IN DOMESTIC RELATIONS MATTERS**

§ 26:34 Regulations governing attorney conduct in domestic relations matters—In general

§ 26:35 Application of rules

§ 26:36 Statement of Client's Rights—22 NYCRR § 1400.2

§ 26:37 Retainer Agreement—Prohibition on nonrefundable retainer fees—22 NYCRR § 1400.3; 22 NYCRR § 1400.4

§ 26:38 Measures to secure payment of attorney's fee—Confession of judgment or lien—22 NYCRR § 1400.5

§ 26:39 Part 137 of the Rules of the Chief Administrator—Attorney Fee dispute resolution program—Effect of failure to comply upon right to collect fees

§ 26:40 De Novo review of fee arbitration awards

§ 26:41 Effect of Failure to Comply with 22 NYCRR Part 1400 Upon Attorneys Right to Commence Action for Legal Fees

§ 26:42 Effect of failure to comply with 1400.2 and 1400.3 on counsel fee applications pursuant to Domestic Relations Law § 237

§ 26:43 Comparison of the rules of professional conduct and

regulations governing attorney conduct in Domestic Relations Matters

### **III. ETHICAL OBLIGATIONS OF ATTORNEYS**

§ 26:44 Ethical obligation to sign a consent to change attorney

§ 26:45 Charging interest on the balance due or use of credit cards

§ 26:46 Attorneys right to bring plenary action for breach of contract

§ 26:47 Right of attorney to withdraw as attorney of record

§ 26:48 Thirty day automatic stay—Notice to appoint another attorney of record

§ 26:49 Written letter of engagement in matters other than domestic relations matters

§ 26:50 Certification of papers in civil cases

§ 26:51 Posting of Statement of Clients Right for matters other than domestic relations matters

### **IV. COSTS AND SANCTIONS FOR FRIVOLOUS CONDUCT**

§ 26:52 Imposition of costs and sanctions upon attorneys for frivolous conduct

## **CHAPTER 27. ATTORNEY'S LIENS**

§ 27:1 Effect of matrimonial, fee arbitration and disciplinary rules on right to assert retaining lien and charging lien

§ 27:2 The attorney's retaining lien

§ 27:3 The attorney's charging lien

§ 27:4 Enforcement of attorney's charging lien

## **PART THREE PROPERTY**

### **CHAPTER 28. MARITAL PROPERTY OF HUSBANDS AND WIVES**

§ 28:1 The Common-Law property system relating to husbands and wives

§ 28:2 —Dower and curtesy

§ 28:3 —Dower and the real property actions and proceedings law and the real property law

§ 28:4 The common-law property system relating to husbands and wives—Inheritance rights under the estates, powers and trusts law

§ 28:5 Effect of divorce, separation or annulment on revocable dispositions—EPTL § 5-1.4

§ 28:6 Statutory history of spousal rights

§ 28:7 —Property of married women

§ 28:8 —Powers of a married woman

§ 28:9 —Insurance on married person's life

§ 28:10 —Contracts in contemplation of marriage

§ 28:11 —Necessaries

§ 28:12 —Husband's liability for wife's antenuptial debts

§ 28:13 —Spousal conveyances and partition

- § 28:14 Conveyances to husband and wife
- § 28:15 —Instruments and transactions involving personal property
- § 28:16 —Spousal immunity abolished
- § 28:17 —Married woman’s right of action for wages

## **CHAPTER 29. COUNSEL FEES AS NECESSARIES**

- § 29:1 Counsel fees as necessities—In general
- § 29:2 Action for divorce
- § 29:3 Action for separation
- § 29:4 Action for annulment
- § 29:5 Custody proceedings
- § 29:6 Effect of award of counsel fees in matrimonial action
- § 29:7 Recovery where no application for counsel fees made in matrimonial action

## **CHAPTER 30. CONFLICT OF LAWS: CLASSIFICATION OF PROPERTY AND CHOICE OF LAW**

- § 30:1 General principles
- § 30:2 Real property
- § 30:3 Personal property

## **CHAPTER 31. CONSTRUCTIVE TRUSTS**

- § 31:1 Generally
- § 31:2 Significance of constructive trusts for matrimonial actions
- § 31:3 How title is held
- § 31:4 Constructive trusts on real property
- § 31:5 Emphasis on equities
- § 31:6 Unjust enrichment
- § 31:7 Promise to reconvey
- § 31:8 Confidential relationship and unjust enrichment
- § 31:9 Reconciliation of the cases
- § 31:10 Constructive trust cases

## **CHAPTER 32. INTERSPOUSAL GIFTS**

- § 32:1 Generally
- § 32:2 American authorities
- § 32:3 Household furnishings and furniture
- § 32:4 —Effect of equitable distribution law
- § 32:5 Wedding gifts
- § 32:6 Gifts given in contemplation of a marriage
- § 32:7 Constructive trusts and gifts
- § 32:8 Gifts of realty interests

## **CHAPTER 33. JOINT BANK ACCOUNTS**

- § 33:1 Generally
- § 33:2 Common law rule
- § 33:3 Statutory changes in common law rule
- § 33:4 Section 675 of the Banking Law of New York
- § 33:5 Rebuttable presumption

- § 33:6 Intention to create a joint tenancy
- § 33:7 Where the issue arises when both tenants are alive
- § 33:8 Where the issue arises after the death of a joint tenant
- § 33:9 Significance of family relationship between joint tenants
- § 33:10 Joint account for convenience only

## **CHAPTER 34. PROPERTY SETTLEMENTS AND AGREEMENTS BETWEEN SPOUSES**

### **I. IN GENERAL**

- § 34:1 Introduction
- § 34:2 Laws governing

### **II. ANTENUPTIAL AGREEMENTS**

#### **A. BETWEEN SPOUSES**

- § 34:3 Generally
- § 34:4 Consideration
- § 34:5 Necessity of writing
- § 34:6 Necessity for trustee
- § 34:7 Effect of infancy of party
- § 34:8 Requisites as to fair dealing and reasonableness
- § 34:9 —Effect of fraud, misrepresentation, and overreaching
- § 34:10 Rules of construction
- § 34:11 Subject of antenuptial agreements
- § 34:12 —Support of spouse
- § 34:13 —After-acquired property
- § 34:14 —Children
- § 34:15 Liability for and assignment of debts and rights of creditors
- § 34:16 Enforcement
- § 34:17 —Who may enforce
- § 34:18 Effect of divorce or separation
- § 34:19 Revocation, release, or cancellation of agreement

#### **B. BY THIRD PERSONS**

- § 34:20 Generally
- § 34:21 Consideration
- § 34:22 Enforcement
- § 34:23 —Who may enforce

### **III. POSTNUPTIAL SETTLEMENTS OR AGREEMENTS**

- § 34:24 Generally
- § 34:25 Subjects of postnuptial agreements
- § 34:26 Agreement for benefit of third person
- § 34:27 Effect of divorce

### **IV. SEPARATION AGREEMENTS**

#### **A. IN GENERAL**

- § 34:28 Introduction
- § 34:29 Intervention of trustee unnecessary
- § 34:30 Validity
- § 34:31 —Agreement inducing divorce—Three timeframes

- § 34:32 —Agreement inducing annulment
- § 34:33 —Agreement inducing separation
- § 34:34 —Effect of fraud, overreaching, coercion or unconscionability
- § 34:35 —Provision for penalty on default
- § 34:36 —Arbitration provisions
- § 34:37 Effect of partial invalidity
- § 34:38 Conflict of laws—Validity, construction, and effect of a separation agreement

## B. REQUISITES

- § 34:39 Application of principles of contract law:  
Consideration
- § 34:40 Parties must be living apart or immediately separate
- § 34:41 Adequate provision for support of spouse
- § 34:42 —Effect of inadequate provision
- § 34:43 —Effect of provision exempting spouse from support liability
- § 34:44 —Provision permitting husband to determine measure of support
- § 34:45 —Provision for lump sum payment
- § 34:46 —Effect of spouse’s subsequent affluence
- § 34:47 Adequate provision for support of children
- § 34:48 Provision for cessation or change in the amount of payments

## C. CONSTRUCTION, OPERATION AND EFFECT

- § 34:49 Generally
- § 34:50 Agreement as bar to action for separation
- § 34:51 Agreement as bar to action for divorce
- § 34:52 Effect on marital relation
- § 34:53 Effect on obligation to support spouse
- § 34:54 Effect on obligation to support children
- § 34:55 Effect of rights in estate of deceased spouse
- § 34:56 —Right of election against will of spouse
- § 34:57 Assignment of right under provision for support payments
- § 34:58 Provisions respecting income or earnings of parties
- § 34:59 Provisions relative to life insurance

## D. ENFORCEMENT

- § 34:60 Generally
- § 34:61 Specific performance
- § 34:62 Provision relating to life insurance
- § 34:63 Parties to action for enforcement
- § 34:64 Defenses
- § 34:65 —Breach of agreement by party seeking enforcement
- § 34:66 —Subsequent adultery of plaintiff
- § 34:67 —Limitation of action and laches
- § 34:68 —Accord and satisfaction
- § 34:69 —Nonsupport of children by custodial parent

## E. TERMINATION, RECISSION, AND MODIFICATION

- § 34:70 Generally
- § 34:71 Repudiation or breach by husband

§ 34:72 Repudiation or breach by wife  
§ 34:73 Obligation to support child  
§ 34:74 Reconciliation and cohabitation  
§ 34:75 —Effect upon property settlement  
§ 34:76 Commencement of matrimonial action and demand for support  
§ 34:77 Subsequent divorce  
§ 34:78 —Secured by paying spouse  
§ 34:79 Subsequent annulment  
§ 34:80 Subsequent judicial separation  
§ 34:81 Effect of recipient’s remarriage  
§ 34:82 —Where second marriage is invalid  
§ 34:83 Bankruptcy of paying spouse  
§ 34:84 Death of recipient  
§ 34:85 Death of paying spouse  
§ 34:86 Modification by mutual consent of parties  
§ 34:87 Modification by the Court  
§ 34:88 —Where agreement incorporated in matrimonial decree

## F. ACTIONS TO SET ASIDE SEPARATION AGREEMENTS

§ 34:89 Generally  
§ 34:90 Joinder with other matrimonial action  
§ 34:91 Incompetency of party  
§ 34:92 Effect of subsequent divorce or annulment  
§ 34:93 Whether restitution required  
§ 34:94 Counsel fees  
§ 34:95 Defenses  
§ 34:96 —Statute of limitations and laches

# Volume 3 Table of Contents

## EQUITABLE DISTRIBUTION

### PART ONE EQUITABLE DISTRIBUTION: ANALYSIS

#### CHAPTER 35. THE EQUITABLE DISTRIBUTION LAW: AN OVERVIEW

§ 35:1 In general  
§ 35:2 Structure of the Equitable Distribution Law of 1980  
§ 35:3 Matrimonial actions, defined  
§ 35:4 The equitable distribution process  
§ 35:5 Procedural problems—In general—Retroactivity  
§ 35:6 —Retroactivity and discontinuance of prior pending action without prejudice  
§ 35:7 —Retroactivity and discontinuance of prior pending action with prejudice

#### CHAPTER 36. MARITAL PROPERTY AND SEPARATE PROPERTY: DEFINITIONS

§ 36:1 Marital property—In general  
§ 36:2 —Presumption all property, unless clearly separate, deemed marital property

§ 36:3 —Cutoff dates for marital property  
§ 36:4 —Examples of marital property  
§ 36:5 —Elimination of enhanced earning capacity as a marital asset—Domestic Relations Law  
§ 236(B)(5)(d)(7)  
§ 36:6 —Employer stock plans and bonuses  
§ 36:7 —Severance payments and deferred compensation  
§ 36:8 Separate property—Property acquired after commencement of action—Tracing property to its source  
§ 36:9 —In General  
§ 36:10 —Property acquired before marriage or by inheritance or gift  
§ 36:11 —Property acquired as compensation for personal injuries  
xvii  
§ 36:12 —Unallocated personal injury recovery  
§ 36:13 —Property acquired in exchange for, or the increase in value of, separate property  
§ 36:14 —Property exempt by agreement  
§ 36:15 —Burden of proof that property is separate  
§ 36:16 —Burden of proof—Exception to clear and convincing evidence rule  
§ 36:17 —Appreciation  
§ 36:18 —New York’s version of transmutation into marital property  
§ 36:19 —Property transferred into joint names or commingled with marital property  
§ 36:20 —Use of marital property to improve separate property does not transmute it into marital property  
§ 36:21 —Rebutting presumption that assets combined with property acquired during marriage are marital—Tracing assets to Source  
§ 36:22 —Summary of rules regarding transmutation and commingling  
§ 36:23 —Origination credit for separate property contribution to marital property

## **CHAPTER 37. THE EQUITABLE DISTRIBUTION SYSTEM**

§ 37:1 Introduction  
§ 37:2 Constitutionality of Equitable Distribution Law  
§ 37:3 Equitable distribution—The Fifteen factors  
§ 37:4 The Original 10 factors—Equitable Distribution Law of 1980  
§ 37:5 The 1986 Amendments—The 13 factors  
§ 37:6 The 2009 Amendment—The Fourteen factors  
§ 37:7 The 2015 Amendment—Factor (7)—Contributions to enhanced earning capacity  
§ 37:8 The 2020 Amendment—The 15 factors—Factor (14)—Acts of domestic violence  
§ 37:9 The 15 Factors—Factor (1) the income and property of each party at the time of marriage, and at the

time of the commencement of the action

§ 37:10 —Factor (2) the duration of the marriage and the age and health of both parties

§ 37:11 —Factor (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects

§ 37:12 —Factor (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution

§ 37:13 —Factor (5) the loss of health insurance benefits upon dissolution of the marriage

§ 37:14 —Factor (6) any award of maintenance

§ 37:15 —Factor (7) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party

§ 37:16 —Factor (8) the liquid or non-liquid character of all marital property

§ 37:17 —Factor (9) the probable future financial circumstances of each party

§ 37:18 —Factor (10) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party

§ 37:19 —Factor (11) the tax consequences to each party

§ 37:20 —Factor (12) the wasteful dissipation of assets by either spouse

§ 37:21 —Factor (13) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration

§ 37:22 —Factor (14) whether either party has committed an act or acts of domestic violence . . . against the other party and the nature, extent, duration and impact of such act or acts

§ 37:23 —Factor (15) any other factor which the court shall expressly find to be just and proper

§ 37:24 —Remedies for transfer in contemplation of a matrimonial action without fair consideration

§ 37:25 Effect of barrier to remarriage—Domestic Relations Law § 253 and Domestic Relations Law

§ 236(B)(5)(h)

§ 37:26 Homemaker services and equality of spousal contributions

## **CHAPTER 38. MATRIMONIAL AGREEMENTS**

### **I. IN GENERAL**

§ 38:1 Agreements made before and during marriage—In

general

§ 38:2 Historical evolution of contract rights leading to the Equitable Distribution Law

§ 38:3 Agreements made before and during marriage—Antenuptial property settlements

§ 38:4 —Antenuptial agreements

§ 38:5 —Antenuptial Agreements—Bloomfield v. Bloomfield

§ 38:6 —Antenuptial agreements—Van Kipness v. Van Kipness

§ 38:7 Agreements made during marriage—Separation agreements executed before July 19, 1980

§ 38:8 —Separation agreements and postnuptial agreements executed on or after July 19, 1980

§ 38:9 —Requirement of a divorce

§ 38:10 Role of separation judgment

## **II. ANTENUPTIAL AGREEMENTS AND PROPERTY SETTLEMENTS**

§ 38:11 Generally

§ 38:12 Laws governing

§ 38:13 Consideration

§ 38:14 Necessity of writing—Domestic Relations Law

§ 236(B)(3)

§ 38:15 —Statute of frauds

§ 38:16 Effect of infancy of party

§ 38:17 Statute of limitations for antenuptial and postnuptial agreements

§ 38:18 Requisites as to fair and reasonable, and not unconscionable—Action to set aside

§ 38:19 Requisites as to fair dealing and reasonableness—Effect of fraud, misrepresentation, deception and overreaching

§ 38:20 Rules of construction

§ 38:21 Subject of antenuptial agreements—Property rights

§ 38:22 —Support of spouse

§ 38:23 —After-acquired property

§ 38:24 —Children

§ 38:25 —Release of pension rights and survivor benefits

§ 38:26 —Waiver of counsel fees

## **CHAPTER 39. REQUISITES OF SEPARATION AND POSTNUPTIAL AGREEMENTS**

### **I. PRINCIPLES APPLICABLE TO AGREEMENTS—IN GENERAL**

§ 39:1 Prospective application of Equitable Distribution Law of 1980—In general

§ 39:2 Principles of contract law—In General

§ 39:3 —Consideration

§ 39:4 Principles applicable separation agreements and postnuptial agreements—Good faith

§ 39:5 Requirement that the parties be living apart or immediately separate

§ 39:6 Adequate provision for support of spouse

§ 39:7 —Effect of inadequate provision

§ 39:8 —Effect of provision exempting spouse from support

liability

§ 39:9 —Provision permitting husband to determine amount of support

§ 39:10 —Provision for lump-sum payment

§ 39:11 —Provision for cessation or change in the amount of payments

## **II. REQUISITES OF MATRIMONIAL AGREEMENTS: DOMESTIC RELATIONS LAW § 236(B)**

§ 39:12 Parameters for agreements—Domestic Relations Law § 236(B)(3)

§ 39:13 —Formal requirements

§ 39:14 — —Requisites of proper acknowledgment

§ 39:15 —Open court stipulations

§ 39:16 —Statute of frauds and electronic evidence of agreements

§ 39:17 —Domestic Relations Law § 236(B)(3)—General Obligations Law § 5-311

§ 39:18 — —“Fair and reasonable” and “Not unconscionable”

§ 39:19 — —Meaning of “Unconscionable”

§ 39:20 — —Effect of nondisclosure

§ 39:21 — —Unconscionable agreements

§ 39:22 — —Effect of Fraud, Misconduct, Overreaching, Duress and Mistake—In general

§ 39:23 — —Effect of fraud

§ 39:24 — —Effect of misconduct and overreaching

§ 39:25 — —Effect of duress

§ 39:26 — —Effect of mistake

§ 39:27 — —Effect of subsequent events upon fraud and overreaching

§ 39:28 Child support—Public policy limitations—Child Support Standards Act—In general

§ 39:29 — —Post-secondary education expenses

§ 39:30 — —Child care and medical expenses

§ 39:31 — —Boden—Brescia—In general

§ 39:32 Other public policy limitations

§ 39:33 Specific provisions—Merger or survival

§ 39:34 —Lump-sum settlements

§ 39:35 —Arbitration clauses

§ 39:36 —Escalation clauses

§ 39:37 —Religious contracts

§ 39:38 —Bankruptcy

§ 39:39 —Retirement plan and pension waivers

§ 39:40 —Partial distribution of property by agreement

§ 39:41 —Penalty on default

§ 39:42 —Counsel fees in event of default

§ 39:43 —Election pursuant to agreement provision for counsel fees in event of default

§ 39:44 —Governing laws

§ 39:45 —Effect of waiver of right to inherit on tenancy by entirety

§ 39:46 —Boiler plate clauses

## **III. CONSTRUCTION, OPERATION, AND EFFECT OF MATRIMONIAL AGREEMENTS**

§ 39:47 Construction of agreements, generally

§ 39:48 Construction of agreements—Determining ambiguity  
§ 39:49 —Time for performance  
§ 39:50 Separation agreement as bar to action for separation  
§ 39:51 Agreement Not a Bar to Action for Divorce  
§ 39:52 Effect on marital relation  
§ 39:53 Effect on obligation to support spouse  
§ 39:54 Child support and separation agreements—Boden—  
Brescia  
§ 39:55 Effect of rights in estate of deceased spouse  
§ 39:56 —Effect on prior will of deceased spouse  
§ 39:57 —Right of election against will of spouse  
§ 39:58 Effect of dissolution on prior will  
§ 39:59 Assignment of right to support payments  
§ 39:60 Construction of provisions respecting income or  
earnings  
§ 39:61 Provisions relative to life insurance  
§ 39:62 Collateral effects of valid agreements  
§ 39:63 Cases construing frequently used terms and  
provisions in agreements  
§ 39:64 Arbitration provisions  
§ 39:65 Bankruptcy—Effect upon agreement of spouses  
discharge in bankruptcy  
§ 39:66 Child support and maintenance payments  
§ 39:67 Change of circumstances or other basis for  
modification of child support and maintenance  
§ 39:68 Camp, child care and extracurricular activities  
expenses.  
§ 39:69 Cases construing provision for parties to “consult  
with regard to the children’s education and after  
school activities”  
§ 39:70 College tuition, room, board and expenses.  
§ 39:71 Child’s private school educational expenses  
§ 39:72 Confidentiality cases  
§ 39:73 Construction of agreements (miscellaneous cases)  
§ 39:74 Construction of term “pharmaceutical expense”  
§ 39:75 Construction of term “superceded”  
§ 39:76 Construction of convey all right and title by deed  
“recorded at husband’s expense”  
§ 39:77 Construction of “earned income”  
§ 39:78 Construction of “earnings”  
§ 39:79 Construction of “marriage vows”  
§ 39:80 Dum custa clause  
§ 39:81 Emancipation of child cases  
§ 39:82 Exclusive occupancy of the marital residence  
§ 39:83 Construction of “failure to insist on strict  
performance” provision  
§ 39:84 Income Tax provisions  
§ 39:85 Life insurance  
§ 39:86 Real property and sale of martial residence  
§ 39:87 Cases involving medical, dental, health insurance and  
related services  
§ 39:88 Cases construing provision requiring notice of change  
of address

- § 39:89 Cases construing provision for support to be paid so long as wife not in default
- § 39:90 Cases construing provision to bequeath portion of net taxable estate
- § 39:91 Cases construing provision that agreement shall not be modified except by agreement in writing executed with the same formality as agreement
- § 39:92 Rent controlled apartment provision
- § 39:93 Retirement, pension and QDRO provision
- § 39:94 Waiver

## **CHAPTER 40. ENFORCEMENT AND MODIFICATION OF DOMESTIC RELATIONS LAW § 236, PART B AGREEMENTS**

### **I. ENFORCEMENT OF MATRIMONIAL AGREEMENTS**

- § 40:1 Generally
- § 40:2 Unacknowledged agreements
- § 40:3 Collaborative law participation agreement
- § 40:4 Agreements to agree
- § 40:5 Choice of remedies
- § 40:6 Specific performance of agreement
- § 40:7 Breach of contract action
- § 40:8 Parties to action for enforcement
- § 40:9 Provisions relating to life insurance and pension beneficiary

### **II. DEFENSES**

- § 40:10 Defenses under contract law—In general
- § 40:11 Consideration
- § 40:12 Capacity to contract: disabilities
- § 40:13 Contracts of minors
- § 40:14 Contracts of persons lacking mental capacity
- § 40:15 Testimonial capacity and privileges
- § 40:16 Testimony of children
- § 40:17 Mental competence of witness
- § 40:18 Spousal competence and privilege
- LAW AND THE FAMILY NEW YORK
- xxiv
- § 40:19 Other disqualifications and privileges
- § 40:20 Statute of frauds
- § 40:21 Parol evidence rule
- § 40:22 Dead man's statute
- § 40:23 Statute of limitations
- § 40:24 Accord and satisfaction
- § 40:25 Waiver and laches of provisions of agreement
- § 40:26 Breach of agreement by party seeking enforcement
- § 40:27 Subsequent misconduct of spouse
- § 40:28 Nonsupport of children by custodial parent

### **III. TERMINATION AND RESCISSION OF MATRIMONIAL AGREEMENTS**

- § 40:29 Generally
- § 40:30 Remarriage, death, and postdivorce cohabitation, generally
- § 40:31 Remarriage of recipient

§ 40:32 Invalid remarriage of recipient  
§ 40:33 Death of paying spouse  
§ 40:34 Death of recipient  
§ 40:35 Post-divorce cohabitation and dum casta clauses of agreements  
§ 40:36 Cohabitation and postnuptial agreements  
§ 40:37 Reconciliation and resumption of cohabitation  
§ 40:38 Effect of reconciliation upon executed property settlement agreement  
§ 40:39 Repudiation or breach of matrimonial agreement by husband  
§ 40:40 Repudiation or breach of matrimonial agreement by wife  
§ 40:41 Agreement obligation to support child—Effect of emancipation  
§ 40:42 Effect of commencement of matrimonial action and demand for support  
§ 40:43 Effect of subsequent divorce upon agreement—Merger or survival  
§ 40:44 Effect of divorce obtained by paying spouse  
§ 40:45 Effect of subsequent annulment  
§ 40:46 Effect of subsequent judicial separation  
§ 40:47 Bankruptcy of paying spouse  
§ 40:48 Reformation of Agreement  
§ 40:49 Void and voidable agreements  
§ 40:50 Rescission and repudiation of agreements by resumption of marital relations  
§ 40:51 Rescission and repudiation of agreements by material breach  
§ 40:52 Restitution and recoupment of payments pursuant to agreement  
§ 40:53 Ratification of agreements

#### **IV. MODIFICATION OF MATRIMONIAL AGREEMENTS**

§ 40:54 Modification of Agreement by Mutual Consent of Parties  
§ 40:55 Modification of agreement by the court—Maintenance  
§ 40:56 —Child support

#### **V. PROCEDURAL ASPECTS OF ACTIONS TO SET ASIDE MATRIMONIAL AGREEMENTS**

§ 40:57 Generally  
§ 40:58 Joinder with matrimonial action  
§ 40:59 Effect of subsequent New York dissolution  
§ 40:60 Effect of subsequent foreign dissolution  
§ 40:61 —Statute of limitations

### **CHAPTER 41. CONFLICTS OF LAW, CONSTITUTIONAL ISSUES, AND RELATED PROBLEMS**

#### **I. IN GENERAL**

§ 41:1 Introduction  
§ 41:2 Divisible divorce  
§ 41:3 Divisible incidents of divorce  
§ 41:4 —Jurisdiction and who will exercise it

§ 41:5 —Jurisdiction over military personnel  
§ 41:6 —Choice of law problems—Which law to apply  
§ 41:7 —Characterization and renvoi  
§ 41:8 —Choice of law and agreements—Auten v. Auten—  
Significant contacts  
§ 41:9 —Forum non conveniens  
§ 41:10 Jurisdiction in the constitutional sense  
§ 41:11 —Territorial jurisdiction  
§ 41:12 —Subject matter jurisdiction  
§ 41:13 —Notice  
§ 41:14 —Due process  
§ 41:15 —Equal protection  
§ 41:16 Full faith and credit  
§ 41:17 When full faith and credit is owed  
§ 41:18 New York’s recognition of sister-state and foreign  
divorces—Custody and child support—Full faith and  
credit  
§ 41:19 Full faith and credit to statutes  
§ 41:20 Estoppel  
§ 41:21 Standing  
§ 41:22 Laches  
§ 41:23 Domicile  
§ 41:24 Substance and procedure  
§ 41:25 Marital property  
§ 41:26 Ex parte divorces  
§ 41:27 Other constitutional issues—Marriage as a civil  
contract  
§ 41:28 Res judicata, collateral estoppel, preclusion and  
judicial estoppel (inconsistent positions)—In general  
§ 41:29 Res judicata  
§ 41:30 Collateral estoppel or issue preclusion  
§ 41:31 Preclusion  
§ 41:32 Estoppel against inconsistent positions or doctrine of  
judicial estoppel  
§ 41:33 Effect of foreign country divorce upon agreements  
§ 41:34 Comity for foreign country judgments of divorce  
§ 41:35 New York’s recognition of sister-state and foreign  
divorces  
§ 41:36 Sister-state and foreign judgments—Fraud, res  
judicata and collateral estoppel  
§ 41:37 Collateral attacks on sister-state’s divorce decrees  
§ 41:38 Collateral attack on foreign country divorces  
§ 41:39 Comity to civil unions  
§ 41:40 The domestic relations exception to federal  
jurisdiction

## **Volume 4 Table of Contents**

### **EQUITABLE DISTRIBUTION (CONTINUED)**

## PART TWO EQUITABLE DISTRIBUTION: PROCEDURE

### CHAPTER 42. DISCOVERY AND EXPERT FEES

- § 42:1 Introduction
- § 42:2 Cases pending before and after enactment of Equitable Distribution Law
- § 42:3 Scope and extent of disclosure
- § 42:4 Limitations upon discovery—Protective order
- § 42:5 —Protective order for non-party witness
- § 42:6 —Prior to 1977
- § 42:7 —Since 1977
- § 42:8 Net worth statement
- § 42:9 Fixation of valuation dates: Domestic Relations Law § 236(B)(4)
- § 42:10 Policy of broad financial disclosure: historical evolution since July 19, 1980
- § 42:11 Policy of broad financial disclosure: since July 19, 1980—Depositions and production of documents
- § 42:12 Policy of broad financial disclosure—Difference between CPLR 3111 notice and CPLR 3120 demand
- § 42:13 Policy of broad financial disclosure: CPLR 3101(i)—Disclosure of films, photographs, video tapes or audio tapes
- § 42:14 —Discovery and inspection—Nonparty witness
- § 42:15 CPLR 3120—Demand for discovery and inspection—Requirement of “reasonable particularity” and description by category
- § 42:16 Interrogatories
- § 42:17 Notice to submit to physical or mental examination—CPLR § 3121
- § 42:18 Right to counsel at court ordered physical or mental examination
- § 42:19 Deposition of non-party witnesses: CPLR § 3101(a)(4)—Since 1984
- § 42:20 Non-party discovery of business interests of party—In general
- § 42:21 Non-party discovery business interests of parties—Procedural requirements
- § 42:22 Disclosure of law practice
- § 42:23 Disclosure of medical practice
- § 42:24 Disclosure of grounds for divorce
- § 42:25 Disclosure of custody issues
- § 42:26 Disclosure in action to set aside agreement—Evolution of present rule
- § 42:27 Disclosure in declaratory judgment action
- § 42:28 Disclosure and copying of computer records and electronically stored records
- § 42:29 Disclosure of social media networking accounts
- § 42:30 Disclosure by party in default
- § 42:31 Sanctions for failure to disclose—CPLR 3126
- § 42:32 Discovery sanctions for spoliation of evidence
- § 42:33 Discovery after note of issue and statement of

readiness filed  
§ 42:34 Discovery in post-judgment modification and enforcement proceedings  
§ 42:35 Discovery of medical, psychiatric, and social worker records under HIPAA  
§ 42:36 Discovery of medical and psychiatric, records under HIPAA—CPLR 3122(a)(2)—Physician-patient privilege  
§ 42:37 Discovery—Assertion of Fifth Amendment privilege  
§ 42:38 Discovery of experts—CPLR 3101(d)  
§ 42:39 Expert fees—Domestic Relations Law § 237(c)  
§ 42:40 Court-appointed neutral experts  
§ 42:41 Court appointed neutral expert—Payment of witness fees (22 NYCRR § 202.16(f)(3))  
§ 42:42 The Uniform Interstate Depositions and Discovery Act—In general  
§ 42:43 —CPLR 3119—Definitions  
§ 42:44 —Issuance and service of New York subpoena  
§ 42:45 —Deposition, production and inspection  
§ 42:46 —Application to court  
§ 42:47 —Uniformity of application and construction  
§ 42:48 —CPLR 3102(e)  
§ 42:49 [The Hague Convention on Taking Evidence Abroad](#)

## **CHAPTER 43. MATRIMONIAL LITIGATION PRACTICE AND PROCEDURE**

§ 43:1 Introduction  
§ 43:2 Right to counsel in matrimonial action  
§ 43:3 Right to interpreter for person who cannot communicate  
§ 43:4 Right of parties to chart their own litigation course  
§ 43:5 Appearance at conference by telephonic or electronic means  
§ 43:6 Appearance at deposition or trial by video conferencing or electronic means  
§ 43:7 Motion practice under the Uniform Rules  
§ 43:8 —Special rules for motions for alimony, maintenance, counsel fees, child support, exclusive occupancy, custody and visitation  
§ 43:9 —Cross motions  
§ 43:10 —Reply papers  
§ 43:11 —Timetable for service of motion papers  
§ 43:12 —Affirmation as to the truth  
§ 43:13 —Affidavits executed outside of New York State  
§ 43:14 —Required papers on applications for maintenance, child support, counsel fees, or any modification of an award—Generally  
§ 43:15 — —Moving party  
§ 43:16 — —Opposing Party  
§ 43:17 —Duty of the court on applications for temporary counsel fees  
§ 43:18 Orders determining a motion—Service and effective

date  
 § 43:19 Practice under the Uniform Rules—22 NYCRR  
 § 202.16—In General  
 § 43:20 —Commentary—In General  
 § 43:21 —Retainer agreements, liens and closing statements  
 § 43:22 —Request for judicial intervention  
 § 43:23 —Certification by attorney  
 § 43:24 —Preliminary conference  
 § 43:25 —Practical aspects of the matrimonial preliminary  
 conference  
 § 43:26 —Motions for maintenance, child support and counsel  
 fees  
 § 43:27 —Expert witness reports and testimony  
 § 43:28 —Statement of proposed disposition  
 § 43:29 —Filing note of issue  
 § 43:30 —Referral to Family Court  
 § 43:31 —Custody trial and hearings to proceed to conclusion  
 § 43:32 —Confidentiality  
 § 43:33 Recusal  
 § 43:34 Judgments—Abandonment of judgment or order  
 § 43:35 —Submit or settle order or judgment—  
 Counter-judgments  
 § 43:36 —Requirement of transcript  
 § 43:37 —Entry and effective date  
 § 43:38 —Required form of judgment and incorporation by  
 reference  
 § 43:39 —Findings of fact—Duty of the trial court  
 § 43:40 — —Duty of court to determine property distribution,  
 maintenance, child support and custody  
 § 43:41 —Directions regarding the marital home  
 § 43:42 —Conditions in event of subsequent bankruptcy  
 § 43:43 —Conditional money judgment  
 § 43:44 —Continuation of pendente lite or temporary  
 maintenance order  
 § 43:45 —Credit for payment of mortgage and related  
 obligations  
 § 43:46 —Credit for payment of certain college expenses  
 § 43:47 —Health care coverage provisions of agreements-  
 Domestic Relations Law § 255  
 § 43:48 —Inconsistency between decision and judgment  
 § 43:49 —Inconsistency between surviving agreement and  
 judgment  
 § 43:50 —Obligation of court to incorporate agreement into  
 judgement  
 § 43:51 —Incorporation of stipulation—“So-Ordered”  
 transcript of open court stipulation  
 § 43:52 —Interest on payments of a distributive award-In  
 General  
 § 43:53 —Interest on payments of a distributive award-Predecision  
 interest  
 § 43:54 —Interest on payments of a distributive award—  
 Post-decision and Post-judgment interest  
 § 43:55 —No Authority to Distribute Separate Property

§ 43:56 —Open-Ended payments  
§ 43:57 —Provision for future modification of maintenance and child support  
§ 43:58 —Powers of receiver to sell property  
§ 43:59 —Required modification notice on child support judgment and orders  
§ 43:60 —Required provision-Custody  
§ 43:61 —Required provision—Social security number and employer information on judgment for child support—Domestic Relations Law § 240-b  
§ 43:62 —Required provision for resumption of premarriage surname and social security number—Domestic Relations Law § 240-a  
§ 43:63 —Retention of jurisdiction by supreme court  
§ 43:64 —Termination Date for Child Support Payments  
§ 43:65 Omission or redaction of confidential personal Information in other actions  
§ 43:66 Omission or redaction of confidential personal information from matrimonial decisions  
§ 43:67 Post-Trial motion for a new trial  
§ 43:68 Recoupment of maintenance and child support following reversal by appellate division, fraud or mathematical error  
§ 43:69 Restitution and recoupment of distributive award following reversal by appellate division

## **CHAPTER 44. ORDER OF PROTECTION**

§ 44:1 Orders of protection—In general  
§ 44:2 —Conduct that constitutes a family offense  
§ 44:3 —Members of the same family or household  
§ 44:4 —Persons who have been in an intimate relationship  
§ 44:5 —Required notice—Authority to arrest person who violates order  
§ 44:6 —Entry before or after final judgment and duration of order of protection  
§ 44:7 —Required findings, standard of proof and limitation upon enforcement and modification by another court  
§ 44:8 —Prohibition upon consolidation of actions and modification of orders without notice  
§ 44:9 — —Statute of limitations  
§ 44:10 — —Procedure—Right to file motion for emergency temporary order of protection  
§ 44:11 — — —Firearms suspension upon issuance of temporary order of protection or order of protection  
§ 44:12 — — —Service and filing of temporary order of protection and order of protection  
§ 44:13 — — —Emergency powers of local criminal court when supreme court not in session  
§ 44:14 — — —Standards for determination of family offense  
§ 44:15 — — —Sufficiency of pleadings or motion papers  
§ 44:16 —Order of disposition  
§ 44:17 —Translation and interpretation

§ 44:18 Violence Against Women Act  
§ 44:19 Full faith and credit to protective orders  
§ 44:20 Interstate domestic violence—Offenses  
§ 44:21 —Penalties  
§ 44:22 Interstate Stalking—Offenses  
§ 44:23 —Penalties  
§ 44:24 Interstate violation of protection order—Offenses  
§ 44:25 —Penalties  
§ 44:26 Pretrial release of defendant  
§ 44:27 Restitution—18 U.S.C.A. §§ 2261 to 2266  
§ 44:28 Repeat offenders 18 U.S.C.A. §§ 2261 to 2266  
§ 44:29 Full faith and credit to protective orders—New York Statutes  
§ 44:30 Orders of protection—Confidentiality of protective proceedings—Domestic Relations Law § 254  
§ 44:31 —Integrated domestic violence parts

## **CHAPTER 45. SUMMARY JUDGMENT, INJUNCTIONS AND PROPERTY DETERMINATIONS UNDER DOMESTIC RELATIONS LAW § 234**

§ 45:1 Summary judgment-In general  
§ 45:2 Reverse summary judgment—In general  
§ 45:3 —The 1984 prohibition  
§ 45:4 Summary judgment in conversion actions for divorce  
§ 45:5 Injunctions pendente lite: early cases under CPLR Art 63  
§ 45:6 Injunctions pendente lite—The effect of Leibowits—Current rule under DRL § 234  
§ 45:7 The effect of Leibowits—Notice to spouse  
§ 45:8 CPLR Article 63—Notice of pendency  
§ 45:9 Automatic restraining orders—Domestic Relations Law § 236, Part B(2)(b)  
§ 45:10 Right to dispose of property—Effect of commencement of action for dissolution  
§ 45:11 Domestic Relations Law § 234—Interim property distributions  
§ 45:12 —Effect of final judgment  
§ 45:13 —Recording final judgment  
§ 45:14 —Title to property—Res judicata—Single action rule-Failure to raise issues in prior action

## **CHAPTER 46. NATURE OF PROCEEDINGS UNDER DOMESTIC RELATIONS LAW § 236, PART B**

§ 46:1 Authority for action for equitable distribution following foreign judgment of divorce  
§ 46:2 Nature of proceedings for equitable distribution following foreign judgment of divorce  
§ 46:3 Authority for independent action for child support  
§ 46:4 Nature of child support proceedings  
§ 46:5 Cut-off date for property distribution

## **CHAPTER 47. MAINTENANCE OR DISTRIBUTION OF MARITAL PROPERTY— JURISDICTION AND SERVICE OF PROCESS**

- § 47:1 Generally—Maintenance or distribution of marital property
- § 47:2 —Child Support
- § 47:3 Jurisdictional requirements—Maintenance and property distribution
- § 47:4 In rem jurisdiction
- § 47:5 In personam jurisdiction
- § 47:6 Long-arm jurisdiction
- § 47:7 Service of a summons—Maintenance and property distribution
- § 47:8 —Child support
- § 47:9 Service of a summons with or without a complaint—Maintenance and property distribution
- § 47:10 Service of a notice of petition or order to show cause—Child support
- § 47:11 Alternate methods of service—Maintenance and property distribution
- § 47:12 —Child support
- § 47:13 Residence requirements—Maintenance and property distribution
- § 47:14 —Child support
- § 47:15 Service by publication in matrimonial action
- § 47:16 Service by publication—Child support
- § 47:17 Service without the state
- § 47:18 Proof of service
- § 47:19 Automatic orders—Maintenance and property distribution

## **CHAPTER 48. PROCEDURE**

- § 48:1 Appearance and service of complaint—Maintenance and property distribution
- § 48:2 —Action for child support
- § 48:3 Answer—Maintenance and property distribution
- § 48:4 —Child support
- § 48:5 Counterclaims—Maintenance and property distribution
- § 48:6 —Child support
- § 48:7 Trial by jury
- § 48:8 Abatement and effect of death of party—Maintenance and property distribution
- § 48:9 —Child support
- § 48:10 Financial disclosure—Maintenance and property distribution
- § 48:11 —Child support
- § 48:12 Decision
- § 48:13 Default—Maintenance and property distribution
- § 48:14 —Child support
- § 48:15 Relief
- § 48:16 Judgments

§ 48:17 Summary judgment

## **PART THREE EQUITABLE DISTRIBUTION: DISTRIBUTIVE AWARDS**

### **CHAPTER 49. PROPERTY DISTRIBUTION**

- § 49:1 Equitable distribution and distributive awards—In general
- § 49:2 —Versions of Domestic Relations Law § 236(B)(5)(d)
- § 49:3 Equitable distribution and distributive award of marital property
- § 49:4 Distribution of marital debts
- § 49:5 The distributive award, generally
- § 49:6 Valuation date—In general—Domestic Relations Law § 236(B)(4)(b)
- § 49:7 —Second department
- § 49:8 —First department
- § 49:9 —Third department
- § 49:10 —Fourth department
- § 49:11 —McSparron v. McSparron
- § 49:12 Presumptions as to marital property
- § 49:13 Equitable distribution and distributive award—Presumptions-burden of proof—Effect of Failure to Value
- § 49:14 —Effect of failure to value by spouse not having joint title or possession
- § 49:15 —Effect of failure to value—Distribution in kind
- § 49:16 — —Pension and retirement benefits
- § 49:17 —Burden of proof—Liability for debts
- § 49:18 — —Presumptions as to separate property and marital property
- § 49:19 — —Appreciation of separate property
- § 49:20 —Required findings—Domestic Relations Law § 236(B)(5)(g)
- § 49:21 Equitable does not mean equal
- § 49:22 Equal as possible distribution
- § 49:23 Equitable distribution—Manner in which property is distributed—Realization of equity—Continuation as joint owners
- § 49:24 Equitable distribution of spouses business
- § 49:25 Equitable distribution—Evidence of ownership and value of property
- § 49:26 Valuation methodology—Generally
- § 49:27 Valuation of real property
- § 49:28 Value of spousal contributions
- § 49:29 Value of homemaker services
- § 49:30 Equitable distribution—Burden of proof—Tax consequences

### **CHAPTER 50. BUSINESSES AND CLOSELY HELD CORPORATIONS**

- § 50:1 In general
- § 50:2 Recognized valuation concepts—Rev. Rul. No. 59-60

- § 50:3 —Capitalization of earnings method
- § 50:4 —Capitalization of dividends method
- § 50:5 —Liquidation method
- § 50:6 —Adjusted book value method
- § 50:7 —Excess earnings (formula) method
- § 50:8 Representative cases—Bona fide shareholders agreement
- § 50:9 —Liquidation value of stock
- § 50:10 —Sale of stock and price per share
- § 50:11 —Good will method
- § 50:12 —Annual earnings method
- § 50:13 —Assets less liabilities method
- § 50:14 —Value to owner method
- § 50:15 —Asset valuation method
- § 50:16 —Discounted cash flow method
- § 50:17 —Estimated sales, tangible assets and good will
- § 50:18 —Estimated unreported cash sales
- § 50:19 —Multiple of income method
- § 50:20 —Multiple of annual net profit method
- § 50:21 —Corporations own formula for valuation

## **CHAPTER 51. PROFESSIONAL PRACTICES**

- § 51:1 Share of professional practice—Generally
- § 51:2 Valuation and distribution of law practice—In general
- § 51:3 Valuation of law practice—New Jersey’s approach to valuation of law practice
- § 51:4 —Goodwill
- § 51:5 Valuation and distribution of law practice—New York’s approach—Formula based upon average annual earning
- § 51:6 — —Partnership agreement
- § 51:7 — —Excess earnings and capitalization of earnings
- § 51:8 Valuation and distribution of accounting practice
- § 51:9 Valuation and distribution of dental practice
- § 51:10 Valuation and distribution of medical practice

## **CHAPTER 52. ENHANCED EARNING CAPACITY FROM PROFESSIONAL LICENSE, DEGREE, CELEBRITY GOODWILL, OR CAREER ENHANCEMENT**

- § 52:1 Share of professional degrees and licenses—O’Brien v. O’Brien—The Rise and Fall of O’Brien
- § 52:2 —Decisions prior to O’Brien
- § 52:3 —O’Brien and its effect on valuation and equitable distribution—Valuation and distribution of medical licenses
- § 52:4 Merger of professional licenses and academic degrees—The “Merger” fiction
- § 52:5 —Demise of the “Merger” fiction—McSparron v. McSparron
- § 52:6 — —Grunfeld v. Grunfeld—Avoiding double counting
- § 52:7 Valuation methodology and distribution of professional degrees, licenses, and enhanced earning capacity

LAW AND THE FAMILY NEW YORK

§ 52:8 Aftermath of O'Brien—Extension of O'Brien to distribution of careers and enhanced earning capacity  
§ 52:9 The Demise of O'Brien—Domestic Relations Law  
§ 236(B)(5)(d)(7)

## **CHAPTER 53. PENSIONS AND RETIREMENT BENEFITS**

§ 53:1 Introduction  
§ 53:2 Early cases  
§ 53:3 Disability pensions—Spousal interest—Deferred Compensation vs. personal injury recover  
§ 53:4 —Presumption that it is marital property  
§ 53:5 —Valuation of components  
§ 53:6 Non-vested pensions and retirement benefits  
§ 53:7 Variable supplement fund benefits  
§ 53:8 Post-Divorce benefits—Deferred Compensation for past services v. severance pay and early retirement benefits—In General  
§ 53:9 —Deferred compensation  
§ 53:10 —Severance payments  
§ 53:11 Early retirement incentive payments  
§ 53:12 Effect of post judgment events upon spouses share of retirement benefits  
§ 53:13 Employee bonuses  
§ 53:14 Restricted stock and stock option benefit plans  
§ 53:15 Sick pay and vacation benefits  
§ 53:16 Social security disability benefits  
§ 53:17 Veterans disability benefits—In general  
§ 53:18 Methods of distribution of pensions—Effect of Majauskas  
§ 53:19 Award of share of pension in payout status  
§ 53:20 Valuation date  
§ 53:21 Necessity for evidence of present value of pension and retirement benefits  
§ 53:22 Interest on distributive share rather than date of trial valuation date  
§ 53:23 Limiting survivor options  
§ 53:24 Tax consequences of distributive award of pension  
§ 53:25 Distribution of retirement plan benefits—In general  
§ 53:26 —Types of retirement plans  
§ 53:27 —Methods of dividing benefits  
§ 53:28 —Transfer of survivor benefits  
§ 53:29 —Form of payment of retirement and survivor benefits  
§ 53:30 —Alternate payee treated as spouse  
§ 53:31 —Federal case law developments  
§ 53:32 Retirement Equity Act of 1984—Generally  
§ 53:33 Transfers of pension benefits, generally  
§ 53:34 Exception to Anti-alienation Rule—Qualified domestic relations order  
§ 53:35 Qualified domestic relations order—Defined  
§ 53:36 Requirements of Internal Revenue Code § 414(p)(2)

§ 53:37 Requirements of Internal Revenue Code § 414(p)(3)  
§ 53:38 —Obligations of plan administrator  
§ 53:39 —Transfer of survivor benefits  
§ 53:40 —Tax consequences of transfers pursuant to a qualified domestic relations order  
§ 53:41 —Tax free rollovers  
§ 53:42 Qualified domestic relations order—Submission of proposed qualified domestic relations order  
§ 53:43 —Effect of subsequent events upon QDRO issued pursuant to stipulation  
§ 53:44 —Pre-retirement death benefits  
§ 53:45 Special employee tax treatment not applicable to alternate payee  
§ 53:46 —Applicability of rules to plans for government employees  
§ 53:47 —Transfers of individual retirement accounts or annuities  
§ 53:48 Military retirement benefits—In general  
§ 53:49 —Distributing “Disposable Retired Pay”  
§ 53:50 —Payments to the former spouse  
§ 53:51 —Direct payments from DFAS  
§ 53:52 —Distribution of VSI and SSB benefits  
§ 53:53 —Valuation and distribution of medical benefits  
§ 53:54 —Valuation and distribution of accrued leave  
§ 53:55 —Survivor Benefit Plan  
§ 53:56 —Medical benefits and commissary privileges  
§ 53:57 Submission of proposed qualified domestic relations order  
§ 53:58 Effect of subsequent events upon QDRO issued pursuant to stipulation

## **CHAPTER 54. MARITAL HOME**

§ 54:1 In general  
§ 54:2 Title to marital home awarded to wife  
§ 54:3 Distribution of rent controlled apartments in New York city  
§ 54:4 Exclusive occupancy of marital home—In general  
§ 54:5 —General rule  
§ 54:6 Cases awarding exclusive occupancy after trial  
§ 54:7 Exclusive occupancy—Where divorce denied  
§ 54:8 Exclusive occupancy of marital home pendente lite—Need to protect safety of person or property  
§ 54:9 —Alternative residence and return to domestic strife  
§ 54:10 —Summary of the rules  
§ 54:11 Modification of exclusive occupancy award  
§ 54:12 Tenancy by the entirety—Exclusive occupancy and partition  
§ 54:13 Methodology of real-estate valuation—In general  
§ 54:14 —Market value  
§ 54:15 —Three approaches to value  
§ 54:16 —Highest and best use  
§ 54:17 —Land value

§ 54:18 —Application of the three approaches  
§ 54:19 —Sales comparison approach  
§ 54:20 —Cost approach  
§ 54:21 —Income capitalization approach  
§ 54:22 Reconciliation of value indications  
§ 54:23 Consideration of tax consequences of sale of marital home

## **Volume 5 Table of Contents**

### **EQUITABLE DISTRIBUTION (CONTINUED)**

#### **PART THREE EQUITABLE DISTRIBUTION: DISTRIBUTIVE AWARDS (CONTINUED)**

#### **CHAPTER 55. MAINTENANCE**

##### **I. NATURE AND HISTORICAL EVOLUTION OF MAINTENANCE**

§ 55:1 Alimony  
§ 55:2 Maintenance—The Equitable Distribution Law of 1980  
§ 55:3 —Definitions—1980 Statute and the 1986 and 2010 Amendments  
§ 55:4 Historical evolution—The 1980 Statute—Ten original factors  
§ 55:5 — — —Pre 1986 cases  
§ 55:6 —The 1986 Amendments—Eleven factors  
§ 55:7 —The 2009 Amendments: loss of health insurance benefits—Twelve factors  
§ 55:8 —The 2010 Amendments: post-divorce maintenance awards—Twenty factors

##### **II. POST-DIVORCE MAINTENANCE AWARDS IN ACTIONS COMMENCED BEFORE JANUARY 23, 2016**

§ 55:9 Historical evolution—The 2015 Amendments effective January 23, 2016—Post-divorce maintenance guidelines  
§ 55:10 The 1986 and 2010 Amendments—Maintenance distinguished from Alimony  
§ 55:11 —Purpose of maintenance  
§ 55:12 —Discretion of the court  
§ 55:13 —Imputed income  
§ 55:14 — —Maintenance (case law)  
§ 55:15 —Duration of maintenance  
xvii  
§ 55:16 —Effect of equitable distribution on maintenance award  
§ 55:17 Effect of a barrier to remarriage on maintenance award (1992 addition to Domestic Relations Law § 236(B)(6)(d))  
§ 55:18 The 1986 and 2010 Amendments—Post-divorce maintenance awards (guidelines or factors)  
§ 55:19 The 2010 Amendments—Post-divorce maintenance

awards (guidelines or factors)—Alimony deduction repealed after December 31, 2018

§ 55:20 Post-divorce maintenance awards (guidelines or factors)—Cases applying the factors

§ 55:21 Burden of proof

§ 55:22 Standard of living during marriage—Before the 2015 Amendments

§ 55:23 —Cases discussing standard of living during marriage as a factor

§ 55:24 Effect of distributive award of enhanced earning capacity upon maintenance—McSparron rule

§ 55:25 —Grunfeld rule

§ 55:26 —Keane exception

§ 55:27 Duration of maintenance

§ 55:28 —Cases awarding and denying “lifetime” or “durational” maintenance

§ 55:29 Time when maintenance terminates

§ 55:30 Short-term marriages

§ 55:31 Durational or rehabilitative maintenance

§ 55:32 Death of Spouse

§ 55:33 Marital misconduct

§ 55:34 Maintenance denied for lack of need—Before the 2015 Amendments

§ 55:35 Maintenance denied for lack of need (case law)—Before the 2015 Amendments

§ 55:36 Inability to pay maintenance—Need of payor to maintain a separate household and have money to live—Before the 2015 Amendments

§ 55:37 Maintenance awards—Where matrimonial relief denied

§ 55:38 Maintenance award—Effect of other provisions for support

§ 55:39 Effect of pendente lite and temporary maintenance awards

§ 55:40 Fragmented, open-ended and unallocated maintenance awards

§ 55:41 Maintenance awards to husband

§ 55:42 Maintenance awards to husbands—Cases in which maintenance awarded

§ 55:43 Maintenance award—Effect of affidavit of support

### **III. POST-DIVORCE MAINTENANCE GUIDELINES IN ACTIONS COMMENCED ON OR AFTER JANUARY 23, 2016**

§ 55:44 Post-divorce maintenance guidelines—Actions commenced on or after January 23, 2016—Domestic Relations Law § 236(B)(6)—The 2015 Amendments—Introduction—Income cap

§ 55:45 — — — —In general

§ 55:46 —Domestic Relations Law § 236(B)(6)—The 2015 Amendments—Legislative intention—Retroactivity

§ 55:47 — — —Mandatory application

§ 55:48 — — —Definitions

§ 55:49 — — — —Determine the income of the parties—

Inclusions in income

§ 55:50 — — — — — Alimony deduction repealed after December 31, 2018

§ 55:51 — — — — — Deductions from income

§ 55:52 — — — Calculation of the post-divorce maintenance guideline amount

§ 55:53 — — — Post-divorce maintenance guideline obligation award—Unjust or inappropriate

§ 55:54 — — — Required statement of factors and reasons where guideline amount is unjust or inappropriate

§ 55:55 — — — The twenty factors in Domestic Relations Law § 236(B)(6)(e)(1)

§ 55:56 Factor (a): the age and health of the parties

§ 55:57 Factor (b): the present or future earning capacity of the parties, including a history of limited participation in the workforce

§ 55:58 Factor (c): the need of one party to incur education or training expenses

§ 55:59 Factor (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

§ 55:60 Factor (e): the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration

§ 55:61 Factor (f): the existence and duration of a pre-marital joint household or a pre-divorce separate household

§ 55:62 Factor (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

§ 55:63 Factor (h): the availability and cost of medical insurance for the parties

§ 55:64 Factor (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

§ 55:65 Factor (j): the tax consequences to each party

§ 55:66 Factor (k): the standard of living of the parties established during the marriage.

§ 55:67 Factor (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

§ 55:68 Factor (m): the equitable distribution of marital property and the income or imputed income on the assets so distributed

§ 55:69 Factor (n): 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

§ 55:70 Factor (o): any other factor which the court shall expressly find to be just and proper

§ 55:71 Post-divorce maintenance guidelines—Domestic Relations Law § 236(B)(6)—The 2015 Amendments—Duration of post-divorce maintenance—The retirement factor

§ 55:72 — — —Factors removed by 2015 amendments

§ 55:73 — — —Self-support reserve—Rebuttable presumption that no maintenance is awarded

§ 55:74 — — —Unrepresented parties

§ 55:75 — — —Opting out of Domestic Relations Law § 236(B)(6)

§ 55:76 — — —In case of default or where insufficient evidence

§ 55:77 — — —Effect of guidelines upon modification of postdivorce maintenance

§ 55:78 — — —Effect of barrier to remarriage

§ 55:79 — — —Termination of post-divorce maintenance

§ 55:80 Duration of post-divorce maintenance

§ 55:81 Payment of maintenance directly to third party

#### **IV. POST-DIVORCE MAINTENANCE AWARDS— RETROACTIVITY—THE 1986, 2010 AND 2015 STATUTES**

§ 55:82 Post-divorce maintenance awards—Retroactivity—The 1986, 2010 and 2015 statutes—Retroactivity—In general

§ 55:83 — —Mandatory award of retroactive maintenance and child support—The 2010 statute

§ 55:84 — — —Credit for payments made pursuant to temporary award—The 2010 statute

§ 55:85 Judgments—Retroactivity—Mandatory award of retroactive Maintenance and Child Support—Credit for 'add-on payments made pursuant to temporary award

§ 55:86 Post-divorce maintenance awards—Mandatory award of retroactive maintenance and child support—The 2010 statute—Exception to rule

§ 55:87 —Retroactivity—Award of retroactive maintenance and child support—Credit for voluntary payments—The 2010 statute

§ 55:88 —Temporary maintenance and child support—Credit for overpayments where judgment retroactively sets a higher rate than that paid during pendency of the action—No restitution or recoupment—The 2010 statute

§ 55:89 — —Indirect recoupment of overpayments against distributive award—The 2010 statute

§ 55:90 —Retroactivity—Award of retroactive maintenance and child support—Credit for payments made to satisfy spouses legal obligations—The 2010 statute

§ 55:91 — — —The 2015 statute

## **V. DEFENSES AND OTHER CONSIDERATIONS**

§ 55:92 Equitable defenses—Judicial estoppel—Inconsistent positions

§ 55:93 Collateral estoppel and res judicata

§ 55:94 Lack of jurisdiction and void judgments

§ 55:95 Effect of recipient's habitual living with another person—Domestic Relations Law § 248

§ 55:96 Effect of recipients remarriage

§ 55:97 Assignment of maintenance

## **CHAPTER 56. TEMPORARY MAINTENANCE**

### **I. MAINTENANCE PENDENTE LITE—ACTIONS COMMENCED BEFORE OCTOBER 12, 2020—IN GENERAL**

§ 56:1 Introduction—Distinction between actions commenced before and after October 12, 2010—Three time periods

§ 56:2 Nature and purpose of maintenance pendente lite and temporary maintenance

§ 56:3 Timing of maintenance pendente lite and temporary maintenance

§ 56:4 Maintenance pendente lite—Discretion as to award and as to amount

§ 56:5 Duration of maintenance pendente lite and temporary maintenance

§ 56:6 Effect of maintenance pendente lite and temporary maintenance award on further support

§ 56:7 Recovery of maintenance pendente lite or temporary maintenance paid where action terminated in favor of opposite spouse

### **II. FACTORS AFFECTING AWARD OF MAINTENANCE PENDENTE LITE—IN GENERAL**

§ 56:8 Refusal to grant relief requested

§ 56:9 Spouse's lack of meritorious defense to the action

§ 56:10 Marital fault of spouse seeking support

§ 56:11 Foreign ex parte decree of divorce granted to spouse

§ 56:12 Foreign matrimonial action participated in by spouse seeking support

§ 56:13 Nonexistence of marital relationship

§ 56:14 Existence of agreement

§ 56:15 Maintenance pendente lite—Spouse's means

§ 56:16 —Parties living together

§ 56:17 Spouse served outside of state

§ 56:18 Maintenance pendente lite—Standard of living

§ 56:19 —Statutory factors—Domestic Relations Law § 236(B)(6)(a)

§ 56:20 —Burden of proof

§ 56:21 —Effective date and retroactivity

### **III. FACTORS AFFECTING AWARD OF TEMPORARY MAINTENANCE-TEMPORARY MAINTENANCE GUIDELINES—2010 AMENDMENTS—DOMESTIC RELATIONS LAW § 236(B)(5-a)**

§ 56:22 Domestic Relations Law § 236(B)(5-a)—The 2010

version

§ 56:23 Temporary maintenance guidelines—2010

Amendments—Domestic Relations Law

§ 236(B)(1)(5-a)—Presumptive Award

§ 56:24 — —Domestic Relations Law § 236(B)(1)(5-a)-Income cap

§ 56:25 — —In general

§ 56:26 The Temporary Maintenance Guidelines (“TMG”)

calculation—2010 Amendments

§ 56:27 “Payor” and “payee”

§ 56:28 —Determine the income of the parties

§ 56:29 Determine the income of the parties—Income from income producing property

§ 56:30 —Investment income

§ 56:31 —Voluntarily deferred income

§ 56:32 —“Imputed income”

§ 56:33 —Additions to income

§ 56:34 —When is income imputed?

§ 56:35 —Deductions from income

§ 56:36 Calculation of the temporary maintenance guideline amount—In general

§ 56:37 —Guideline amount where payor’s income is under income cap

§ 56:38 —Guideline amount where payor’s income exceeds income cap

§ 56:39 —Factor 12 for temporary maintenance awards

§ 56:40 —Guideline duration

§ 56:41 —Presumptive award

§ 56:42 —Presumptive amount of temporary maintenance unjust or inappropriate

§ 56:43 — —Cases

§ 56:44 —Alimony deduction repealed after December 31, 2018

§ 56:45 Required statement of factors and reasons where presumptive amount found unjust or inappropriate

§ 56:46 Self-support reserve—Rebuttable presumption that no temporary maintenance is awarded

§ 56:47 Unrepresented Parties

§ 56:48 Court Required to Set Forth Factors and Reasons

§ 56:49 Effect of agreement or stipulation

§ 56:50 Application of temporary maintenance guidelines where party in default or insufficient evidence

§ 56:51 Effect of temporary maintenance guidelines upon modification proceeding

§ 56:52 Effect of a barrier to remarriage on temporary maintenance award

#### **IV. FACTORS AFFECTING AWARD OF TEMPORARY MAINTENANCE—THE 2015 AMENDMENTS**

§ 56:53 Temporary maintenance guidelines—Domestic Relations Law § 236(B)(5-a)—The 2015 version

§ 56:54 — —The 2015 Amendments—In general

§ 56:55 Legislative intention

§ 56:56 —Mandatory application of temporary maintenance

guidelines

§ 56:57 Definitions

§ 56:58 —Determine the income of the parties—Inclusions in income

§ 56:59 — —Alimony deduction repealed after December 31, 2018

§ 56:60 — —Determine the income of the parties—Deductions from income

§ 56:61 Calculation of the temporary maintenance guideline amount—In general

§ 56:62 Temporary maintenance guideline obligation award—Unjust or inappropriate

§ 56:63 Required statement of factors and reasons where guideline amount is unjust or inappropriate

§ 56:64 Allocation of family expenses

§ 56:65 Duration of temporary maintenance

§ 56:66 The Factors in Domestic Relations Law § 236(B)(5-a)(h)(1) [Stopped]

§ 56:67 Self-support reserve—Rebuttable presumption that no temporary maintenance is awarded

§ 56:68 Unrepresented parties

§ 56:69 Opting out of Domestic Relations Law § 236(B)(5-a)

§ 56:70 In case of default or where insufficient evidence

§ 56:71 Effect upon post-divorce maintenance award

§ 56:72 Effect of guidelines upon modification of existing order or agreement

## **V. PROCEDURE FOR OBTAINING MAINTENANCE PENDENTE LITE AND TEMPORARY MAINTENANCE**

§ 56:73 Application is made by motion—Generally

§ 56:74 —Effect of Uniform Rules

§ 56:75 Special Rules for motions for alimony, maintenance, counsel fees, child support, exclusive occupancy, custody, and visitation

§ 56:76 Required papers on application for maintenance pendente lite and temporary maintenance—Generally

§ 56:77 —Moving party

§ 56:78 —Opposing party

§ 56:79 No necessity for a hearing

§ 56:80 Hearing or reference to referee or family court

§ 56:81 Requirements of orders—Third party payments as child support

## **CHAPTER 57. TAX ASPECTS OF MAINTENANCE, SUPPORT, AND PROPERTY DISTRIBUTION**

§ 57:1 Introduction

§ 57:2 The Domestic Relations Tax Reform Act of 1984 (“1984 Act”)

§ 57:3 The Tax Reform Act of 1986 (“1986 Act”)

§ 57:4 Alimony and separate maintenance payments—In general

§ 57:5 —Specific requirements under the 1984 and 1986

Acts

§ 57:6 —Cash payments

§ 57:7 —Opting out

§ 57:8 —Same household

§ 57:9 —Liability to make payments after death of payee

§ 57:10 —Substitute payments after death of payee

§ 57:11 —Excess front-loading; The 1984 Act

§ 57:12 —Operation of the 1984 minimum term rule

TABLE OF CONTENTS

xxv

§ 57:13 —Repeal of the alimony deduction

§ 57:14 The Tax Cuts and Jobs Act of 2017—In general

§ 57:15 Operation of the 1984 recapture rule

§ 57:16 —Exceptions to the 1984 recapture rule

§ 57:17 —1984 alimony and maintenance amendments;  
effective dates

§ 57:18 —Excess front-loading; the 1986 Act

§ 57:19 —The 1986 recapture rule

§ 57:20 —Exceptions to the 1986 recapture rule

§ 57:21 —The 1986 recapture rule; effective dates

§ 57:22 Child support payments; the 1984 Act

§ 57:23 —The 1984 child support amendments; effective  
dates

§ 57:24 —Treatment of payment as fixed for child support

§ 57:25 —The 1986 amendment

§ 57:26 Transfers of property; Internal Revenue Code § 1041

§ 57:27 Sale of principal residence

§ 57:28 —Effective date

§ 57:29 —Application

§ 57:30 —Requirement that transfer must be incident to the  
divorce or related to the cessation of the marriage

§ 57:31 —Transfers on behalf of a spouse

§ 57:32 —Tax consequences

§ 57:33 —Notice and recordkeeping requirement

§ 57:34 —Effective dates, transitional periods, and elections

§ 57:35 The 1986 Act; transfers between spouses

§ 57:36 —Transfers to a trust

§ 57:37 Dependency exemption

§ 57:38 —Effective date

§ 57:39 Effect of the Act of 2004 on the dependency  
exemption

§ 57:40 —Children who support themselves

§ 57:41 —Special rule

§ 57:42 —Effect upon existing rules

§ 57:43 —Citizenship and residency requirements

§ 57:44 —Children of divorced or legally separated parents

§ 57:45 —Summary of the effect of the 2004 Act on the  
dependency exemption

§ 57:46 The Tax Cuts and Jobs Act of 2017—Personal and  
dependent exemptions suspended through 2025

§ 57:47 —Standard deduction

§ 57:48 Custodial parent

§ 57:49 Reporting requirements; alimony and maintenance

payments

- § 57:50 Filing status as married
- § 57:51 Federal tax treatment of same-sex couples
- § 57:52 Option to file joint return; liability of spouse
- § 57:53 Married taxpayer treated as unmarried
- § 57:54 Divorce or separation instrument defined
- § 57:55 Medical deductions
- § 57:56 The Tax Cuts and Jobs Act of 2017—Medical expense deduction
- § 57:57 Head of household status
- § 57:58 —Effect of the Act of 2004 on head of household filing status
- § 57:59 Effect of the Act of 2004 on head of household filing status—Children who support themselves
- § 57:60 —Special rule
- § 57:61 —Effect upon existing rules
- § 57:62 —Citizenship and residency requirements
- § 57:63 —Children of divorced or legally separated parents
- § 57:64 —Summary of the effect of the 2004 Act on the head of household filing status
- § 57:65 Childcare credit
- § 57:66 Effect of the Act of 2004 on the child credit
- § 57:67 —Children who support themselves
- § 57:68 —Special rule
- § 57:69 —Effect upon existing rules
- § 57:70 —Citizenship and residency requirements
- § 57:71 —Children of divorced or legally separated parents
- § 57:72 —Summary of the effect of the 2004 Act on the child credit
- § 57:73 The Tax Cuts and Jobs Act of 2017—Enhancement of child tax credit through 2025 and new family credit
- § 57:74 Earned income credit
- § 57:75 Effect of the Act of 2004 on the earned income credit
- § 57:76 —Children who support themselves
- § 57:77 —Special rule
- § 57:78 —Citizenship and residency requirements
- § 57:79 —Children of divorced or legally separated parents
- § 57:80 —Summary of the effect of the 2004 Act on the earned income credit
- § 57:81 Innocent spouse, separation of liability, and equitable relief
- § 57:82 Gift and estate tax treatment of certain property settlements

## **CHAPTER 58. INSURANCE COVERAGE AND MEDICAL SUPPORT ORDERS**

- § 58:1 Domestic Relations Law § 236(B)(8)(a)—Correcting the hardship situation
- § 58:2 Obligations of insurer to beneficiary of insurance
- § 58:3 Health insurance requirements for child support orders—In general
- § 58:4 Effect of automatic orders on life insurance policy—Domestic Relations Law § 236(B)(2)(b)

§ 58:5 Qualified medical child support order—In general  
§ 58:6 Medical support execution—In general

## **CHAPTER 59. CHILD SUPPORT**

### **I. IN GENERAL**

#### **A. INTRODUCTION**

§ 59:1 Generally  
§ 59:2 Historical evolution of liability for child support  
§ 59:3 —Child’s financial resources  
§ 59:4 —Allocation of the child support duty  
§ 59:5 Criminal and civil sanctions  
§ 59:6 Liability for child support—Doctrine of necessities  
§ 59:7 —Stepparents and persons standing in Loco Parentis  
§ 59:8 —By estoppel  
§ 59:9 Effect of death of parent  
§ 59:10 Supreme Court v. Family Court

#### **B. APPLICABLE STATUTES**

##### **1. In General**

§ 59:11 Domestic Relations Law § 236(B)(7)—1980, 1989, 1990, 1992  
§ 59:12 Legislative intent of Child Support Standards Act of 1989  
§ 59:13 Statutes amended by Child Support Standards Act of 1989

##### **2. Domestic Relations Law § 240(1-b)**

§ 59:14 Amendments to the 1989 statute and income cap—Generally

### **II. CHILD SUPPORT AWARDS**

#### **A. BASIC CHILD SUPPORT OBLIGATION**

##### **1. In General**

§ 59:15 Child support defined  
§ 59:16 The child support obligation—Generally  
§ 59:17 Joint and Shared custody situations—Bast v. Rossoff  
§ 59:18 —Third Department—Baraby v. Baraby  
§ 59:19 —First Department—Rubin v. Salla  
§ 59:20 —Baraby and Rubin compared

##### **2. Calculating Basic Child Support**

§ 59:21 Application of the formula—Presumption of correct amount of support obligation  
§ 59:22 —Combined parental income  
§ 59:23 —Statutory cap on combined parental income  
§ 59:24 —Combined parental income exceeds statutory cap—Add-ons  
§ 59:25 —Add-ons  
§ 59:26 —Rebuttable minimum payment—Income from nonrecurring payments—Unjust and inappropriate  
§ 59:27 Unconstitutionality of non-rebuttable minimum payment

## B. DETERMINING GROSS INCOME

### 1. In General

§ 59:28 Gross (total) income defined

§ 59:29 Gross (total) income defined after January 24, 2016—  
Inclusion of spousal maintenance

§ 59:30 Treatment of social security disability payments—The  
Graby case

### 2. Imputed Income

§ 59:31 Imputed income—In general

§ 59:32 —Ability to provide—Income, education and earning  
potential

§ 59:33 —Considerations

§ 59:34 Non-income producing assets

§ 59:35 Employment perquisites that confer an economic  
benefit and fringe benefits

§ 59:36 Money, goods, services and gifts provided by relatives  
or friends

§ 59:37 Intentional dissipation of assets or reduction of  
income

§ 59:38 Imputed income—Basis for imputation of income

### 3. Deductions From Income

§ 59:39 Generally

§ 59:40 Rule against double counting inapplicable to child  
support awards

§ 59:41 Unreimbursed employee business expenses

§ 59:42 Maintenance paid to a former spouse

§ 59:43 Child support order

§ 59:44 Maintenance order for a current spouse

§ 59:45 Maintenance order for a current spouse after January  
24, 2016

§ 59:46 Certain federal and state taxes

## C. COMBINED PARENTAL INCOME OVER STATUTORY CAP

§ 59:47 Generally—The three-step method and statutory cap  
on combined parental income

§ 59:48 The three step method—Cassano—The “blind  
application rule”

§ 59:49 — —Test where combined parental income exceeds  
statutory cap

§ 59:50 — — —Needs of the child in high-income cases

§ 59:51 The ten factors—The financial resources of the  
parents and child—Factor 1

§ 59:52 —The physical and emotional health of the child and  
his/her special needs and aptitudes—Factor 2

§ 59:53 —The standard of living the child would have enjoyed  
had the marriage or household not been dissolved—  
Factor 3

§ 59:54 —The tax consequences to the parties—Factor 4

§ 59:55 —The non-monetary contribution the parents will  
make toward the care and well-being of the child—  
Factor 5

§ 59:56 —The educational needs of either parent—Factor 6

§ 59:57 —A determination that the gross income of one parent is substantially less than the other parent’s gross income—Factor 7  
§ 59:58 The Ten Factors—The needs of other children—Factor 8  
§ 59:59 The ten factors—Visitation expenses—Factor 9  
§ 59:60 —Any other factors the court determines are relevant in each case—Factor 10

#### D. BASIC CHILD SUPPORT OBLIGATION—“ADD ONS”

§ 59:61 Generally  
§ 59:62 Mandatory award of child care expenses  
§ 59:63 Discretionary award of child care expenses  
§ 59:64 Mandatory award of health care expenses—In general—Former Domestic Relations Law  
§ 240(1-b)(c)(5)—Introduction  
§ 59:65 Private health insurance benefits—Available—Obligation to exercise option  
§ 59:66 — —Mandatory orders  
§ 59:67 —Determination of availability  
§ 59:68 Private health insurance—Availability  
§ 59:69 —Payment for share of reasonable cash medical support expenses for additional unreimbursed expenses  
§ 59:70 —Not available—Cash medical support  
§ 59:71 —Cash medical support determined under Domestic Relations Law § 240(1-b)(c)(5)  
§ 59:72 Private health insurance benefits—Not available—Application for state child health insurance program or medical assistance program  
§ 59:73 Private health insurance—Not available—Cash medical support—Application for state child health insurance program or medical assistance program—Managed care coverage  
§ 59:74 — — — —Fee for service coverage  
§ 59:75 — — — —Child eligible under state child health insurance program  
§ 59:76 — —Reasonable health care expenses not covered by insurance  
§ 59:77 — —Cash medical support—Unjust or inappropriate  
§ 59:78 Requirements for child support orders—Directions for health insurance  
§ 59:79 —Social security number  
§ 59:80 Discretionary award of child educational expenses—Historical perspective  
§ 59:81 —Effect of the Child Support Standards Act  
§ 59:82 —Private school, special, or enriched education  
§ 59:83 —College and post-secondary  
§ 59:84 —Private school and college expenses—The Second Department balancing of factors rule  
§ 59:85 College expenses for young child premature—Klauer v. Abeliovich exception

## E. VARIATION FROM THE BASIC CHILD SUPPORT OBLIGATION

### 1. In General

§ 59:86 Generally

§ 59:87 Child support amount that is just or appropriate

### 2. Statutory Factors

§ 59:88 In general

§ 59:89 The financial resources of the custodial and noncustodial parent, and those of the child—Factor 1

§ 59:90 The physical and emotional health of the child and his/her special needs and aptitudes—Factor 2

§ 59:91 The standard of living the child would have enjoyed had the marriage or household not been dissolved—Factor 3

§ 59:92 The tax consequences to the parties—Factor 4

§ 59:93 The non-monetary contributions that the parents will make toward the care and well-being of the child—Factor 5

§ 59:94 The educational needs of either parent—Factor 6

§ 59:95 A determination that the gross income of one parent is substantially less than the other parent's gross income—Factor 7

§ 59:96 The needs of other children—Factor 8

§ 59:97 Visitation expenses—Factor 9

§ 59:98 Any other factors the court determines are relevant in each case—Factor 10

## F. OTHER MATTERS

### 1. In General

§ 59:99 Additional child support award from non-recurring payments not considered as income

§ 59:100 Minimum payment—Income below poverty income guidelines amount—Former rule

§ 59:101 —Income below self-support reserve but not below the poverty income guidelines amount

§ 59:102 No minimum payment where basic child support obligation is unjust or inappropriate

§ 59:103 No arrears beyond \$500 where non-custodial parent's income is less than or equal to the poverty income guidelines amount

§ 59:104 Agreements for child support—Opting out of the statutory scheme

§ 59:105 — —Add-ons

§ 59:106 — —Formal requirements

§ 59:107 Unrepresented parties

§ 59:108 Children born out of wedlock

§ 59:109 Temporary child support

§ 59:110 Default child support awards

§ 59:111 Effect of insufficient evidence to determine gross income

§ 59:112 Financial disclosure

§ 59:113 Retroactivity of child support awards

§ 59:114 Retroactivity of pendente lite child support awards

## 2. Pendente Lite Child Support Awards

§ 59:115 Generally

§ 59:116 Effect of uniform rules

§ 59:117 Required papers—In general

§ 59:118 —Moving party

§ 59:119 Special Rules for motions for alimony, maintenance, counsel fees, child support, exclusive occupancy, custody and visitation

§ 59:120 Required papers—Opposing party

§ 59:121 No necessity for a hearing

### III. DEFENSES

#### A. IN GENERAL

§ 59:122 Generally

§ 59:123 Voluntary payment

§ 59:124 Lack of personal jurisdiction

§ 59:125 Inability to pay

§ 59:126 Other financial obligations

§ 59:127 Bankruptcy

§ 59:128 Limit on garnishment

§ 59:129 Contractual limitations upon support

§ 59:130 Equitable estoppel

§ 59:131 Custodial parent

#### B. SPECIFIC DEFENSES

§ 59:132 Non-paternity—Equitable estoppel

§ 59:133 Defenses—Non-paternity—Blood genetic marker or DNA test

§ 59:134 Age of majority

§ 59:135 Emancipation—In general

§ 59:136 Change of child's name

§ 59:137 Statute of limitations

§ 59:138 Denial of visitation rights and wrongful removal

§ 59:139 —Effect of agreement

§ 59:140 Custodian may not withhold visitation because of arrearages

### IV. PROCEDURE

§ 59:141 Nature of action or proceeding in which award may be made

§ 59:142 Payment of maintenance and child support in lump sum

§ 59:143 Payment out of property of either or both parents

§ 59:144 Effect of award on further support

§ 59:145 Refusal to grant relief sought

§ 59:146 Time award may be made

§ 59:147 Effect of agreement or stipulation

§ 59:148 Effect of default

§ 59:149 Modification of default orders

§ 59:150 Required provisions for custody and child support

§ 59:151 Required statement regarding child support enforcement services

§ 59:152 Effect of insufficient evidence to determine gross income

## **V. MODIFICATION OF CHILD SUPPORT AWARDS**

§ 59:153 Modification of child support awards—Domestic Relations Law § 236(B)(9)(b)

§ 59:154 Unforeseen change in circumstances, resulting in a complete failure of support obligations contemplated in parties' agreement

§ 59:155 Modification of child support since 2010 under "LISOPA"—In general—Domestic Relations Law

§ 236(B)(9)(b) and Family Court Act § 451

## **VI. ADJUSTMENT OF CHILD SUPPORT ORDERS**

§ 59:156 Adjustment of child support—Applicability of CSSA

§ 59:157 Adjustment of child support orders—In general

§ 59:158 Child support enforcement services

## **VII. Domestic Relations Law § 240-c—REVIEW AND COST OF LIVING ADJUSTMENT**

§ 59:159 Review and cost of living adjustment of child support orders—Request

§ 59:160 —Adjustment process

§ 59:161 —Objection process—Timely filing of objections

§ 59:162 — —Stay of adjustment—Order after hearing

§ 59:163 — —Effect of failure to make objections

§ 59:164 — —No burden of proof

§ 59:165 — —Issuance of order

§ 59:166 —Modification of orders

## **VIII. REVIEW AND COST OF LIVING ADJUSTMENT OF CHILD SUPPORT ORDERS BY SUPPORT COLLECTION UNIT**

§ 59:167 Review and cost of living adjustment of child support orders by Support Collection Unit—Notice of right to adjustment review

§ 59:168 —Review for adjustment purposes by Support Collection Unit—Orders subject to review

§ 59:169 —Timeframes for review for cost of living adjustment purposes

§ 59:170 —Adjustment process—Calculation of cost of living adjustment

§ 59:171 — —Adjusted order

§ 59:172 — —Form

§ 59:173 — —Effect of failure to make objections

§ 59:174 — —Effect of making objections

## **IX. ONE-TIME REVIEW OF ORDER ISSUED PRIOR TO SEPTEMBER 15, 1989**

§ 59:175 Right to request a one-time review of order issued prior to September 15, 1989

§ 59:176 Review procedures

§ 59:177 —Time to initiate review

§ 59:178 —Notice of intention to commence review

§ 59:179 —Review procedures

§ 59:180 —Notice of findings

§ 59:181 —Filing proposed order and written objections

§ 59:182 —Commencement of family court proceeding

§ 59:183 —Motion to vacate adjusted order

§ 59:184 Notice of findings

§ 59:185 Filing proposed order and written objections

§ 59:186 Commencement of family court proceeding  
§ 59:187 Commencement of Supreme Court proceeding  
§ 59:188 Objections sustained by court  
§ 59:189 Objections rejected by court  
§ 59:190 Motion to vacate adjusted order  
§ 59:191 Ongoing cost of living adjustment  
§ 59:192 Review and cost of living adjustment of child support orders—Notice

## **Volume 6 Table of Contents**

### **EQUITABLE DISTRIBUTION (CONTINUED)**

#### **PART THREE EQUITABLE DISTRIBUTION: DISTRIBUTIVE AWARDS (CONTINUED)**

#### **CHAPTER 60. COUNSEL FEES**

##### **I. IN GENERAL**

§ 60:1 Introduction—Organization of counsel fee chapter  
§ 60:2 Historical development of Domestic Relations Law § 237 and § 238  
§ 60:3 In general—Actions and proceedings commenced before October 12, 2010  
§ 60:4 —Actions and proceedings commenced on or after October 12, 2010—Rebuttable presumption under Domestic Relations Law § 237 and § 238 in favor of “less monied spouse”  
§ 60:5 Burden of proof and presumptions  
§ 60:6 Actions and proceedings in which counsel fees may not be awarded  
§ 60:7 Special proceeding for dissolution on the ground of absence  
§ 60:8 Action to declare the validity of a marriage  
§ 60:9 Proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce  
§ 60:10 Independent action for child support  
§ 60:11 Action for divorce or separation  
§ 60:12 Action to declare the validity or nullity of a foreign divorce  
§ 60:13 Action to enjoin foreign divorce  
§ 60:14 Action to annul a marriage or declare the nullity of a void marriage  
§ 60:15 Child protective proceedings  
§ 60:16 Habeas corpus proceedings under Domestic Relations Law § 70  
§ 60:17 Grandparent visitation proceedings under Domestic Relations Law § 72  
§ 60:18 Proceedings under the UCCJA—Historical note

§ 60:19 Proceedings under the UCCJEA  
§ 60:20 Proceedings under the international child abduction remedies act  
§ 60:21 Counsel fees in enforcement of income execution  
§ 60:22 Counsel fees in surrogate parenting contract proceedings  
§ 60:23 Counsel fees on appeal  
§ 60:24 Period for which allowed  
§ 60:25 Award for past services  
§ 60:26 Attorney’s right to make application in own name  
§ 60:27 Reimbursement of counsel fees to client  
§ 60:28 Restitution of counsel fees paid under order  
§ 60:29 Modification or cancellation of counsel fee award  
§ 60:30 Expenses—Domestic Relations Law § 237—In general  
§ 60:31 Multiple applications for fees and expenses  
§ 60:32 Compensation of the attorney for child  
§ 60:33 Compensating court appointed experts

## **II. COUNSEL FEES PENDENTE LITE**

### **A. IN GENERAL**

§ 60:34 Discretion as to award and amount  
§ 60:35 Factors—Reasonable probability of success  
§ 60:36 —Lack of meritorious defense, relative merits and obstructionist tactics  
§ 60:37 Factors-misconduct of a spouse  
§ 60:38 Nonexistence of marital relationship  
§ 60:39 Factors—Necessity and ability to pay—Statutory framework—Actions commenced prior to October 12, 2010  
§ 60:40 Necessity and ability to pay—Retainer or advance to attorney—The demise of the Kann-Winter Rule—Actions commenced prior to October 12, 2010.  
§ 60:41 Factors—Necessity and ability to pay—The 2008 “Significant Disparity” Rule  
§ 60:42 Effect of agreement, stipulation or other provisions for support  
§ 60:43 Spouse served outside state  
§ 60:44 Miscellaneous considerations, inadequate documentation and obstructionist tactics  
§ 60:45 Rebuttable presumption under Domestic Relations Law § 237(a) in favor of “less monied spouse” in actions and proceedings commenced on or after October 12, 2010  
§ 60:46 Rebuttable presumption under Domestic Relations Law § 237(b) in favor of “less monied spouse” in actions and proceedings commenced on or after October 12, 2010  
§ 60:47 Rebuttable presumption under Domestic Relations Law § 238 in favor of “less monied spouse” in actions and proceedings commenced on or after October 12, 2010  
§ 60:48 Expert fee awards pendente lite

## **B. PROCEDURE FOR OBTAINING COUNSEL FEES PENDENTE LITE**

§ 60:49 Generally

§ 60:50 Method of making application

§ 60:51 Required papers—Moving Party

§ 60:52 —Unrepresented litigant—Actions and proceedings commenced on after November 20, 2015.

§ 60:53 —Page limits on motions for pendente lite counsel fees

§ 60:54 —Opposing party

§ 60:55 Hearing of application for pendente lite counsel fees

§ 60:56 Scope of appellate review of pendente lite counsel fee awards

## **III. COUNSEL FEE AWARDS AFTER TRIAL**

### **A. IN GENERAL**

§ 60:57 Generally

§ 60:58 —In actions commenced on or after October 12, 2010

§ 60:59 Method of making application

§ 60:60 Necessity for hearing

§ 60:61 —Waiver or stipulation

### **B. FACTORS AFFECTING COUNSEL FEES AWARDED AFTER TRIAL**

§ 60:62 Generally

§ 60:63 —In actions and proceedings commenced on or after October 12, 2010—Rebuttable presumption in favor of “less monied spouse”

§ 60:64 Success of a party and relative merit of parties positions

§ 60:65 Misconduct of a spouse

§ 60:66 Lack of need, ability to pay, respective financial conditions

§ 60:67 Effect of distributive award

§ 60:68 Conduct in litigation, obstruction, and delaying tactics

§ 60:69 Egregious misconduct and extraordinary circumstances

§ 60:70 Significant disparity, depletion of distributive award and other considerations

§ 60:71 Court may not award of counsel fees to monied spouse

§ 60:72 Determining who is the less monied spouse—Actions commenced on or after October 12, 2010

§ 60:73 Factors—Decision to proceed to trial rather than settlement

§ 60:74 Required findings

§ 60:75 Effect of Rules of Professional Conduct

§ 60:76 Requirement of affidavits from experts

§ 60:77 Requirement of affidavits from prior attorneys

## **IV. COUNSEL FEES FOR AN APPEAL**

### **A. IN GENERAL**

§ 60:78 Generally

§ 60:79 Factors considered

## **B. PROCEDURE FOR OBTAINING COUNSEL FEES FOR OR AFTER APPEAL**

§ 60:80 Generally

§ 60:81 Place and method of making application

§ 60:82 Court is expert on value of legal services

§ 60:83 Required papers—Moving party

§ 60:84 —Opposing party

§ 60:85 Necessity for hearing

§ 60:86 —Waiver or stipulation

## **V. COUNSEL FEES IN ENFORCEMENT PROCEEDINGS**

### **A. IN GENERAL**

§ 60:87 Generally—Domestic Relations Law § 238 and Domestic Relations Law § 237(c)

§ 60:88 —In actions commenced on or after October 12, 2010

§ 60:89 Discretion as to award and amount

§ 60:90 —In actions commenced on or after October 12, 2010

§ 60:91 Factors affecting the award

§ 60:92 —In actions commenced on or after October 12, 2010

### **B. PROCEDURE FOR OBTAINING COUNSEL FEE AWARDS IN ENFORCEMENT PROCEEDINGS**

§ 60:93 Generally

§ 60:94 Method of making the application

§ 60:95 Required papers—Moving party

§ 60:96 — —In actions or proceedings commenced on or after October 12, 2010

§ 60:97 —Opposing party

§ 60:98 —Moving party—In actions or proceedings commenced on or after October 12, 2010

§ 60:99 Necessity for hearing; waiver

### **C. SPECIFIC ENFORCEMENT ACTIONS**

§ 60:100 Enforcement of separation agreement incorporated in judgment

§ 60:101 Election pursuant to agreement provision for counsel fees in event of default

§ 60:102 Income execution for support enforcement and income deduction order—CPLR 5141 and 5142

§ 60:103 Contempt proceedings not involving the payment of money

§ 60:104 Counsel fees as necessaries in enforcement proceedings

## **VI. COUNSEL FEES IN CUSTODY AND MODIFICATION PROCEEDINGS**

### **A. IN GENERAL**

§ 60:105 Generally

§ 60:106 —In actions and proceedings commenced on or after

TABLE OF CONTENTS

xxi

October 12, 2010—Rebuttable presumption in favor of “less monied spouse”

§ 60:107 Discretion as to award and amount

§ 60:108 —In actions commenced on or after October 12, 2010

§ 60:109 Factors affecting award

- § 60:110 Retainer or advance to attorney
- § 60:111 Award of counsel fees to monied spouse improper
- § 60:112 Retainer or advance to attorney—In actions commenced on or after October 12, 2010

## **B. PROCEDURE FOR OBTAINING COUNSEL FEES IN CUSTODY AND MODIFICATION PROCEEDINGS**

- § 60:113 Generally
- § 60:114 Method of making application
- § 60:115 Required papers—Moving party
- § 60:116 —Opposing party
- § 60:117 Necessity for hearing
- § 60:118 —Waiver
- § 60:119 Method of making application in cases under the International Child Abduction Remedies Act

## **VII. COUNSEL FEES IN FAMILY COURT PROCEEDINGS**

- § 60:120 Counsel fee awards under Family Court Act § 438
- § 60:121 —Proceedings in which allowed
- § 60:122 —Period for which allowed
- § 60:123 Exercise of discretion—Factors considered
- § 60:124 Requirement of net worth statements
- § 60:125 Right to a hearing
- § 60:126 Upon referral from Supreme Court

## **VIII. TAX ASPECTS OF COUNSEL FEE PAYMENTS**

- § 60:127 Effect of Tax Cuts and Jobs Act
- § 60:128 Deductibility of attorneys' fees paid by husband
- § 60:129 Deductibility of wife's attorney's fees
- § 60:130 Effect of bankruptcy upon counsel fee awards

# **CHAPTER 61. MODIFICATION OF ORDERS AND JUDGMENTS**

## **I. MODIFICATION OF MAINTENANCE**

- § 61:1 In General
- § 61:2 Continuing jurisdiction to modify
- § 61:3 Notice to spouse
- § 61:4 Venue of application
- § 61:5 Basis for modification of maintenance order; no surviving agreement, generally
- § 61:6 Effect of surviving agreement before July 19, 1980: Domestic Relations Law § 236(A)(1)
- § 61:7 Effect of non-surviving agreement before July 19, 1980: Domestic Relations Law § 236(A)(1)
- § 61:8 Statutory basis to modify maintenance—Surviving agreement—Versions of Domestic Relations Law § 236(B)(9)(b)
- § 61:9 —Domestic Relations Law § 236(B)(9)(b)(1)—Version as of January 23, 2016
- § 61:10 Modification of arrears under judgment or order and retroactivity
- § 61:11 Modification of maintenance in judgment—No surviving agreement—Recipients inability to be self-supporting

§ 61:12 Modification of maintenance—Effect of surviving agreement—Extreme hardship  
§ 61:13 — — —Extreme hardship defined  
§ 61:14 Constitutionality of Domestic Relations Law § 236(B)(9)(b)  
§ 61:15 Modification of maintenance—Effect of surviving agreement—Terms not incorporated  
§ 61:16 —Effect of termination of child support  
§ 61:17 Modification of maintenance award—Anticipated retirement—Actions commenced on or after January 23, 2016—In general  
§ 61:18 Modification of maintenance—Recipient’s habitual living with another man—Domestic Relations Law § 248—Versions of Domestic Relations Law § 248  
§ 61:19 — —Domestic Relations Law § 248  
§ 61:20 —Remarriage of recipient  
§ 61:21 —By agreement of parties  
§ 61:22 —Factors considered on application to modify maintenance award in judgment—In general  
§ 61:23 Factors considered on application to modify maintenance—On or after January 23, 2016—In general  
§ 61:24 — —Effect of surviving agreement  
§ 61:25 —On or after January 23, 2016  
§ 61:26 —Relevant dates for comparison—In general  
§ 61:27 —Change in paying spouse’s financial condition  
§ 61:28 —Change in recipient’s financial condition  
§ 61:29 —Remarriage of paying spouse  
§ 61:30 —Increase in cost of living  
§ 61:31 —Changes of income tax laws  
§ 61:32 Burden of proof required for modification of maintenance—Necessity for hearing  
§ 61:33 —Where no maintenance award in final judgment  
§ 61:34 —Modification of sister-state and foreign support orders

## **II. MODIFICATION OF CHILD SUPPORT**

§ 61:35 In general  
§ 61:36 Statutory basis to modify child support—Versions of Domestic Relations Law § 236(B)(9)(b)  
§ 61:37 Relevant dates for comparison  
§ 61:38 Modification authority—No surviving agreement—Prior to July 19, 1980—Factors considered  
§ 61:39 — —Since July 19, 1980—Factors considered  
§ 61:40 — —Hearing  
§ 61:41 — —Cases  
§ 61:42 Jurisdiction to modify  
§ 61:43 Notice to spouse  
§ 61:44 Venue of application  
§ 61:45 Retroactive child support  
§ 61:46 No modification of arrears of child support  
§ 61:47 Modification of child support—Where no provision for support made in final judgment

§ 61:48 —Effect of surviving agreement—The Boden-Brescia rule

§ 61:49 —Effect of the 1989 Child Support Standards Act (“CSSA”) upon surviving agreement

§ 61:50 —Effect of the 1989 Child Support Standards Act upon surviving agreement—Determination of postsecondary education expenses

§ 61:51 —Effect of 2002 Decision in *Gravlin v. Ruppert*—Unforeseen change in circumstances, resulting in a complete failure of support obligations contemplated in parties’ agreement

§ 61:52 —Effect of the 2010 Low Income Support Obligation and Performance Improvement Act (“LISOPA”)—In general

§ 61:53 Modification of child support since 2010 under “LISOPA”—Opting out

§ 61:54 — —Domestic Relations Law § 236(B)(9)(b)(2)(ii) and Family Court Act § 451(3)(b)

§ 61:55 —Did Boden survive the 2010 Amendment?

§ 61:56 —Clarification of *Knights v. Knights*

§ 61:57 —Retroactivity

§ 61:58 —Notice requirement—Domestic Relations Law § 236(B)(7) and Family Court Act § 440(4)

§ 61:59 —Family Court Act § 461

§ 61:60 —Modification of automatic adjustment where maintenance terminates—2015 Amendment of Domestic Relations Law § 240(1-b)(5)(iii)

§ 61:61 —Authorization to require non-custodial parent to seek employment—Family Court Act § 437-a

§ 61:62 —De Novo review of cost of living adjustment to order or agreement

### **III. REQUIRED PAPERS ON APPLICATION OR MOTION TO MODIFY MAINTENANCE OR CHILD SUPPORT AWARD**

§ 61:63 Required papers

§ 61:64 —Moving party

§ 61:65 —Opposing party

### **IV. AUTOMATIC MODIFICATION AND ENFORCEMENT OF CHILD SUPPORT BY THE SUPPORT COLLECTION UNIT**

§ 61:66 Automatic modification and enforcement of support orders by support collection unit—In general

§ 61:67 Automatic modification and enforcement of support orders—Child support enforcement services

§ 61:68 —Domestic Relations Law and Family Court Act—Right to request review

§ 61:69 — —Notice of right to review

§ 61:70 — —Adjustment process

§ 61:71 — —Objection process

§ 61:72 — —No necessity for proof of change of circumstances

§ 61:73 — —Review by court

§ 61:74 — —Modification of orders

§ 61:75 —Social Services Law—Orders subject to review

§ 61:76 —Notice of right to request review—Social Services

Law

§ 61:77 Automatic modification and enforcement of support orders-Definitions

§ 61:78 Automatic modification and enforcement of support orders—Time to initiate review

§ 61:79 —Adjustment process

§ 61:80 —Adjusted order

§ 61:81 —Filing proposed order and written objections

## **V. MODIFICATION OF PROPERTY DISTRIBUTIONS AND DETERMINATIONS**

§ 61:82 Modification of property distributions and determinations—In general

## **CHAPTER 62. ENFORCEMENT OF ORDERS AND JUDGMENTS**

### **I. IN GENERAL**

§ 62:1 Introduction—In General

§ 62:2 Historical evolution of enforcement statutes since 1980

§ 62:3 Enforcement by Family Court or Supreme Court

§ 62:4 Continuing jurisdiction to enforce New York awards

### **II. SECURITY—Domestic Relations Law § 243**

§ 62:5 In general

§ 62:6 Notice to spouse

### **III. COUNSEL FEES**

§ 62:7 Counsel fees and expenses in enforcement proceedings

### **IV. DOCKETING MONEY JUDGMENTS**

§ 62:8 Entry of money judgment—Domestic Relations Law § 244

§ 62:9 Notice to spouse

§ 62:10 —Service of process—Nonresident spouse

§ 62:11 As an additional remedy

§ 62:12 Venue of application

§ 62:13 Discretion of court

§ 62:14 Hearing

§ 62:15 Burden of proof—Third party payments

§ 62:16 Enforcement of arrears which accrue during pendency of an enforcement proceeding—Notice of intention to amend

§ 62:17 Docketing money judgment under CPLR 2222 for arrears

§ 62:18 Matters affecting and in defense of enforcement—Emancipation—In general

§ 62:19 — —Marriage

§ 62:20 —Marriage—Responsibility under Family Court Act § 415 and Social Services Law § 101(1)

§ 62:21 —Emancipation—Entry into the Military

§ 62:22 — —Return to unemancipated status.

§ 62:23 — —Effect of agreement

§ 62:24 —Constructive emancipation—Refusal to adhere to parental authority and control

§ 62:25 — —Refusal of contact and visitation

§ 62:26 — —Childs misconduct

§ 62:27 — —Economic independence  
 § 62:28 — — —Employable age  
 § 62:29 —Wrongful interference by custodial parent with visitation rights  
 § 62:30 —Constructive emancipation—Responsibility of parent under Family Court Act § 415 and Social Services Law § 101  
 § 62:31 —Effect of death of spouse  
 § 62:32 —Matrimonial agreements incorporated in divorce judgment—Lack of mandate  
 § 62:33 —Termination of matrimonial action  
 § 62:34 —Statute of limitations  
 § 62:35 —Arbitration  
 § 62:36 —Waiver  
 § 62:37 —Laches  
 § 62:38 —Remarriage  
 § 62:39 —Domestic Relations Law § 248  
 § 62:40 —Inability to pay  
 § 62:41 —Payment  
 § 62:42 —Parent not liable for support  
 § 62:43 —Bankruptcy—Debt for alimony and support not dischargeable in bankruptcy  
 § 62:44 — —Debt for division of property dischargeable  
 § 62:45 — —Determination of nature of the debt  
 § 62:46 — —Jurisdiction of federal courts over bankruptcy matters  
 § 62:47 — —The Rooker-Feldman doctrine—No review of state court judgment  
 § 62:48 — —Property of the estate  
 § 62:49 — —Automatic stay—Law before 2005 amendments—11 U.S.C.A. § 362  
 § 62:50 — — —2005 amendments—11 U.S.C.A. § 362  
 § 62:51 — — — —Exceptions—11 U.S.C.A. § 362  
 § 62:52 — —Exclusive jurisdiction of bankruptcy court to determine effect and exceptions to stay  
 § 62:53 — —Action to determine dischargeability of debt to spouse—In general—11 U.S.C.A. § 523(a)(5)  
 § 62:54 — —Discharge of debt to spouse—Prior law—11 U.S.C.A. § 523(a)(5)  
 § 62:55 — —Act of 2005—Discharge of debt to spouse—Domestic support obligations—11 U.S.C.A. § 523(a)  
 § 62:56 — —Bankruptcy Act of 2005—Nondischargeability of domestic support obligation—11 U.S.C.A. § 523(a)  
 § 62:57 — — —Exemption from automatic stay provisions—11 U.S.C.A. § 362(b)(2)  
 § 62:58 — — —Priority afforded domestic support obligations—11 U.S.C.A. § 507(a)  
 § 62:59 — — —Continued liability of property—11 U.S.C.A. § 522(c)  
 § 62:60 — — —Protection of domestic support claims against preferential transfer motions—11 U.S.C.A. § 547(c)(7)  
 § 62:61 — — —Notice to holder of domestic support claim

§ 62:62 — —Judgment lien in favor of spouse—11 U.S.C.A. § 522(f)  
§ 62:63 — —Sale of spouse’s interest in real property—11 U.S.C.A. § 363

## **V. SEQUESTRATION**

§ 62:64 Sequestration before order or judgment: Domestic Relations Law § 233  
§ 62:65 Sequestration after order or judgment, generally  
§ 62:66 Property Subject to Sequestration  
§ 62:67 —Determination of property belonging to spouse  
§ 62:68 Substitution of security for property sequestered  
§ 62:69 Necessity for strict compliance with statute  
§ 62:70 The receiver  
§ 62:71 Discretion  
§ 62:72 Procedure; drastic remedy  
§ 62:73 Notice to spouse

## **VI. INCOME EXECUTION AND INCOME DEDUCTION ORDER FOR SUPPORT ENFORCEMENT**

§ 62:74 In general; former Personal Property Law § 49-b  
§ 62:75 Income execution for support enforcement—Issuance  
§ 62:76 —CPLR 5241—Order of support; definitions  
§ 62:77 —Requirements and issuance  
§ 62:78 —Limitations upon amount of deduction  
§ 62:79 —Procedure; notice to debtor;  
§ 62:80 —Mistake of fact  
§ 62:81 —Defenses  
§ 62:82 —Levy by issuer  
§ 62:83 —Obligation of employer to make deductions from income  
§ 62:84 — —Liability for failure to comply  
§ 62:85 —Priority  
§ 62:86 —Levy upon money payable by the state.  
§ 62:87 —Obligation of employer to make deductions from income—Effect of defect or termination of employment or income  
§ 62:88 Income deduction order—CPLR 5242  
§ 62:89 Income deduction order for support enforcement—Limitation upon deductions  
§ 62:90 The 2013 Amendments to CPLR 5241 and 5242

## **VII. CONTEMPT PROCEEDINGS**

### **A. IN GENERAL**

§ 62:91 Introduction—Domestic Relations Law § 245—In general—Versions before and after 2016  
§ 62:92 — —In General  
§ 62:93 Failure to furnish security—Prior to and since 2016 Amendment  
§ 62:94 Where spouse has left state  
§ 62:95 Procedural prerequisites  
§ 62:96 Notice to accused  
§ 62:97 Defenses—Generally  
§ 62:98 No prior application for enforcement necessary for contempt after September 29, 2016

§ 62:99 Hearing  
§ 62:100 Burden of proof in contempt proceedings  
§ 62:101 Burden of proof in family court commitment proceedings  
§ 62:102 Contempt of court for violation of non-financial orders and judgments—Criminal contempt  
§ 62:103 —Civil contempt  
§ 62:104 Indigent parents right to counsel in civil contempt proceeding  
§ 62:105 Defense to civil contempt—Order made without subject matter jurisdiction or void on its face

## **B. DEFENSE OF CONTEMPT PROCEEDINGS**

§ 62:106 Generally  
§ 62:107 Waiver of maintenance provisions  
§ 62:108 Delay in bringing proceedings  
§ 62:109 Termination of matrimonial action  
§ 62:110 Inability to pay—In general  
§ 62:111 Relief from payment or order—Domestic Relations Law § 246—Inability to pay  
§ 62:112 —Domestic Relations Law § 246(3)—Defense of inability to pay  
§ 62:113 —Domestic Relations Law § 246(2)—Revocation of order relieving spouse of payment  
§ 62:114 Right to counsel in contempt proceeding

## **C. PUNISHMENT FOR CONTEMPT**

§ 62:115 Imprisonment  
§ 62:116 Amount of fine  
§ 62:117 Suspension of payments during imprisonment  
§ 62:118 Punishment for contempt—Defense of inability to pay in action for divorce or separation—Domestic Relations Law § 247

## **VIII. STAY OF PROCEEDINGS**

§ 62:119 Generally—Domestic Relations Law § 239

## **IX. ENFORCEMENT OF SUPPORT BY SUSPENSION OF LICENSES**

§ 62:120 In general

LAW AND THE FAMILY NEW YORK

xxx

§ 62:121 Enforcement of support by suspension of drivers licenses—Domestic Relations Law § 244-b  
§ 62:122 Enforcement of support by suspension of business or professional licenses—Domestic Relations Law § 244-c  
§ 62:123 Suspension of Recreational License—Domestic Relations Law § 244-d  
§ 62:124 Enforcement of support by suspension of attorney's license to practice law—Judiciary Law § 90  
§ 62:125 Suspension of professional and business licenses  
§ 62:126 Suspension of other licenses—General Obligations Law § 3-503

## **X. ENFORCEMENT OF SUPPORT ORDERS BY THE SUPPORT COLLECTION UNIT—SUSPENSION OF DRIVING PRIVILEGES**

- § 62:127 Enforcement of support orders by the support collection unit—Suspension of driving privileges—  
Forty-five day notice of arrears from support collection unit to support obligor
- § 62:128 — —Calculation of accumulated support arrears
- § 62:129 — —Exemption
- § 62:130 — —Effect of failure to challenge forty-five day notice
- § 62:131 — —Method of service of forty-five day notice
- § 62:132 — —Form and content of forty-five day notice
- § 62:133 — —Challenge to forty-five day notice
- § 62:134 — —Review determination by support collection unit
- § 62:135 — —Review by family court
- § 62:136 — —Methods of avoiding suspension by support obligor
- § 62:137 — —Effect of failure to receive actual notice
- § 62:138 — —Effect of compliance by support obligor

## **XI. ENFORCEMENT OF SUPPORT ORDERS BY THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE**

- § 62:139 Enforcement of support orders by the New York state department of taxation and finance—In general
- § 62:140 —Forty-five day notice of arrears from support collection unit to support obligor
- § 62:141 —Calculation of accumulated support arrears
- § 62:142 —Exemption
- § 62:143 —Effect of failure to challenge forty-five day notice
- § 62:144 —Method of service of forty-five day notice
- § 62:145 —Form and content of forty-five day notice
- § 62:146 —Challenge to support collection unit forty-five day notice
- § 62:147 —Bureau of special hearings—Child support unit
- § 62:148 —Method of challenge to determination of support collection unit
- § 62:149 —Review determination by support collection unit
- § 62:150 —Review of denial of challenge by bureau of special hearings; child support unit—30 Day Period for Filing Objections
- § 62:151 Procedure for review by bureau of special hearings child support unit

## **XII. MEDICAL SUPPORT EXECUTION AND ORDER**

- § 62:152 Medical support execution
- § 62:153 Qualified medical child support order
- § 62:154 CPLR Article 52—Enforcement of arrears/past-due support

## **XIII. APPOINTMENT OF RECEIVER**

- § 62:155 CPLR 5106—Appointment of receiver

## **XIV. ENFORCEMENT OF SISTER-STATE AND FOREIGN COUNTRY JUDGMENTS**

- § 62:156 Generally
- § 62:157 Sister-state and foreign judgments
- § 62:158 Authority to enforce foreign judgment
- § 62:159 Execution to enforce sister-state judgment
- § 62:160 Security, sequestration, and contempt to enforce sister-state judgments
- § 62:161 Where sister-state judgment is subject to modification
- § 62:162 —Judgments of foreign nations
- § 62:163 Registration of foreign support orders: The uniform Interstate Family Support Act (“UIFSA”)
- § 62:164 International family maintenance convention
- § 62:165 CPLR Article 54—“Uniform Enforcement of Foreign Judgments Act.”—Registration of foreign judgments
- § 62:166 The Federal Child Support Recovery Act
- § 62:167 —Willfulness requirement
- § 62:168 —Definitions
- § 62:169 —Rebuttable presumption
- § 62:170 —Venue of action
- § 62:171 —Right to a jury trial
- § 62:172 —Burden of proof
- § 62:173 —Default order
- § 62:174 —Defense of Inability to pay any amount
- § 62:175 —Defense of statute of limitations
- § 62:176 —Lack of order fixing arrears not a defense
- § 62:177 —Good faith belief arrears not due not a defense
- § 62:178 —Domestic relations exception not a defense
- § 62:179 —Multiple counts in indictment precluded
- § 62:180 —Mandatory restitution
- § 62:181 —U.S. v. Kerley

## **Volume 7 Table of Contents**

### **CHILD CUSTODY, CHILD SUPPORT AND INTERNATIONAL CHILD ABDUCTION**

#### **CHAPTER 63. CHILD CUSTODY AND VISITATION**

##### **I. INTRODUCTION**

- § 63:1 Generally
- § 63:2 Custody defined
- § 63:3 Right to access to school records of child
- § 63:4 Unfit parent concept
- § 63:5 “Tender Years” rule and “Best Interests” doctrine
- § 63:6 Natural parent vs. “stranger”
- § 63:7 Special status of Grandparents
- § 63:8 Custody/visitation plans
- § 63:9 Parent education & awareness program

- § 63:10 Appointment of attorney for child—In general
- § 63:11 —Authority to appoint
- § 63:12 —Exercise of discretion in custody cases
- § 63:13 —Mandatory appointment of attorney for child in custody cases
- § 63:14 Role of attorney for the child—Prior to 2007
- § 63:15 Role of the attorney for the child—Rules of the chief judge
- § 63:16 Role of the attorney for the child on appeal
- § 63:17 Status of the child in a custody case
- § 63:18 Role of the attorney for the child—Reports and recommendations
- § 63:19 Role of the court—Lincoln hearing

## **II. CUSTODY-VISITATION JURISDICTION**

- § 63:20 Custody-visitation jurisdiction: The UCCJEA and PKPA

## **III. FACTORS AFFECTING DETERMINATION**

- § 63:21 Factors affecting determination—In general  
xvii
- § 63:22 Child’s preference
- § 63:23 Child’s environment
- § 63:24 Parental lifestyle and religion
- § 63:25 Domestic violence
- § 63:26 Other factors

# **CHAPTER 64. VISITATION AND JOINT CUSTODY**

## **I. VISITATION RIGHTS OF NON-CUSTODIANS**

- § 64:1 In general—Noncustodial parent
- § 64:2 Marital parents—Incarcerated parent
- § 64:3 —Arrangements for prison visitation
- § 64:4 Non-marital and unadjudicated parents
- § 64:5 Stepparents
- § 64:6 Nonparents—Generally
- § 64:7 —Equitable estoppel and judicial estoppel
- § 64:8 Grandparents—In general—Before 2000
- § 64:9 Grandparent visitation after the Troxel case in 2000
- § 64:10 Burden of Proof of Standing in Grandparent Visitation Proceedings
- § 64:11 Proceeding for sibling visitation
- § 64:12 Other relatives, siblings, friends and concerned persons

## **II. CONDITIONS AND RESTRICTIONS ON VISITATION**

- § 64:13 Denial of visitation
- § 64:14 Suspended visitation
- § 64:15 Conditional visitation
- § 64:16 —Therapy or anger management as condition of visitation
- § 64:17 —Treatment or counselling as condition of visitation
- § 64:18 —Treatment or counselling as component of visitation order

- § 64:19 —Limitations or restrictions on visitation
- § 64:20 —As to time or duration
- § 64:21 —As to place
- § 64:22 —Supervised visitation
- § 64:23 —As to parent’s activities
- § 64:24 —As to parent’s companions
- § 64:25 Court ordered restrictions upon parents ability to cancel visitation
- § 64:26 Delegation of Authority to determine visitation
- § 64:27 Appointment of parenting coordinator

### **III. INTERFERENCE WITH VISITATION RIGHTS**

- § 64:28 In general
- § 64:29 Removal of child without permission—Historical development and the current rule
- § 64:30 Relocation with court permission—Historical development of the current rule
- § 64:31 — —Radford v. Propper
- § 64:32 Relocation—The current totality of the circumstances and best interest of the child approach
- § 64:33 —No necessity for change of circumstances in modification cases

### **IV. JOINT AND SHARED CUSTODY**

- § 64:34 Overview
- § 64:35 Joint or shared custody
- § 64:36 New York approach—In general—Joint custody defined
- § 64:37 —Effect of agreement between parties
- § 64:38 —Effect of child’s age or preference
- § 64:39 —Logistical considerations
- § 64:40 —Trial court’s discretion
- § 64:41 Zones of decision making—In general
- § 64:42 —Categorizing the zones
- § 64:43 —Where joint legal custody is inappropriate
- § 64:44 —Where neither parent can be trusted not to obstruct the other parents relationship with or access to child
- § 64:45 —Where one parent is incapable of or unable to make appropriate decisions with respect to certain aspects of the child’s life
- § 64:46 —To maintain the respective roles of each parent in the child’s life
- § 64:47 —To equalize each parents involvement or maintain a meaningful involvement in the child’s life
- § 64:48 —To take advantage of the strengths, demonstrated ability, or expressed interest of the noncustodial parent with respect to a particular dimension of child-rearing
- § 64:49 —Where one parent will facilitate the relationship between the other parent and the child

## **CHAPTER 65. FACTORS CONSIDERED IN CUSTODY DISPUTES**

### **A. MORAL FITNESS: THE TRADITIONAL CONCERN**

#### **1. INTRODUCTION**

§ 65:1 Generally

§ 65:2 Effect of “fault” in divorce proceeding

§ 65:3 Illicit sex and the “forbidden fruit”

§ 65:4 Abandonment or neglect of child

§ 65:5 Substance abuse

§ 65:6 Undesirable associations

§ 65:7 Mental, emotional or physical health

§ 65:8 Age

#### **2. THE “UNMENTIONABLES”: RELIGION, RACE AND POLITICAL FACTORS**

§ 65:9 Religion and religious upbringing of children

§ 65:10 Religious freedom of Parents

§ 65:11 Race

§ 65:12 Politics

### **B. THE CONTEMPORARY APPROACH: BEST INTERESTS OF THE CHILD STANDARD**

#### **1. IN GENERAL**

§ 65:13 Introduction

§ 65:14 “Tender Years” doctrine

§ 65:15 Parental rights doctrine

§ 65:16 Primary caretaker doctrine or factor

§ 65:17 Current New York standard—Best interests of the child

#### **2. SPECIFIC FACTORS CONSIDERED**

§ 65:18 Introduction

§ 65:19 New York—Specific factors considered in initial custody determinations—In general

§ 65:20 New York mandatory factor—Domestic violence

§ 65:21 Effect of parental alienation

§ 65:22 Parent’s sexual behavior, or lifestyle

§ 65:23 Physical or sexual abuse of child or spouse

§ 65:24 Proof and corroboration in child sexual abuse cases

§ 65:25 Psychological factors

§ 65:26 Home environment, material resources and logistics

§ 65:27 Effect of prior agreement or order

§ 65:28 Continuity of stable environment

§ 65:29 Child’s preference

§ 65:30 Keeping siblings together

§ 65:31 Primary caretaker doctrine

§ 65:32 “Friendly parent” concept

§ 65:33 “More fit” parent concept

§ 65:34 Child’s need for role model

§ 65:35 Denial of custody and visitation to murderer or sexual predator

### **C. MODIFICATION OF PRIOR AWARDS**

§ 65:36 Overview

§ 65:37 Summary of modification jurisdiction—In general

§ 65:38 Modification of custody and visitation provisions for

parents in military service—Domestic Relations Law  
§ 75-L and Domestic Relations Law § 240, 1(a-2)—  
The 2008 statute  
§ 65:39 — —The 2009 amendments  
§ 65:40 Circumstances warranting modification of custody  
and visitation awards—Specific factors considered—  
In general  
§ 65:41 — —Effect of prior agreement  
§ 65:42 —Specific changed circumstances of custodial parent  
and child  
§ 65:43 Circumstances not warranting modification of custody  
and visitation awards—In general  
§ 65:44 Circumstances not warranting modification—  
Alienation  
§ 65:45 Circumstances warranting modification of joint  
custody awards  
§ 65:46 Circumstances warranting modification of custody  
and visitation awards—Change of custody upon  
future event improper  
§ 65:47 Proceeding to modify custody determination to permit  
relocation

## **CHAPTER 66. CHILD CUSTODY AND VISITATION PRACTICE & PROCEDURE**

### **I. IN GENERAL**

§ 66:1 Introduction  
§ 66:2 Concurrent jurisdiction of the supreme court and  
family court  
§ 66:3 Comparison of original and modification proceedings  
§ 66:4 Protective orders  
§ 66:5 Mandatory review of records prior to issuance of  
permanent or initial custody order  
§ 66:6 Effect of agreement between parties  
§ 66:7 —Arbitration agreement  
§ 66:8 Parties right to assigned counsel in custody  
proceedings  
§ 66:9 Parties right to assigned counsel in visitation  
proceedings  
§ 66:10 Counsel fees

### **II. PRACTICE AND EVIDENTIARY CONSIDERATIONS**

§ 66:11 Generally  
§ 66:12 Rule against hearsay  
§ 66:13 —Relaxation of rule in cases involving abuse and  
neglect  
§ 66:14 Evidentiary issues in custody and visitation cases  
§ 66:15 Use of experts evaluations and reports—Forensic  
evaluations  
§ 66:16 —Forensic reports—22 NYCRR § 202.18 and  
§ 202.16(g)  
§ 66:17 Lincoln hearing and in-camera interview in custody  
cases  
§ 66:18 Use of experts evaluations and reports—Frye hearing

§ 66:19 Guidelines for child custody evaluations  
§ 66:20 Weight to be accorded court-appointed experts  
§ 66:21 Custody pendente lite  
§ 66:22 Initial and modification determination of custody—  
Need for hearing  
§ 66:23 No hearing necessary where court possesses adequate  
relevant information  
§ 66:24 No hearing necessary where no disputed issues of  
fact  
§ 66:25 Limitation upon adequate relevant information  
standard  
§ 66:26 Confidentiality of proceedings  
§ 66:27 Child as a witness in custody cases  
§ 66:28 Privilege against self-incrimination in custody cases  
§ 66:29 Confidential communications  
§ 66:30 Admissibility of child abuse reports  
§ 66:31 Examination of witnesses outside of New York state  
§ 66:32 Testimony or deposition of witness outside New York  
by telephone or other electronic means

### **III. HABEAS CORPUS PROCEEDINGS**

§ 66:33 Generally  
§ 66:34 Procedure, in general  
§ 66:35 Petition  
§ 66:36 Service of writ and petition  
§ 66:37 Return to writ, warrant of attachment and precept  
§ 66:38 Hearing

### **IV. RECOGNITION AND ENFORCEMENT OF PRIOR ORDERS**

#### **A. RECOGNITION OF PRIOR ORDERS**

§ 66:39 Generally  
§ 66:40 Res judicata, collateral estoppel and issue preclusion  
in custody and visitation matters involving a sister state  
or foreign country  
§ 66:41 Equitable estoppel in paternity, child support and  
visitation cases  
§ 66:42 Equitable estoppel—Father estopped from asserting  
paternity of child  
§ 66:43 —Mother estopped from challenging paternity of  
child  
§ 66:44 —Father estopped from denying paternity of child  
§ 66:45 —Mother estopped from establishing biological  
paternity of child  
§ 66:46 —Mother estopped from challenging husband's  
paternity of her child  
§ 66:47 —Equitable estoppel to determine whether same-sex  
partner should pay child support  
§ 66:48 —Equitable estoppel in proceedings to establish  
custody or visitation

#### **B. ENFORCEMENT MECHANISMS**

##### **a. In General**

§ 66:49 Parent locator services

§ 66:50 Suspension of support  
§ 66:51 Tort actions  
§ 66:52 Orders of protection and injunctions  
§ 66:53 Criminal sanctions  
§ 66:54 Contempt

## **CHAPTER 67. UNIFORM CHILD CUSTODY JURISDICTION ACT—IN EFFECT UNTIL APRIL 28, 2002.**

### **I. PLEADINGS AND DUE PROCESS REQUIREMENTS**

§ 67:1 Authors introductory note—UCCJA vs UCCJEA  
§ 67:2 The Uniform Child Custody Jurisdiction Act  
§ 67:3 Purposes of the Uniform Child Custody Jurisdiction Act  
§ 67:4 Purposes of the Uniform Child Custody Jurisdiction Act and rule of statutory construction  
§ 67:5 Definitions  
§ 67:6 Force and effect of custody decrees—Domestic Relations Law § 75-m  
§ 67:7 Recognition of out of state custody decrees—Domestic Relations Law § 75-n  
§ 67:8 Modification of another state’s custody or visitation decree—Domestic Relations Law § 75-o  
§ 67:9 Due process requirements—Notice and opportunity to be heard  
§ 67:10 Pleadings and duty to inform the court in pleadings, papers and affidavits  
§ 67:11 Joinder of additional parties  
§ 67:12 Requirement of personal appearance upon court order  
§ 67:13 Payment of travel expenses  
§ 67:14 Preference given to determination of jurisdictional issues

### **II. BASIS TO ASSUME JURISDICTION TO MAKE A CHILD CUSTODY DETERMINATION**

§ 67:15 Statutory basis to assume jurisdiction to make a child custody determination—Domestic Relations Law § 75-d  
§ 67:16 Home state of the child—Domestic Relations Law § 75-d(1)(a)  
§ 67:17 Best interest of child and significant connection with state—Domestic Relations Law § 75-d(1)(b)  
§ 67:18 Child abandoned or in need of emergency protection—Domestic Relations Law § 75-d(1)(c)  
§ 67:19 Best interest of child and lack or refusal of jurisdiction elsewhere—Domestic Relations Law § 75-d(1)(d)  
§ 67:20 Duty to communicate where simultaneous proceedings pending in another state—Domestic Relations Law § 75-g (1)  
§ 67:21 Declination of jurisdiction—Forum inconvenient—Domestic Relations Law § 75-h  
§ 67:22 —Counsel fees and travel expenses—Domestic Relations Law § 75-h  
§ 67:23 —Misconduct of petitioner—Domestic Relations Law

§ 75-i

§ 67:24 — —Counsel fees and travel expenses—Domestic Relations Law § 75-i

### **III. ASSISTANCE FROM AND TO COURTS OF OTHER STATES**

§ 67:25 Court records of custody proceedings in other states

§ 67:26 Hearings in courts outside of New York state

§ 67:27 Orders to parties from courts of other states

§ 67:28 Assistance to courts of other states

§ 67:29 Enforcement of sister state custody decree by filing

§ 67:30 Counsel fees and travel expenses in certain enforcement proceedings

§ 67:31 International application of Uniform Child Custody Jurisdiction Act

§ 67:32 Inconsistent provisions of other laws superseded

## **CHILD CUSTODY, CHILD SUPPORT AND INTERNATIONAL CHILD ABDUCTION**

### **Chapter 63 Child Custody and Visitation**

#### **I. INTRODUCTION**

§ 63:1 Generally

§ 63:2 Custody defined

§ 63:3 Right to access to school records of child

§ 63:4 Unfit parent concept

§ 63:5 “Tender Years” rule and “Best Interests” doctrine

§ 63:6 Natural parent vs. “stranger”

§ 63:7 Special status of Grandparents

§ 63:8 Custody/visitation plans

§ 63:9 Parent education & awareness program

§ 63:10 Appointment of attorney for child—In general

§ 63:11 —Authority to appoint

§ 63:12 —Exercise of discretion in custody cases

§ 63:13 —Mandatory appointment of attorney for child in custody cases

§ 63:14 Role of attorney for the child—Prior to 2007

§ 63:15 Role of the attorney for the child—Rules of the chief judge

§ 63:16 Role of the attorney for the child on appeal

§ 63:17 Status of the child in a custody case

§ 63:18 Role of the attorney for the child—Reports and recommendations

§ 63:19 Role of the court—Lincoln hearing

#### **II. CUSTODY-VISITATION JURISDICTION**

§ 63:20 Custody-visitation jurisdiction: The UCCJEA and PKPA

#### **III. FACTORS AFFECTING DETERMINATION**

§ 63:21 Factors affecting determination—In general

§ 63:22 Child’s preference

§ 63:23 Child’s environment

- § 63:24 Parental lifestyle and religion
- § 63:25 Domestic violence
- § 63:26 Other factors

## **Volume 8 Table of Contents**

### **CHILD CUSTODY, CHILD SUPPORT AND INTERNATIONAL CHILD ABDUCTION (CONTINUED)**

#### **CHAPTER 68. THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT—IN EFFECT APRIL 28, 2002**

##### **PART 1. THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT—IN GENERAL**

§ 68:1 Uniform Child Custody Jurisdiction and Enforcement

Act—In general

§ 68:2 —Purpose

§ 68:3 —Overview

§ 68:4 —The New York assembly memorandum

§ 68:5 —The New York text of the act

§ 68:6 —Legislative intent and structure of the act

§ 68:7 —Domestic Relations Law § 75-a—Definitions

§ 68:8 — —Definitions-Home state

§ 68:9 —Domestic Relations Law § 75-b—Proceedings governed by other laws

§ 68:10 —Domestic Relations Law § 75-c—Application to Indian tribes

§ 68:11 —Domestic Relations Law § 75-d—International application of article

§ 68:12 —Domestic Relations Law § 75-e—Effect of child custody determination

§ 68:13 —Domestic Relations Law § 75-f. Priority

##### **PART 2. BASIS TO ASSUME JURISDICTION TO MAKE A CHILD CUSTODY DETERMINATION**

§ 68:14 Uniform Child Custody Jurisdiction and Enforcement Act—Domestic Relations Law § 76. Initial child custody jurisdiction

§ 68:15 —Domestic Relations Law § 76. Initial child custody jurisdiction—Personal jurisdiction not necessary

§ 68:16 —Domestic Relations Law § 76. Initial child custody jurisdiction—Commentary

§ 68:17 —Domestic Relations Law § 76-f. Inconvenient forum—In general

§ 68:18 — —Factors for consideration

§ 68:19 — —Stay of proceedings

§ 68:20 — —Decline to exercise jurisdiction

§ 68:21 — —Commentary

§ 68:22 —Domestic Relations Law § 76-g. Jurisdiction declined by reason of conduct

§ 68:23 — —Stay of proceeding

§ 68:24 — —Assessment of costs

§ 68:25 — —Factors not considered

§ 68:26 — —Commentary

§ 68:27 — Domestic Relations Law § 76-a. Exclusive, continuing jurisdiction  
§ 68:28 — — Modification of child custody determination  
§ 68:29 — — Commentary  
§ 68:30 — Domestic Relations Law § 76-b. Jurisdiction to modify determination  
§ 68:31 — — Commentary  
§ 68:32 — Domestic Relations Law § 76-e. Simultaneous proceedings  
§ 68:33 — — Communication, stay and dismissal where prior action in another jurisdiction  
§ 68:34 — — Proceeding to enforce commenced in another state  
§ 68:35 — — Commentary  
§ 68:36 — Domestic Relations Law § 76-c. Temporary emergency jurisdiction  
§ 68:37 — — No previous child custody determination  
§ 68:38 — — Previous child custody determination  
§ 68:39 — — Communication to resolve emergency  
§ 68:40 — — Commentary  
§ 68:41 — Domestic Relations Law § 76-d. Notice; opportunity to be heard; joinder  
§ 68:42 — — Commentary

### **PART 3. PRACTICE AND PROCEDURE**

§ 68:43 Uniform Child Custody Jurisdiction and Enforcement Act—Domestic Relations Law § 76-h. Information to be submitted to court  
§ 68:44 — — Commentary  
§ 68:45 — Domestic Relations Law § 76-i. Appearance of parties and child  
§ 68:46 — — Commentary  
§ 68:47 — Domestic Relations Law § 75-g. Notice to persons outside state and proof of service  
§ 68:48 — — Commentary  
§ 68:49 — Domestic Relations Law § 75-h. Appearance and limited immunity  
§ 68:50 — — Commentary  
§ 68:51 — Domestic Relations Law § 75-i—Communication between courts  
§ 68:52 — — — Participation by parties  
§ 68:53 — — — Commentary  
§ 68:54 — Domestic Relations Law § 75-j. Taking testimony in another state  
§ 68:55 — — Commentary  
§ 68:56 — Domestic Relations Law § 75-k. Cooperation between courts; preservation of records  
§ 68:57 — — Commentary

### **PART 4. ENFORCEMENT OF CUSTODY DETERMINATIONS**

§ 68:58 Uniform Child Custody Jurisdiction and Enforcement Act—Domestic Relations Law § 77. Definitions of enforcement terminology  
§ 68:59 — — Commentary

§ 68:60 —Domestic Relations Law § 77-a. Enforcement under Hague convention  
§ 68:61 —Domestic Relations Law § 77-a. Enforcement under **hague** convention—Commentary  
§ 68:62 —Domestic Relations Law § 77-b. Duty to enforce  
§ 68:63 — —Commentary  
§ 68:64 —Domestic Relations Law § 77-c. Temporary visitation  
§ 68:65 —Domestic Relations Law § 77-d. Registration of child custody determination  
§ 68:66 — —Contesting validity of registered order  
§ 68:67 — —Confirmation of registered order  
§ 68:68 — —Commentary  
§ 68:69 —Domestic Relations Law § 77-e. Enforcement of registered determination  
§ 68:70 — —Commentary  
§ 68:71 —Domestic Relations Law § 77-f. Simultaneous proceedings  
§ 68:72 — —Commentary  
§ 68:73 —Domestic Relations Law § 77-g. Expedited enforcement of child custody determination—Petition and hearing  
§ 68:74 — —Commentary  
§ 68:75 —Domestic Relations Law § 77-h. Service of petition and order  
§ 68:76 —Domestic Relations Law § 77-i. Hearing and order  
§ 68:77 — —Commentary  
§ 68:78 —Domestic Relations Law § 77-j. Warrant to take physical custody of child  
§ 68:79 — —Commentary  
§ 68:80 —Domestic Relations Law § 77-k. Costs, fees, and expenses  
§ 68:81 — —Commentary  
§ 68:82 —Domestic Relations Law § 77-l. Recognition and enforcement  
§ 68:83 — —Commentary  
§ 68:84 —Domestic Relations Law § 77-m. Appeals  
§ 68:85 — —Commentary  
§ 68:86 —Domestic Relations Law § 77-n. Role of prosecutor or public official  
§ 68:87 — —Commentary  
§ 68:88 —Domestic Relations Law § 77-o. Role of law enforcement  
§ 68:89 — —Commentary  
§ 68:90 —Domestic Relations Law § 77-p. Costs and expenses  
§ 68:91 — —Commentary

## **PART 5. MISCELLANEOUS PROVISIONS**

§ 68:92 Uniform Child Custody Jurisdiction and Enforcement Act—Domestic Relations Law § 78. Application and construction  
§ 68:93 —Domestic Relations Law § 78-a. Severability clause

## **CHAPTER 69. THE PARENTAL KIDNAPPING PREVENTION ACT**

- § 69:1 Generally
- § 69:2 The Federal Parental Kidnapping Protection Act—  
Child custody determinations
- § 69:3 —Jurisdiction
- § 69:4 —Visitation determination
- § 69:5 Definitions
- § 69:6 Purposes of the Parental Kidnapping Protection Act
- § 69:7 Effect of the Parental Kidnapping Protection Act  
upon the exercise of jurisdiction by another state
- § 69:8 Federal court jurisdiction under the Parental  
Kidnapping Protection Act
- § 69:9 General rule—Faith and credit to custody  
determinations “consistent with the provisions of” 28  
U.S.C.A. § 1738A
- § 69:10 Requirements of custody orders—“consistent with the  
provisions of” 28 U.S.C.A. § 1738A
- § 69:11 Requirements for continuing jurisdiction
- § 69:12 Jurisdiction prohibited where simultaneous  
proceedings in another state
- § 69:13 Limited authority to modify orders of court of sister  
state
- § 69:14 Notice and opportunity to be heard

## **CHAPTER 70. CHILDREN’S PASSPORTS**

- § 70:1 Children’s passport applications—Limitations
- § 70:2 —Required consents
- § 70:3 —Execution of passport application by both parents  
or by each legal guardian
- § 70:4 —Execution of passport application behalf of a minor  
under age 16 by only one parent or legal guardian
- § 70:5 —Execution of passport application by a person  
acting in loco parentis.
- § 70:6 —Exigent or special family circumstances
- § 70:7 —Minors 16 years of age and above
- § 70:8 —Rules applicable to all minors—Objections by  
parent to issuance of passport
- § 70:9 Children’s Passport Applications—Rules applicable to  
all minors—Effect of joint custody order
- § 70:10 Children’s passport applications—Access to passport  
records of minors
- § 70:11 Children’s passport issuance alert program

## **CHAPTER 71. THE INTERNATIONAL PARENTAL KIDNAPPING CRIME ACT**

- § 71:1 The International Parental Kidnapping Crime Act
- § 71:2 —Affirmative defenses
- § 71:3 —Parental rights
- § 71:4 —Sufficiency of evidence
- § 71:5 —Fleeing an incidence or pattern of domestic violence

## **CHAPTER 72. HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**

- § 72:1 Hague Convention—Introduction to this Chapter
- § 72:2 —Nature and purpose—Overview
- § 72:3 —Text of the Convention on the Civil Aspects of International Child Abduction done at the Hague on October 25, 1980
- § 72:4 —Text of the International Child Abduction Remedies Act
- § 72:5 —Central authority
- § 72:6 — —Non-judicial remedies
- § 72:7 —Central Authority—Application to Central Authority
- § 72:8 — —Statement of reasons for delay
- § 72:9 — —Regulations
- § 72:10 —Interpretation of The Convention
- § 72:11 —Applicable to habitual resident of state signatory countries only
- § 72:12 —Applicable only to Children less than 16 years old
- § 72:13 Prima facie case under the Convention—Wrongful removal or retention
- § 72:14 —Rights of custody
- § 72:15 Rights of custody defined—Abbott v. Abbott—U.S. Supreme Court
- § 72:16 —Other circuits
- § 72:17 Rights of custody defined-District Court cases in other circuits
- § 72:18 Ne exeat and Patria potestas—Defined
- § 72:19 Ne exeat rights and Patria potestas as rights of custody
- § 72:20 Rights of access distinguished
- § 72:21 Prima facie case under the Convention—Exercising rights of custody—Liberal approach to Exercise of Rights
- § 72:22 Defining “Habitual Residence”—Monasky v. Taglieri—U.S. Supreme Court
- § 72:23 —Second Circuit
- § 72:24 —District Court Cases in the Second Circuit
- § 72:25 —View of other circuits
- § 72:26 —Other circuits
- § 72:27 —District courts in other circuits
- § 72:28 Defenses to return under the Hague Convention—In general
- § 72:29 Defenses to return—Article 12: one-year limitations exception—The “now settled” defense—Second Circuit
- § 72:30 — — —Rejection of Equitable Tolling—Lozano v. Alvarez—U.S. Supreme Court
- § 72:31 — — —District Court cases in the Second Circuit
- § 72:32 —Article 12: one-year limitations and “now settled” exception—Equitable tolling—Other circuits
- § 72:33 — — —District court cases in other circuits

§ 72:34 Article 20: Human rights and Fundamental Freedoms exception—The human rights defense  
 § 72:35 — —Other circuits  
 § 72:36 — —District court cases in other circuits  
 § 72:37 Article 13(a): Consent or acquiescence exception—The Consent defense  
 § 72:38 — —Other circuits  
 § 72:39 — —District court cases in other circuits  
 § 72:40 Article 13(b)—Grave risk of harm exception—The Grave risk of harm defense—Second Circuit  
 § 72:41 — — —District court cases in Second Circuit  
 § 72:42 — — —Other circuits  
 § 72:43 — — —District court cases in other circuits  
 § 72:44 — — —Undertakings—Second Circuit  
 § 72:45 — — — —Other circuits  
 § 72:46 Article 13: Wishes of the child exception—The “Age and Maturity” defense—Second Circuit  
 § 72:47 — —District Courts in the Second Circuit  
 § 72:48 — —Other circuits  
 § 72:49 — —Cases in district courts in other circuits  
 § 72:50 — —District court cases in other circuits—Child’s wishes considered and determinative  
 § 72:51 — — —Child’s wishes considered and not determinative  
 § 72:52 Article 18—Discretion to order return of child where defense established  
 § 72:53 — —Other circuits  
 § 72:54 — —District Courts in other circuits  
 § 72:55 Article 26—Security, costs and expenses—Security  
 § 72:56 — —Necessary expenses—In general  
 § 72:57 — — —Reasonable Attorney’s Fees  
 § 72:58 — — — —Second Circuit Cases—Article 26 and 42 U.S.C.A. § 9007  
 § 72:59 — — — —District Court cases in Second Circuit—Article 26 and 42 U.S.C.A. § 9007  
 § 72:60 — — — —Other circuits—Article 26 and 42 U.S.C.A. § 9007  
 § 72:61 — — — —District Court Cases in other circuits—Article 26 and 42 U.S.C.A. § 9007  
 § 72:62 — — — —Clearly inappropriate standard—Second Circuit  
 § 72:63 — — — — —Other circuits—Unclean hands, video link testimony, good faith, pro bono counsel  
 § 72:64 — — — — —Necessary expenses denied  
 § 72:65 — — — — —Denied in part  
 § 72:66 — — —Non-Taxable costs—Second Circuit  
 § 72:67 — — — —Other circuits  
 § 72:68 — —Costs and expenses—Second Circuit  
 § 72:69 — —Necessary expenses—Out of pocket expenses—Second Circuit  
 § 72:70 — — — —Other circuits  
 § 72:71 — — —Taxable Costs—28 U.S.C.A. § 1920—Local Rules—Second Circuit

§ 72:72 — — —Costs on appeal  
§ 72:73 — — —Reasonable Attorney’s Fees—Scope of review—Second Circuit

## **CHAPTER 73. HAGUE CONVENTION AND INTERNATIONAL CHILD ABDUCTION REMEDIES ACT (“ICARA”) PRACTICE AND PROCEDURE**

§ 73:1 Right to exercise federal and state judicial remedies  
§ 73:2 Federal subject matter jurisdiction—In General  
§ 73:3 Federal subject matter jurisdiction under the International Child Abduction Remedies Act  
§ 73:4 Federal question jurisdiction  
§ 73:5 —Venue  
§ 73:6 —Applicability of Federal Rules of Civil Procedure  
§ 73:7 Standing to file a Hague petition in federal district Court  
§ 73:8 Commencement of proceedings—Jurisdiction and venue  
§ 73:9 Pleading requirements and service of summons in Hague convention cases—In general  
§ 73:10 Commencement of proceedings under ICARA—Definitions  
§ 73:11 Article 16—Stay of custody proceedings after notice of wrongful removal or retention  
§ 73:12 Article 17—Effect of state court decision after notice  
§ 73:13 Article 11—Expeditious determination  
§ 73:14 Motion practice in Hague convention cases—In general  
§ 73:15 Notice of commencement of proceedings  
§ 73:16 Petitioner’s burden of proof  
§ 73:17 Respondent’s burden of proof  
§ 73:18 Determination as to wrongful removal from authorities of state of habitual residence of child  
§ 73:19 Provisional remedies—Temporary restraining order, surrender passport, post bond, temporary custody and access to child—Second circuit  
§ 73:20 — —Other circuits  
§ 73:21 Appointment of guardian ad litem and attorney for the child in Hague convention cases—Second circuit  
§ 73:22 —Other circuits  
§ 73:23 Interview with child  
§ 73:24 Legal aid  
§ 73:25 Full faith and credit and comity  
§ 73:26 —Cases from other circuits  
§ 73:27 Jurisdiction to enforce rights of access—Second circuit  
§ 73:28 —Other circuits  
§ 73:29 Pleading requirements  
§ 73:30 —Other circuits  
§ 73:31 Default judgment  
§ 73:32 Removal of state Hague proceedings to federal court  
§ 73:33 Discovery  
§ 73:34 Federal abstention under the Younger and Colorado River abstention doctrines—and Anti-Injunction Act

§ 73:35 —Other circuits  
§ 73:36 — —Minority view  
§ 73:37 Denial of relief under the fugitive disentitlement doctrine  
§ 73:38 Denial of relief—Doctrine of unclean hands  
§ 73:39 Applicability of the mootness doctrine to Hague petition  
§ 73:40 Applicability of the mootness doctrine to Hague appeal—Second circuit  
§ 73:41 —Cases in other circuits  
§ 73:42 Withdrawal or dismissal of own petition—Second circuit  
§ 73:43 Motion to dismiss—Second circuit  
§ 73:44 —Other circuits  
§ 73:45 Diplomatic immunity  
§ 73:46 Availability of summary judgment  
§ 73:47 Referral of Hague convention petition to magistrate judge to report and recommend—Second circuit  
§ 73:48 Summary bench trial—Second circuit  
§ 73:49 Rules of evidence—In general  
§ 73:50 —Issue concerning foreign law  
§ 73:51 —Admissibility of foreign record  
§ 73:52 —Admissibility of application to foreign state documents  
§ 73:53 —Admissibility of foreign public documents  
§ 73:54 —Admissibility of foreign private documents  
§ 73:55 —Admissibility of expert opinion on foreign law—Second circuit  
§ 73:56 —Admissibility of expert opinion—Second circuit  
§ 73:57 — —Other circuits  
§ 73:58 Testimony by video transmission from a different location—Second circuit  
§ 73:59 —Other circuits  
§ 73:60 Judicial notice of foreign law  
§ 73:61 Child’s right to appeal  
§ 73:62 Jurisdiction of district court to maintain status quo pending appeal—Second circuit  
§ 73:63 Judgment of district court for return—Remedies—Motion for new trial—Enforcement of judgment  
§ 73:64 Return remedy  
§ 73:65 Conditional order granting return of child  
§ 73:66 Re-return order—Chafin v. Chafin  
§ 73:67 Standard of review—Second circuit  
§ 73:68 Remand by court of appeals—Change of circumstances as result of stay pending appeal  
§ 73:69 Issuance of mandate by court of appeals—Second circuit

## **CHAPTER 74. HAGUE CONVENTION PRACTICE AND PROCEDURE IN NEW YORK STATE COURTS**

§ 74:1 Hague convention proceedings in New York State Courts—Commencement of proceedings  
§ 74:2 —State court jurisdiction

- § 74:3 —Habitual residence
- § 74:4 —Grave risk of harm
- § 74:5 —No jurisdiction to enforce rights of access
- § 74:6 —No family court jurisdiction

## **Volume 9 Table of Contents**

### **APPELLATE PRACTICE, EQUITABLE DISTRIBUTION CASE SUMMARY TABLE AND APPENDICES**

#### **PART ONE APPELLATE PRACTICE**

#### **CHAPTER 75. MATRIMONIAL AND FAMILY LAW APPELLATE PRACTICE**

##### **I. APPEALS TO THE APPELLATE DIVISION**

###### **A. IN GENERAL**

- § 75:1 “Appellant” and “Respondent” utilized
- § 75:2 Requirement of an appealable paper
- § 75:3 Appeal from final judgment—Scope of review
- § 75:4 — —Appeal from intermediate order
- § 75:5 Permissible appellant—“Aggrieved party” and the Mootness doctrine
- § 75:6 The mootness doctrine—Exceptions
- § 75:7 Permissible appellant—Appeal as of right to the Appellate Division from the Supreme Court—Appealable judgment or order
- § 75:8 —No appeal unless order or judgment entered
- § 75:9 —No appeal from an order granting or denying a motion not made on notice
- § 75:10 —No appeal from an order entered on consent
- § 75:11 —No appeal from intermediate order in habeas corpus
- § 75:12 —Appeal from motion in limine or evidence ruling
- § 75:13 —Order not affecting a substantial right
- § 75:14 —No appeal from Qualified Domestic Relations Order
- § 75:15 —Appealable judgment or order—No Appeal from order or judgment entered on default—CPLR 551
- § 75:16 — —Order or judgment based in part on default—James v. Powell Exception
- § 75:17 —Waiver of right to counsel—Preservation of issue
- § 75:18 Appeals by permission to the Appellate Division  
xvii
- § 75:19 Appeals to the Appellate Division from motions for renewal and reargument
- § 75:20 Distinction between appealability and reviewability
- § 75:21 Effect of judge’s rules under the individual assignment system
- § 75:22 Waiver or limitation of right to appeal—In general
- § 75:23 —Limited by notice of appeal
- § 75:24 —Acceptance of benefits of order or judgment.
- § 75:25 —Participation in proceedings without objecting or

requesting relief  
§ 75:26 —Failure to preserve issues for review by failing to request or object to relief—Exception to rule  
§ 75:27 —Issues which could have been raised on prior appeal  
§ 75:28 —Issues or arguments raised for first time in reply or reply brief  
§ 75:29 —Failure to cross appeal  
§ 75:30 —Failure to address issues in brief  
§ 75:31 —Failure to provide an adequate record  
§ 75:32 —Failure to file specific written objections in Family Court  
§ 75:33 —New arguments on appeal—Interest of justice exception  
§ 75:34 — —Judicial notice exception  
§ 75:35 —Arguments raised in trial court or which can be resolved on existing record  
§ 75:36 Fugitive disentitlement doctrine in custody and child support appeals  
§ 75:37 Review of ex-parte orders by the Appellate Division  
§ 75:38 Review of sua sponte orders by the Appellate Division  
§ 75:39 Appeals by permission to the Appellate Division—CPLR 5701(c)  
§ 75:40 Appeals to the Appellate Division from motions for renewal and reargument  
§ 75:41 Appeals to the Appellate Division from the Family Court—Appealable orders  
§ 75:42 —Appeals to appellate division from order of disposition  
§ 75:43 —Special procedures—Duty of counsel  
§ 75:44 Appeals to the Appellate Division from family court—Preparation of Transcript of proceedings  
§ 75:45 Appeals to the Appellate Division from the Family Court—Counsel for parties and children  
§ 75:46 —Counsel for indigent parties  
§ 75:47 Terms and sessions of the Appellate Division  
§ 75:48 —Local rules—Appellate division, First department  
§ 75:49 —Local Rules—Appellate division, Second department  
§ 75:50 —Local rules—Appellate division, Third department  
§ 75:51 — —Appellate division, Fourth department  
§ 75:52 Local rules—Appellate Division, Second Department—Appearance of counsel and consent to change counsel  
§ 75:53 Jurisdictional makeup and location of Appellate Divisions  
§ 75:54 Admission pro hac vice  
§ 75:55 Waiver of Appellate Division Rules of Practice

## **B. TAKING AN APPEAL**

### **1. In General**

§ 75:56 Appeal of right  
§ 75:57 Motion for permission to appeal

§ 75:58 Time to cross-appeal where adverse party takes appeal or moves for permission

§ 75:59 Time for motion for permission to appeal

## 2. Extensions of Time to Take Appeal or Move for Permission to Appeal

§ 75:60 Attorney's disability

§ 75:61 Alternate method of taking appeal

§ 75:62 Other extensions of time to take or move for permission to appeal

## C. NOTICE OF APPEAL—SERVICE AND FILING

§ 75:63 Service and filing notice of appeal

§ 75:64 Premature service of notice of appeal and defects in form

§ 75:65 Construction of time limitations for service and filing of papers by mail

§ 75:66 Initial Filing of notice of appeal and informational statement—Practice Rules of the Appellate Division

§ 75:67 Initial filing of notice of appeal and informational statement—Local rules—Appellate Division, Second Department

§ 75:68 Initial Filing of notice of appeal and informational statement—Local rules—Appellate Division, Fourth Department

## D. GENERAL PROVISIONS AND DEFINITIONS APPLICABLE TO 22 NYCRR PART 1250

§ 75:69 General provisions and definitions—Practice Rules of the Appellate Division

§ 75:70 —Local rules—Appellate Division, First Department

§ 75:71 — —Appellate Division, Second Department

§ 75:72 — —Appellate Division, Third Department

§ 75:73 — —Appellate Division, Fourth Department

§ 75:74 Number of Justices to whom appeal submitted—Practice Rules of the Appellate Division

§ 75:75 Filing and service of papers—Practice Rules of the Appellate Division—Electronic filing

§ 75:76 — —Hard copy filing

§ 75:77 — —Proof of service

§ 75:78 — —Service by mail and overnight mail

§ 75:79 — —Service by electronic mail upon consent

§ 75:80 Signing of papers

§ 75:81 Certification of documents—Practice Rules of the Appellate Division

§ 75:82 Confidentiality and sealing of files—Practice Rules of the Appellate Division

§ 75:83 Use of assigned Appellate Division numbers—Practice Rules of the Appellate Division

§ 75:84 Rejection of submission for noncompliance—Practice Rules of the Appellate Division

§ 75:85 Sanctions for frivolous conduct—Practice Rules of the Appellate Division

## E. MOTION PRACTICE—PRACTICE RULES OF THE APPELLATE DIVISION

§ 75:86 Motion practice—Practice Rules of the Appellate

Division—In general

§ 75:87 — Motions or applications which include requests for interim relief—Practice Rules of the Appellate Division

§ 75:88 — — Local rules—Appellate division, First Department

§ 75:89 — — — Appellate division, Second Department

§ 75:90 — — — Appellate division, Third Department

§ 75:91 — — — Appellate Division, Fourth Department

§ 75:92 Motion for permission to appeal to the Appellate Division in a Civil Matter—Practice Rules of the Appellate Division

§ 75:93 Motion for poor person relief—Practice Rules of the Appellate Division

§ 75:94 — — Family Court Matters

§ 75:95 Motion for leave to file amicus curiae brief—Practice Rules of the Appellate Division

§ 75:96 Withdrawal of motion, appeal or proceeding—Practice Rules of the Appellate Division

§ 75:97 — Local rules—Appellate Division, Second Department

§ 75:98 Stay of enforcement of an order of judgment pending appeal

§ 75:99 Effect of stay pending appeal

§ 75:100 Active management of causes; settlement or mediation program—Practice Rules of the Appellate Division

§ 75:101 — Local Rules Appellate Division, First Department—Pre-argument conference program

§ 75:102 — Local Rules Appellate Division, Second Department

§ 75:103 — — Pre-Perfection Civil Appeals Management Program

§ 75:104 — Local rules Appellate Division, Second Department—Mandatory Civil Appeals Mediation Program

§ 75:105 — Local Rules Appellate Division, Fourth Department

## F. DUTY TO NOTIFY COURT OF SETTLEMENT OF APPEAL

§ 75:106 Notice of change of circumstances sanctions for failure to notify—Practice Rules of the Appellate Division

## G. PERFECTING THE APPEAL TO THE APPELLATE DIVISION

§ 75:107 Perfecting the appeal to the appellate division—In general—Practice Rules of the Appellate Division—Appellate Division Bound by Record

§ 75:108 Perfecting the appeal to the Appellate Division—In general—Practice Rules of the Appellate Division—Order and settle the transcript

## H. METHODS OF PERFECTING APPEAL

§ 75:109 Methods of perfecting appeal—Civil Practice Law

and Rules

§ 75:110 —Practice Rules of the Appellate Division

§ 75:111 —Local rules—Appellate Division, Third Department

## I. FORM AND CONTENT OF RECORDS AND APPENDICES

§ 75:112 Form and content of records and appendices—Civil Practice Law and Rules

§ 75:113 — —Record requirement in custody appeal—Sealed transcript of in camera interview

§ 75:114 — —Record requirement in neglect appeal—Unsealed transcript of in camera hearing

§ 75:115 — —Memoranda of law sometimes included in record

§ 75:116 Reproduction of records, appendices and briefs—Format—Practice Rules of the Appellate Division

§ 75:117 —Content—Civil Practice Law and Rules

§ 75:118 —Format—Practice Rules of the Appellate Division

§ 75:119 —Form and Content of Records and Appendices, Exhibits and Certification—Local rules—Appellate Division, Third Department

§ 75:120 Full record method—Reproduction of records, appendices and briefs—Proof of filing and service of notice of appeal and certification—Local rules—Appellate Division, Fourth Department

§ 75:121 Supplemental record-Local rules-Appellate Division, Second Department

§ 75:122 Reproduction of records, appendices and briefs—Practice Rules of the Appellate Division

§ 75:123 Appendix method—Civil Practice Law and Rules

§ 75:124 Appellants Appendix—Practice Rules of the Appellate Division

§ 75:125 Condensed format of transcripts prohibited—Practice Rules of the Appellate Division

§ 75:126 Settlement of transcript or statement—Practice Rules of the Appellate Division

§ 75:127 Certification of record or appendix—Practice Rules of the Appellate Division

§ 75:128 Briefs—Form and content of briefs—Civil Practice Law and Rules

§ 75:129 Appellant's brief—Content and format—Civil Practice Law and Rules

§ 75:130 Respondent's brief—Content and format—Civil Practice Law and Rules

§ 75:131 Reply briefs—Content and format—Civil Practice Law and Rules

§ 75:132 Form and content of briefs—Practice Rules of the Appellate Division

§ 75:133 —Local Rules—Appellate Division, Fourth Department—Cover color

§ 75:134 Time, number and manner of filing of records, appendices and briefs—Practice Rules of the Appellate Division

§ 75:135 — —Extension of time to perfect appeal  
§ 75:136 — —Respondent’s filing  
§ 75:137 — —Appellant’s reply  
§ 75:138 — —Pro Se Parties  
§ 75:139 —Local rules—Appellate Division, First Department—Filing and service of digital copies of record, appendices and briefs  
§ 75:140 — —Appellate Division, Second Department—Digital copies of records, appendices and briefs  
§ 75:141 — — —Extensions of time to perfect an appeal or to file and serve a brief  
§ 75:142 — —Appellate Division, Third Department—Extension of time to perfect appeal  
§ 75:143 — — —Extensions of time to file and serve responsive briefs  
§ 75:144 — —Appellate Division, Fourth Department—Extension of time to perfect  
§ 75:145 — — —Extension of time to file brief  
§ 75:146 — — —Digital copies

#### **J. CROSS APPEALS; CONCURRENT APPEALS FROM SINGLE ORDER OR JUDGMENT; CONSOLIDATION OF APPEALS FROM MULTIPLE ORDERS OR JUDGMENTS**

§ 75:147 Joint record timetable for service of briefs requirement of Consultation—Practice Rules of the Appellate Division  
§ 75:148 Concurrent appeals from a single order or judgment—Practice Rules of the Appellate Division  
§ 75:149 Appeals from multiple orders or judgments—Practice Rules of the Appellate Division

#### **K. EXTENSIONS OF TIME TO FILE AND SERVE RESPONSIVE BRIEFS**

§ 75:150 Extensions of time to file and serve responsive briefs—By initial stipulation or application—Practice Rules of the Appellate Division  
§ 75:151 Leave to file oversized brief—Practice Rules of the Appellate Division

#### **L. CONSTITUTIONALITY OF STATE STATUTE SERVICE; UPON ATTORNEY GENERAL**

§ 75:152 Duty to notify attorney general—Practice Rules of the Appellate Division

#### **M. DISMISSAL OF APPEAL**

§ 75:153 Dismissal of appeal—Civil matters six month rule—Practice Rules of the Appellate Division  
§ 75:154 Motion to vacate dismissal—Practice Rules of the Appellate Division

#### **N. CERTIFICATION OF RECORD**

§ 75:155 Appeal on agreed statement of facts—CPLR 3222—Practice Rules of the Appellate Division  
§ 75:156 Certification of the record—CPLR 2105  
§ 75:157 Stipulation in lieu of certification

#### **O. APPEALS FROM FAMILY COURT**

§ 75:158 Appeals from Family Court—Practice and

procedure—Time of appeal  
§ 75:159 — —Notice of appeal  
§ 75:160 — —Effect of appeal; stay  
§ 75:161 — —Printed record or printed brief not required  
§ 75:162 — —Preferences  
§ 75:163 — —Special procedures—Duty of counsel  
§ 75:164 — —Costs  
§ 75:165 — —Applicability of civil practice law and rules

## P. PREFERENCES

§ 75:166 Civil Practice Law and Rules

## Q. CALENDAR PREFERENCE; CALENDAR NOTICE; ORAL ARGUMENT; POST-ARGUMENT SUBMISSIONS

§ 75:167 Notice from court appeal placed on calendar—  
Practice Rules of the Appellate Division

## R. ORAL ARGUMENT OF CAUSE

§ 75:168 Oral argument generally—Practice Rules of the  
Appellate Division

§ 75:169 Oral argument by permission—Practice Rules of the  
Appellate Division

§ 75:170 Failure to request oral argument—Practice Rules of  
the Appellate Division

§ 75:171 Failure to appear for oral argument—Practice Rules  
of the Appellate Division

§ 75:172 Rebuttal—Practice Rules of the Appellate Division

## S. POST-ARGUMENT SUBMISSIONS

§ 75:173 In general—Practice Rules of the Appellate Division

§ 75:174 Calendar preference by letter or motion—Practice  
Rules of the Appellate Division

§ 75:175 —Local Rules Appellate Division, First  
Department—Calendar preferences; calendar  
notice; oral argument; post-argument submissions

§ 75:176 —Local rules—Appellate Division, Second  
Department—Calendar preferences; calendar  
notice; oral argument; post-argument submissions

§ 75:177 — —Appellate Division Third Department—  
Calendar preferences; calendar notice; oral  
argument; post-argument submissions

§ 75:178 — —Appellate Division, Fourth Department—  
Calendar preferences; calendar notice; oral  
argument; post-argument submissions

## T. DECISIONS, ORDERS AND JUDGMENTS; COSTS; REMITTITUR

§ 75:179 Decisions, orders and judgments—Practice Rules of  
the Appellate Division

### TABLE OF CONTENTS

xxv

§ 75:180 —Local rules—Appellate Division, Third  
Department

§ 75:181 — —Appellate Division, Fourth Department

§ 75:182 Costs on appeal—Practice Rules of the Appellate  
Division

## **U. MOTION FOR REARGUMENT OR LEAVE TO APPEAL TO THE COURT OF APPEALS**

§ 75:183 Time of motion—Practice Rules of the Appellate Division

§ 75:184 Reargument—Practice Rules of the Appellate Division

§ 75:185 Leave to appeal to the Court of Appeals—Practice Rules of the Appellate Division

## **V. DISPOSITION OF APPEAL**

§ 75:186 Appellate Court may reverse, affirm or modify or remit

§ 75:187 Content of order determining an appeal—Findings of fact—Authority

§ 75:188 Remittal by the appellate division to the Supreme Court for findings

§ 75:189 Remittitur—Practice Rules of the Appellate Division

§ 75:190 Restitution

## **W. FILING FEES FOR AN APPEAL**

§ 75:191 In general—CPLR

§ 75:192 Fees of the clerk of the court—Practice Rules of the Appellate Division

§ 75:193 —Local rules—Appellate Division, First Department

§ 75:194 — —Appellate Division, Second Department

§ 75:195 — —Appellate Division, Third Department

## **II. APPEALS TO THE COURT OF APPEALS**

### **A. IN GENERAL**

§ 75:196 Location, makeup and majority

§ 75:197 Jurisdiction—Questions of law

§ 75:198 Distinction between appealability and reviewability—Exercise of discretion—Power to review

### **B. APPEAL AS OF RIGHT**

§ 75:199 From Appellate Division

§ 75:200 From Court of original instance

§ 75:201 Finality

§ 75:202 Dissent on a question of law

§ 75:203 Judgment absolute

§ 75:204 Non-final determination of Appellate Division

### **C. APPEALS BY PERMISSION**

§ 75:205 Generally

§ 75:206 Non-final orders

§ 75:207 Certified questions

§ 75:208 Review of the facts

### **D. PRACTICE AND PROCEDURE**

§ 75:209 Time for taking an appeal—As of right

§ 75:210 Time for taking the appeal—By permission

§ 75:211 Extension of time to take appeal or move for permission to appeal

§ 75:212 Taking the appeal—Order granting permission

§ 75:213 Notice of appeal—Appeal as of right

§ 75:214 Service and filing of preliminary appeal statement  
§ 75:215 Examination of subject matter jurisdiction  
§ 75:216 Form of papers and companion digital filings  
§ 75:217 Fees for filing motions and record material  
§ 75:218 Alternative procedure review  
§ 75:219 Motions—General procedures  
§ 75:220 Motion for permission to appeal in civil cases  
§ 75:221 Motions for reargument of appeals, motions and decisions on certified questions  
§ 75:222 Emergency matters; orders to show cause  
§ 75:223 Motion for amicus curiae relief  
§ 75:224 Motion for pro hac vice admission  
§ 75:225 Sealed documents and confidential material  
§ 75:226 Filing of record material and briefs in normal course appeals and required copies  
§ 75:227 Content and form of briefs in normal course appeals  
§ 75:228 Records, appendices and exhibits in normal course appeals  
§ 75:229 Developments affecting appeals, certified questions and motions  
§ 75:230 Notification of unavailability  
§ 75:231 Adjournment of calendared appeal  
§ 75:232 Argument time and counsel for oral argument  
§ 75:233 Calendar preferences  
§ 75:234 Inadequate appendix  
§ 75:235 Dismissal or preclusion for failure to proceed or file papers  
§ 75:236 Extensions of time to file papers on appeal  
§ 75:237 Post-briefing, post-submission, and post-argument communications  
§ 75:238 Withdrawal of an appeal or motion  
§ 75:239 Remittitur

### **III. PRACTICE CONSIDERATIONS**

#### **A. MATRIMONIAL PRACTICE CONSIDERATIONS**

##### **A. In General**

§ 75:240 Standard of Review by the Appellate Division—In general  
§ 75:241 Standard of appellate review of credibility determinations  
§ 75:242 Appellate Review of pendente lite awards of maintenance, child support and counsel fees  
§ 75:243 Review of pendente lite orders by the Court of Appeals—In general  
§ 75:244 Appellate review of grounds determinations  
§ 75:245 Appellate review of maintenance and child support determinations  
§ 75:246 Appellate review of equitable distribution and property determinations  
§ 75:247 Review by Court of Appeals of equitable distribution and property determinations  
§ 75:248 Appellate review of counsel fee determinations

§ 75:249 Review by the Court of Appeals of counsel fee determinations  
§ 75:250 Appellate review of custody and visitation determinations—Appeals to Appellate Division—In general  
§ 75:251 —Considerations  
§ 75:252 —Appeals to Court of Appeals—In general  
§ 75:253 Review of custody and visitation determinations by the Court of Appeals—Considerations  
§ 75:254 Appellate review of custody determinations—Effect of changed circumstances on custody appeals

LAW AND THE FAMILY NEW YORK

xxviii

§ 75:255 Appellate review of proceedings for modification of matrimonial orders and judgments  
§ 75:256 Appellate review of family offense proceeding  
§ 75:257 Custody appeal—Transcript of in camera interview required  
§ 75:258 Neglect appeal—Transcript of in camera hearing not sealed  
§ 75:259 Counsel fees to prosecute or defend an appeal  
§ 75:260 Law to be applied on appeal  
§ 75:261 Effect of death of a party  
§ 75:262 Application of the doctrine of law of the case  
§ 75:263 Judicial notice of facts by the appellate division  
§ 75:264 Filing fees for an appeal

## B. ELECTRONIC FILING IN THE APPELLATE DIVISION

§ 75:265 In general  
§ 75:266 Definitions  
§ 75:267 Entry of initial information for electronic filing—Appeals or transferred matters—Entry of contact information.  
§ 75:268 Appeals or transferred matters—Service of notice of appellate case or docket number  
§ 75:269 Original proceedings—Commencement by electronic filing  
§ 75:270 Entry of information by respondents and other parties  
§ 75:271 Designation of other persons and electronic filing agents  
§ 75:272 Designation of an electronic filing agent  
§ 75:273 Exemptions of certain persons from electronic filing—Personal exemptions  
§ 75:274 Notice of hard copy filing  
§ 75:275 Entry of information the other parties.  
§ 75:276 Voluntary participation  
§ 75:277 Withdrawal of consent  
§ 75:278 Electronic filing and service  
§ 75:279 Site instructions  
§ 75:280 Attachment A to the electronic filing rules of the appellate division  
§ 75:281 In general

§ 75:282 Multiple volumes  
§ 75:283 Corrections  
§ 75:284 PDF initial view  
§ 75:285 PDF file size  
§ 75:286 Hard copy filing and service—Filing of additional hard copies  
§ 75:287 Filing of unbound copy of documents by exempt attorneys and exempt litigants  
§ 75:288 Motions and applications seeking emergency relief  
§ 75:289 Technical failure  
§ 75:290 Timeliness of filing and service; Rejection by clerk—Filing of e-filed documents  
§ 75:291 Service of e-filed documents  
§ 75:292 Rejection by the clerk  
§ 75:293 Hard copy filing or service  
§ 75:294 Confidentiality; sealed documents; redaction  
§ 75:295 Authorized record; scanning of documents by clerk  
§ 75:296 Rejection of non-compliant documents; modification of electronic filing procedures—Rejection of documents  
§ 75:297 Modification of procedures  
§ 75:298 Local rules regarding electronic filing—Appellate Division, First department  
§ 75:299 —Appellate Division, Second Department  
§ 75:300 —Appellate Division, Third Department  
§ 75:301 —Appellate Division, Fourth Department  
Appendix 1. Summary of Equitable Distribution Decisions  
Appendix 2. McKinney’s Domestic Relations Law § 236  
Appendix 3. McKinney’s Domestic Relations Law § 240  
Appendix 4. Statement of Net Worth (Gender Neutral)  
Appendix 5. Findings of Fact and Conclusions of Law and Matrimonial Judgements  
Appendix 6. Table of Court Filing Fees  
Appendix 7. Table of Poverty Income Guidelines Amount, Self-Support Reserve, Combined Parental Income and Income Cap  
LAW AND THE FAMILY NEW YORK  
xxx

## **Volume 10 Table of Contents**

### **FAMILY COURT PROCEEDINGS**

#### **PART ONE FAMILYCOURT PROCEEDINGS**

#### **CHAPTER 76. POWERS AND PROCEDURES OF FAMILY COURT**

##### **I. JURISDICTION AND VENUE**

§ 76:1 Overview  
§ 76:2 Exclusive original jurisdiction  
§ 76:3 Concurrent jurisdiction

§ 76:4 Native American children—Indian Child Welfare Act (ICWA)—In general  
 § 76:5 Indian Child Welfare Act—Jurisdiction of the Family Court over Indian child custody proceedings  
 § 76:6 —The New York Indian Child Welfare Act  
 § 76:7 —New York statutes-Applicability of the Domestic Relations Law  
 § 76:8 —New York Court Rules  
 § 76:9 —Existing Indian Family exception (EIF)  
 § 76:10 —Definitions  
 § 76:11 —Exclusive Jurisdiction of Tribe over Indian Child custody proceedings  
 § 76:12 —Transfer of foster care or termination of parental rights proceedings—children not domiciled on reservation—declination of jurisdiction by tribal court  
 § 76:13 —Transfer proceeding to jurisdiction of tribe—Burden of Proof  
 § 76:14 —Appointment of counsel for parent or Indian custodian where indigency in removal, placement or termination proceeding  
 § 76:15 —Foster care and termination of parental rights proceeding—Parental and tribal rights of intervention  
 § 76:16 —Foster care placement or termination of parental rights—Notice of proceedings—Right to intervention  
 § 76:17 — —Efforts to provide Remedial services and rehabilitative programs—preventive measures  
 § 76:18 —Placement preferences for the adoption of Indian children  
 § 76:19 —Foster care or preadoptive placements—Least restrictive alternative  
 § 76:20 — —Tribal resolution for different order of preference—personal preference considered— anonymity in application of preferences  
 § 76:21 —Placement preferences for the adoption of Indian children—“Good cause” exception  
 § 76:22 — —Social and cultural standards applicable  
 § 76:23 — —Record of placement; availability  
 § 76:24 —Foster care placement or termination of parental rights proceeding—Examination of documents by party  
 § 76:25 — —Petition for invalidation of illegal proceedings  
 § 76:26 — —Petition to invalidate action  
 § 76:27 —Voluntary consent to foster care or termination of parental rights—Validity of Consent  
 § 76:28 —Voluntary consent to foster care or termination of parental rights-Withdrawal of consent  
 § 76:29 —Voluntary Proceeding for termination of parental rights or adoptive placement—Withdrawal of consent—Return of custody  
 § 76:30 —Final decree of adoption—Collateral attack— vacation of decree—return of custody—limitations

§ 76:31 —Full faith and credit to public acts, records, and judicial proceedings of Indian tribes  
§ 76:32 —Involuntary termination of parent’s rights—absence of a heightened showing of serious harm  
§ 76:33 —Foster care placement orders; evidence; determination of damage to child  
§ 76:34 —Parental rights termination orders; evidence; determination of damage to child  
§ 76:35 —Return of the child to the custody of parent or prior Indian custodian notwithstanding final adoption  
§ 76:36 —Return of the child after vacatur of Adoption or Termination of Parental Rights-Petition—best interests of child  
§ 76:37 —Removal from foster care home—placement procedure  
§ 76:38 Indian Child Welfare Act-Improper removal or retention of child from Indian parent—Return of child  
§ 76:39 Indian Child Welfare Act—Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child  
§ 76:40 —Emergency removal or placement of child; termination; appropriate action  
§ 76:41 —Disclosure of tribal affiliation information  
§ 76:42 —Agreements between States and Indian tribes  
§ 76:43 —Effective date  
§ 76:44 Uniform child custody jurisdiction and enforcement act—In general  
§ 76:45 Parental Kidnapping Prevention Act  
§ 76:46 Transfers  
§ 76:47 Venue  
§ 76:48 Change of venue  
§ 76:49 Counsel for indigents  
§ 76:50 Assignment of counsel  
§ 76:51 Right to counsel—Waiver of right to counsel  
§ 76:52 —Right to interpreter in Family Court for person who cannot participate meaningfully

## **II. COURT PROCEDURE**

§ 76:53 Parts of Family Court  
§ 76:54 Commencement of Proceeding  
§ 76:55 Assistance in Preparing Petition  
§ 76:56 Limitation on Access to Family Court  
§ 76:57 Format requirements for papers  
§ 76:58 Service of process  
§ 76:59 Intervention  
§ 76:60 Warrants  
§ 76:61 Notice of appearance  
§ 76:62 Motion Papers  
§ 76:63 Individual assignment system  
§ 76:64 Qualifications of Family Court judges  
§ 76:65 Procedure in Family Court  
§ 76:66 Definitions

### **III. POWER AND AUTHORITY OF FAMILY COURT JUDGES**

#### **A. POWER TO COMPEL PERFORMANCE**

- § 76:67 Generally
- § 76:68 Subpoenas and Warrants
- § 76:69 Subpoenas and warrants-Child support subpoena
- § 76:70 Arrest warrants
- § 76:71 Procedure after arrest
- § 76:72 —Emergency power of local criminal court to issue order of protection
- § 76:73 —Ex parte modification of order of protection by local criminal court
- § 76:74 Admission to bail
- § 76:75 Out-of-state party
- § 76:76 Effect of personal appearance-Waiver of defective service
- § 76:77 Appearance by attorney
- § 76:78 Contempts
- § 76:79 Protective Custody for Material Witness

#### **B. GENERAL POWERS**

- § 76:80 Interpretation of Part 5, General Powers of the Family Court

#### **C. PROTECTIVE ORDERS**

- § 76:81 Overview
- § 76:82 Application and issuance
- § 76:83 Orders of protection; procedural requirements—Family Court Act § 154-c
- § 76:84 Service of process request for order of protection
- § 76:85 Full faith and credit to out of state orders of protection
- § 76:86 Required notice on order of protection
- § 76:87 Translation of order of protection
- § 76:88 Enforcement of order of protection
- § 76:89 Filing of copies of order of protection with law enforcement agencies
- § 76:90 Answer and counterclaims

#### **D. AUTHORITY FOR ACTIONS OUTSIDE OF COURTROOM**

- § 76:91 Overview
- § 76:92 School or institutional visitation
- § 76:93 Community activities
- § 76:94 Judicial immunity

### **IV. PROVISIONS GOVERNING HEARINGS**

#### **A. GENERAL PROVISIONS**

- § 76:95 Overview
- § 76:96 Provisions as to children
- § 76:97 Access to Family Court proceedings
- § 76:98 Privacy of records
- § 76:99 Conferences
- § 76:100 Adjournments
- § 76:101 Submission of papers to judge
- § 76:102 Submission of orders for signature

§ 76:103 Default judgments—Relief from a default in a Family Court proceeding

## **B. SUPPORT MAGISTRATES**

§ 76:104 Overview

§ 76:105 Assignments and referrals

§ 76:106 Conduct of hearing

§ 76:107 Jurisdiction of Judicial Hearing Officers and Referees in Family Court

§ 76:108 Expedited process

## **C. POWERS REGARDING ORDERS GRANTED IN ANOTHER COUNTY**

§ 76:109 Enforcement or modification

§ 76:110 Procedure

§ 76:111 Violation of probation

## **V. ADMINISTRATION OF FAMILY COURT SERVICES**

### **A. SUPPORT BUREAU**

§ 76:112 Establishment and purpose

§ 76:113 Duties and powers of support collection unit

§ 76:114 Cooperation by Financial Institutions with Support Collection Units

### **B. MEDICAL AND HANDICAPPED SERVICES**

§ 76:115 Medical Services

§ 76:116 Children with a developmental disability

§ 76:117 Physically disabled children

§ 76:118 Handicapped children

### **C. ATTORNEY FOR THE CHILD**

§ 76:119 Role of attorney for child

§ 76:120 Attorney for the child—Appointment

§ 76:121 Waiver of Counsel by Child

§ 76:122 Designation

§ 76:123 Duration of designation and compensation

§ 76:124 Rules of court for attorneys for children

### **D. AUXILIARY SERVICES**

§ 76:125 Auxiliary Services

§ 76:126 Probation Service

§ 76:127 Public entity counsel

§ 76:128 Organizational cooperation

## **CHAPTER 77. CUSTODY PROCEEDINGS IN FAMILY COURT**

### **I. OVERVIEW**

§ 77:1 Introduction

§ 77:2 Choice of Family Court-Auxiliary services—Facilities for children

§ 77:3 Procedural statutes and Uniform Rules of the Family Court

### **II. SUBJECT MATTER JURISDICTION**

#### **A. GENERALLY**

§ 77:4 Overview

§ 77:5 Concurrent jurisdiction—Supreme Court and Family

Court

§ 77:6 —Surrogate’s Court and Family Court

§ 77:7 Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and Parental Kidnapping Prevention Act (PKPA)

## **B. ORIGINAL JURISDICTION**

§ 77:8 Statutory basis

§ 77:9 —Effect of pending matrimonial action

§ 77:10 —Habeas corpus—Generally

§ 77:11 — —Rules of court

§ 77:12 —Visitation by grandparents

§ 77:13 —Visitation with grandchild in intact family

§ 77:14 —Factors considered

§ 77:15 —Effect of adoption on grandparent’s rights of visitation

§ 77:16 —Sibling visitation

## **C. REFERRAL JURISDICTION**

§ 77:17 Statutory basis—Referral jurisdiction—Matrimonial cases—Constitutional provisions

§ 77:18 — —Family Court Act provisions

§ 77:19 —Referral Jurisdiction—Procedure

§ 77:20 Referral jurisdiction—Habeas corpus—By parent

§ 77:21 — —Grandparent’s application in matrimonial action for visitation

§ 77:22 —County Court referrals

## **D. CUSTODY AND VISITATION IN SUPPORT PROCEEDINGS**

§ 77:23 Overview

§ 77:24 Orders of protection with visitation provisions

§ 77:25 Custody and visitation orders

§ 77:26 Effect of criminal court order of protection

## **III. PARTIES AND STANDING**

§ 77:27 Overview

§ 77:28 Nonparents—Generally

§ 77:29 Fathers of children born out-of-wedlock

§ 77:30 Stepparents

§ 77:31 Foster parents

## **IV. COMMENCEMENT OF PROCEEDING**

### **A. PRELIMINARY CONSIDERATIONS**

§ 77:32 Venue-Initial determinations

§ 77:33 Venue-Modification or enforcement proceedings

§ 77:34 Venue-Referrals pursuant to section 462 of the Family Court Act

§ 77:35 Venue—Transfer of Venue

§ 77:36 Role of probation service

§ 77:37 —Investigations in pending proceedings

§ 77:38 —Liability of probation officers

§ 77:39 Native American children

### **B. PLEADINGS**

§ 77:40 Petition and order to show cause

§ 77:41 Issuance of summons—Service of process under the UCCJEA

§ 77:42 Answer to the petition

§ 77:43 Habeas corpus proceedings

§ 77:44 Uniform Child Custody Jurisdiction Act requirements—Domestic Relations Law § 76-h.

Information to be submitted to court

§ 77:45 Petition for modification or enforcement

§ 77:46 Requests for orders of protection—Answer and counterclaims

## C. ACQUIRING PERSONAL JURISDICTION

§ 77:47 In general

§ 77:48 Service of warrant to compel attendance—Family Court Act § 153

§ 77:49 —Family Court Act § 671

§ 77:50 Service of writ of habeas corpus

§ 77:51 Writ of Attachment for Child

§ 77:52 Request for order of protection—Service of process

§ 77:53 Interstate proceedings—Uniform Child Custody Jurisdiction and Enforcement Act

§ 77:54 —Parental Kidnapping Prevention Act

## V. TRIALS

### A. PRELIMINARY MATTERS

§ 77:55 Generally

§ 77:56 Notice of appearance

§ 77:57 Rights of Pro Se Litigant

§ 77:58 Default in appearance

§ 77:59 Right to counsel for indigent parents in custody proceedings—Notice of rights

§ 77:60 Right to counsel for indigent parents in custody proceedings—Effect of denial of right

§ 77:61 Right to counsel for indigent parents in custody proceedings—Waiver of right

§ 77:62 —Effect of ineffective assistance of counsel

§ 77:63 Right to counsel for indigent parents in custody proceedings -Presence at every stage of the proceeding

§ 77:64 Right to counsel for indigent parents in custody proceedings—Effect of ability to pay for counsel

§ 77:65 Attorney for the child

§ 77:66 Conference with court

§ 77:67 Court ordered examinations by a physician, psychiatrist or psychologist

§ 77:68 Discovery—Generally

§ 77:69 —Forensic and mental health examinations by impartial court-designated psychiatrist

### B. TEMPORARY ORDERS

§ 77:70 Temporary order of protection

§ 77:71 Temporary custody and visitation—Review all decisions and reports

§ 77:72 Temporary custody—Considerations

§ 77:73 Temporary Custody and Visitation—Order on Consent  
§ 77:74 Temporary custody and visitation enforcement  
§ 77:75 Temporary custody and visitation—Appeal  
§ 77:76 Temporary Custody or Visitation to Murderer  
§ 77:77 Custody and visitation—Military service by parent—effect on child custody orders.

## C. HEARING

### 1. Generally

§ 77:78 Necessity of a Hearing  
§ 77:79 Joint hearing of proceedings pursuant to Family Court Act Article 6 and Article 10-A  
§ 77:80 Investigation as to filing of abuse or neglect proceeding  
§ 77:81 Adjournments

### 2. Evidence

§ 77:82 Hearsay statements of child  
§ 77:83 Rule against hearsay-Relaxation of rule in cases involving abuse and neglect  
§ 77:84 In camera interview with child  
§ 77:85 Use of probation reports  
§ 77:86 Child abuse reports  
§ 77:87 Tape recordings

## D. DECISIONS AND ORDERS

§ 77:88 Generally—Decisions and findings  
§ 77:89 Orders of protection and probation—Generally  
§ 77:90 —Issuance and filing with police  
§ 77:91 Counsel fees  
§ 77:92 Submission of proposed orders

## VI. MODIFICATION AND ENFORCEMENT OF ORDERS AND JUDGMENTS

### A. JURISDICTION

§ 77:93 Family court orders  
§ 77:94 Supreme court orders—In general  
§ 77:95 —Referral to Family Court

### B. MODIFICATION

§ 77:96 In general  
§ 77:97 Out-of-State orders

### C. ENFORCEMENT

§ 77:98 Enforcement methods; overview  
§ 77:99 Contempt—In general  
§ 77:100 —Motion or order to show cause  
§ 77:101 —Notice and warning  
§ 77:102 —Notice of alleged violations  
§ 77:103 —Service of papers  
§ 77:104 —Hearing and representation of accused  
§ 77:105 —Order of contempt  
§ 77:106 —Punishment  
§ 77:107 —Circumstances warranting contempt findings  
§ 77:108 —Circumstances not warranting contempt findings  
§ 77:109 Modification of order as enforcement remedy

§ 77:110 Enforcement by suspension of maintenance for violation of visitation or custody order  
§ 77:111 Enforcement of sister state orders—Filing under UCCJEA

## **CHAPTER 78. SUPPORT PROCEEDINGS—OVERVIEW**

### **A. PRELIMINARY CONSIDERATIONS**

§ 78:1 Jurisdiction—Generally  
§ 78:2 —Concurrent jurisdiction  
§ 78:3 —Effect of pendency of action for divorce, separation or annulment on petition for support of spouse  
§ 78:4 Jurisdiction—Effect of separation agreement, judgment of separation, and judgment terminating a marriage on jurisdiction to award child support  
§ 78:5 —Effect of absence of support order on jurisdiction to award child support  
§ 78:6 Procedural statutes and Uniform Rules of the Family Court  
§ 78:7 Venue  
§ 78:8 Who may originate proceedings  
§ 78:9 —Nonresidents  
§ 78:10 Preliminary probation conferences and procedures  
§ 78:11 Petition  
§ 78:12 —Essential allegations  
§ 78:13 Compulsory financial disclosure  
§ 78:14 Agreement to support  
§ 78:15 Issuance and service of summons  
§ 78:16 Issuance of warrant  
§ 78:17 Temporary order of protection  
§ 78:18 Sequestration of Respondent’s Property

### **B. DUTIES OF SUPPORT**

§ 78:19 Spouses liability for support—Former Family Court Act § 412—Distinction between support on means basis and needs basis—In general  
§ 78:20 Spouses liability for support on means basis—Former Family Court Act § 412—In effect until January 22, 2016  
§ 78:21 — — —Considerations  
§ 78:22 Distinction Between Spousal Support and Maintenance  
§ 78:23 Spousal support guidelines—Family Court Act § 412—The 2015 Amendments—Income cap  
§ 78:24 — — —In general  
§ 78:25 — — —Legislative intention  
§ 78:26 — — —Mandatory application of spousal support guidelines—Application of the guidelines  
§ 78:27 — — —Definitions  
§ 78:28 — — —Determine the income of the parties—Inclusions in income  
§ 78:29 — — —Deductions from income  
§ 78:30 — — —Calculation of the spousal support guideline

amount—In general

§ 78:31 — —Spousal support guideline obligation award—  
Unjust or Inappropriate

§ 78:32 — — —Alimony deduction repealed after December  
31, 2018

§ 78:33 — —Required statement of factors and reasons where  
guideline amount is unjust or inappropriate

§ 78:34 — —The fourteen factors in Family Court Act § 412  
(6)(a)

§ 78:35 — — —Factor (1): the age and health of the parties

§ 78:36 — — —Factor (2): the present or future earning  
capacity of the parties, including a history of limited  
participation in the workforce

§ 78:37 — — —Factor (3): the need of one party to incur  
education or training expenses

§ 78:38 — — —Factor (4): termination of a child support  
award before the termination of the spousal support  
award

§ 78:39 — — —Factor (5): the wasteful dissipation of marital  
property

§ 78:40 — — —Factor (6): the existence and duration of a  
pre-marital joint household or a pre-divorce separate  
household

§ 78:41 — — —Factor (7): acts by one party against another  
that have inhibited or continue to inhibit a party's  
earning capacity

§ 78:42 — — —Factor (8): the availability and cost of medical  
insurance for the parties

§ 78:43 — — —Factor (9): the care of children or  
stepchildren, disabled adult children or stepchildren,  
elderly parents, or in-laws

§ 78:44 — — —Factor (10): the tax consequences to each  
party

§ 78:45 — — —Factor (11): the standard of living of the  
parties established during the marriage

§ 78:46 — — —Factor (12): the reduced or lost earning  
capacity of the payee as a result of having forgone or

LAW AND THE FAMILY NEW YORK

xxviii

delayed education, training, employment, or career  
opportunities during the marriage

§ 78:47 — — —Factor (13): the contributions and services of  
the payee a spouse, parent, wage earner and  
homemaker, and to the career or career potential of  
the other party

§ 78:48 — — —Factor (14): any other factor which the court  
shall expressly find to be just and proper

§ 78:49 — —Alimony deduction repealed after December 31,  
2018

§ 78:50 — —Self-support reserve

§ 78:51 — — —Rebuttable presumption that no Spousal  
Support is awarded

§ 78:52 — —Unrepresented parties

§ 78:53 — —In case of default or where insufficient evidence  
§ 78:54 — —Effect upon modification of existing spousal  
Support order  
§ 78:55 — —Effect upon modification of existing agreement  
§ 78:56 — —Modification of spousal support order  
§ 78:57 Parents of child—Liability for support of child under  
the age of 21—Child Support Standards Act,  
effective February 15, 1989—In general  
§ 78:58 — — —Child who is recipient of public assistance  
§ 78:59 — —Effect of child’s activities—In general  
§ 78:60 —Effect of separation agreement, separation, or  
termination of marriage  
§ 78:61 Stepparents-Liability for support of child  
§ 78:62 Grandparents—Liability for support of grandchild

## **CHAPTER 79. CHILD SUPPORT STANDARDS ACT**

### **A. IN GENERAL**

§ 79:1 In general—Child Support Standards Act  
§ 79:2 Application of the formula—Presumption of correct  
amount of support obligation  
§ 79:3 —Combined parental income  
§ 79:4 — —Evolution of Current Law  
§ 79:5 Definition of Income—Until January 24, 2016  
§ 79:6 —After January 24, 2016  
§ 79:7 Child support percentage  
§ 79:8 Child support calculation—Combined parental income  
over statutory cap—The Cassano case

#### TABLE OF CONTENTS

xxix

§ 79:9 “Add-ons” —In general  
§ 79:10 —Child care expenses  
§ 79:11 “Add-Ons” —Health Care Expenses  
§ 79:12 Private health insurance benefits—Available—  
Obligation to exercise option  
§ 79:13 Private health insurance—Available—Mandatory  
orders  
§ 79:14 Private health insurance benefits—Determination of  
availability  
§ 79:15 Private health insurance—Availability  
§ 79:16 —Payment for share of reasonable cash medical  
support expenses for additional unreimbursed  
expenses  
§ 79:17 —Not available—Cash medical support  
§ 79:18 —Cash medical support determined under domestic  
relations law § 240(1-b)(c)(5)  
§ 79:19 Private health insurance benefits—Not available—  
Application for state child health insurance program  
or medical assistance program  
§ 79:20 Private health insurance—Not available—Cash  
medical support—Application for state child health  
insurance program or medical assistance program—  
Managed care coverage

§ 79:21 — — — —Fee for service coverage  
§ 79:22 — — — —Child eligible under state child health insurance program  
§ 79:23 Private Health Insurance—Not Available—Reasonable Health Care Expenses Not Covered by Insurance  
§ 79:24 Private health insurance—Not available—Cash medical support—Unjust or inappropriate  
§ 79:25 Requirements for child support orders—Directions for health insurance  
§ 79:26 “Add-ons”—Educational expenses  
§ 79:27 —Non-recurring payments  
§ 79:28 Variation from the formula  
§ 79:29 Opting out  
§ 79:30 Unrepresented parties  
§ 79:31 Temporary child support  
§ 79:32 Disclosure  
§ 79:33 Modification

## **B. ADJUSTMENT OF CHILD SUPPORT ORDERS**

### **1. RIGHT TO REQUEST A ONE-TIME REVIEW**

§ 79:34 Right to request a one-time Review—Family Court Act § 413(3)(a)—Orders issued prior to September 15, 1989  
§ 79:35 Review procedures  
§ 79:36 Time to initiate review  
§ 79:37 Notice of intention to commence review  
§ 79:38 Notice of findings  
§ 79:39 Filing proposed order and written objections  
§ 79:40 Commencement of family court proceeding  
§ 79:41 Notice of findings  
§ 79:42 Filing proposed order and written objections  
§ 79:43 Commencement of Family Court proceeding  
§ 79:44 Commencement of Supreme Court proceeding  
§ 79:45 Objections sustained by court  
§ 79:46 Objections rejected by court  
§ 79:47 Motion to vacate adjusted order  
§ 79:48 Ongoing cost of living adjustment

### **2. RIGHT TO REVIEW AND ADJUSTMENT OF CHILD SUPPORT ORDERS ISSUED ON BEHALF OF A CHILD IN RECEIPT OF PUBLIC ASSISTANCE, OR CHILD SUPPORT ENFORCEMENT SERVICES—FAMILY COURT ACT § 413-A**

§ 79:49 Notice  
§ 79:50 Request  
§ 79:51 Adjustment process

### **3. OBJECTION PROCESS TO COST OF LIVING ADJUSTMENT**

§ 79:52 Timely filing of objections  
§ 79:53 —Stay of adjustment after hearing  
§ 79:54 —Effect of failure to make objections  
§ 79:55 No burden of proof  
§ 79:56 Issuance of order  
§ 79:57 —Modification of orders

#### 4. REVIEW AND COST OF LIVING ADJUSTMENT OF CHILD SUPPORT ORDERS ISSUED ON BEHALF OF A CHILD IN RECEIPT OF FAMILY ASSISTANCE OR CHILD SUPPORT ENFORCEMENT SERVICES BY THE SUPPORT COLLECTION UNIT EVERY TWO YEARS

§ 79:58 Notice of right to adjustment review

§ 79:59 Orders subject to review

§ 79:60 Timeframes for review for cost of living adjustment purposes

§ 79:61 —Calculation of cost of living adjustment

§ 79:62 Adjusted order

§ 79:63 Adjusted order; form

§ 79:64 Effect of failure to make objections

§ 79:65 Effect of making objections

#### C. HEARINGS

§ 79:66 Right to counsel

§ 79:67 Conduct of hearing

§ 79:68 Default for failure to answer or appear

§ 79:69 Procedural rules and rules of evidence

§ 79:70 Burden of proof—Competent proof

§ 79:71 Adjournment of hearing

§ 79:72 Probation reports

§ 79:73 Referral to work programs

§ 79:74 Testimony by telephone, audio-visual means or other electronic means

§ 79:75 Hearings before support magistrates—Subject matter jurisdiction to hear and determine

§ 79:76 —Matters beyond jurisdiction to hear and determine

§ 79:77 —Procedure and rules of evidence

§ 79:78 —Adjournments—Temporary support orders

§ 79:79 —Default

§ 79:80 —Required findings

§ 79:81 —Required referral to judge and temporary support order

§ 79:82 —Objections to final order of support magistrate

§ 79:83 —Objections—Requirement of final order

§ 79:84 — —Default order

§ 79:85 — —Timeliness of Service

§ 79:86 — —Service of objections upon attorney

§ 79:87 —Objections requirement of final order—Exception

§ 79:88 —Objections—Dated deemed filed

§ 79:89 — —Submission of order and transcript of hearing

§ 79:90 — —Proof of service

§ 79:91 — —Time limitations in Family Court Act § 439(e)

§ 79:92 —Requirement of filing specific objections

§ 79:93 —Submission of New evidence with objections

§ 79:94 —Objections to final order of support magistrate—Review by court

§ 79:95 —Which order is the appeal taken from?

§ 79:96 —Objections to “final” order of a support magistrate determining person is in willful violation of an order and recommends commitment

§ 79:97 —Objections to “final” order of a Support Magistrate

determining person is in willful violation of an order and recommends commitment—Postdispositional hearing

§ 79:98 —Effect of new order upon payments in excess of support order

§ 79:99 —Appeal from final order

§ 79:100 Order for Temporary Child Support and Spousal Support

§ 79:101 Testimony of spouse

§ 79:102 Presumption of legitimacy

§ 79:103 Presumption of sufficient means

§ 79:104 Counsel fees

§ 79:105 Expedited Process

#### **D. ORDERS**

§ 79:106 Orders of Support—Generally

§ 79:107 Provisions for health & accident insurance—Family Court Act § 416

§ 79:108 Required health insurance provisions in support orders—Family Court Act § 416

§ 79:109 Requirements of support order—Family Court Act § 440

§ 79:110 Enforcement of support order—Family Court Act § 440

§ 79:111 Issuance of income execution and execution for medical support enforcement—Family Court Act § 440

§ 79:112 Income deduction order—Family Court Act § 440

§ 79:113 Review and adjustment of support orders

§ 79:114 Requirements of support orders issued under Domestic Relations Law § 251, or Family Court Act Article 4, 5, 5-A or 5-B

§ 79:115 Prima facie evidence of ability to provide support

§ 79:116 Required notice in support order

§ 79:117 Effective date and retroactivity of support orders—Family Court Act § 449

§ 79:118 Order dismissing petition

§ 79:119 Orders of support—Child support

§ 79:120 —Support by spouse

§ 79:121 Order of support—Support by parent

§ 79:122 Orders of support—Support by relative

§ 79:123 Orders of protection

§ 79:124 Orders of visitation

§ 79:125 Effect of Supreme Court orders on duration of Family Court custody or visitation order

§ 79:126 Effect of Supreme Court order on Family Court child support order

§ 79:127 Effect of Supreme Court Order on subsequent Family Court spousal support order

§ 79:128 Effect of Supreme Court Order on subsequent Family Court enforcement or modification of Support Order

## **E. COMPLIANCE WITH ORDERS AND MODIFICATION**

### **1. COURT PROCEDURE TO VACATE, MODIFY OR SET ASIDE SUPPORT ORDER**

§ 79:129 Continuing Jurisdiction to vacate, modify or set aside a support order

§ 79:130 Continuing jurisdiction to modify spousal support and child support under Family Court Act § 412 and § 451

§ 79:131 Continuing jurisdiction to vacate, modify or set aside a support order—Burden of proof—Hearing

§ 79:132 Duration of spousal support order

### **2. COURT PROCEDURE ON VIOLATION OF SUPPORT ORDER**

§ 79:133 Summons and petition—Violation of court order

§ 79:134 Powers of Family Court on violation of support order—Family Court Act § 454

§ 79:135 Powers of Family Court on wilful violation of support order—Family Court Act § 454

§ 79:136 Review of support collection unit denial of challenge to license suspension

§ 79:137 Right to counsel in support violation proceeding

§ 79:138 Evidentiary hearing before support magistrate—Violation of support order—Family Court Act § 454

§ 79:139 — —Filing objections with Family Court judge—Family Court Act § 454—In general

§ 79:140 Procedure before support magistrate—Commitment for wilful failure to obey order—Family Court Act

§ 454—Wilfulness hearing

§ 79:141 Confirmation hearing by court before final order of support magistrate—Violation of order—Family Court Act § 454

§ 79:142 Procedure for confirmation hearing by court of order of support magistrate—Commitment for willful

failure to obey order—Family Court Act § 454

§ 79:143 Confirmation hearing by court where no recommendation of Incarceration by support magistrate—Violation of order—Family Court Act § 454

§ 79:144 Suspension and modification of orders of commitment

## **F. PROBATION**

§ 79:145 Probation

## **G. SEQUESTRATION**

§ 79:146 Order of sequestration on failure to obey support order

§ 79:147 Lien against property—Authorization for lien against real and personal property

§ 79:148 Determination of entitlement to lien

§ 79:149 —Assertion of mistake of fact by obligor

§ 79:150 —Effect of no mistake of fact—Stay of enforcement

§ 79:151 —Filing and service of notice of lien

§ 79:152 Voiding of fraudulent transfers of income or property

§ 79:153 Enforcement of support by suspension of licenses—

In general

§ 79:154 —Family Court Act § 458-a -Suspension of driving privileges

§ 79:155 —Family Court Act § 458-b—suspension of state professional, occupational and business licenses

§ 79:156 —Family Court Act § 458-c—Suspension of recreational licenses

## **H. DOCKETING OF MONEY JUDGMENT**

§ 79:157 Entry and docketing of money judgment

§ 79:158 Amendment of petition to request additional arrears

## **I. UNDERTAKING**

§ 79:159 Undertaking for support

§ 79:160 Procedure as to default

§ 79:161 Forfeitures applied to support of petitioner

§ 79:162 Surrender of respondent by surety

§ 79:163 Termination of surety's liability

§ 79:164 When new security required

§ 79:165 Effect of Bankruptcy

## **J. SUPPORT COLLECTION UNIT**

### **1. IN GENERAL**

§ 79:166 Generally

§ 79:167 Application for services by individuals not otherwise eligible for child support services

§ 79:168 Tax refund offset process

§ 79:169 Assignment of support rights

§ 79:170 Crediting of tax overpayments toward spousal support—Social Services Law § 111-y

§ 79:171 Crediting of tax overpayments toward child support—Social Services Law § 111-z

## **CHAPTER 80. UNIFORM INTERSTATE FAMILY SUPPORT ACT**

### **A. OVERVIEW**

§ 80:1 Important historical information

§ 80:2 Historical perspective—Uniform Support of Dependents Law—Effective until December 31, 1997

§ 80:3 Uniform Support of Dependents Law—Rule of Construction

§ 80:4 —Jurisdiction and powers of court

§ 80:5 —Liability for support—Support of children

§ 80:6 —Support over age 21

§ 80:7 —Support of spouse

§ 80:8 —Procedure—Generally

§ 80:9 — —Commencement of Proceeding

§ 80:10 — —Hearing

§ 80:11 —Temporary support

§ 80:12 —Procedure—Order of support

§ 80:13 — —Order of visitation

§ 80:14 — —Transmittal of Payments to Petitioner

§ 80:15 — —Violation of or failure to obey order

§ 80:16 — —Appeal

§ 80:17 —Registration of foreign support orders

## **B. FEDERAL PREEMPTION**

§ 80:18 The Full Faith and Credit for Child Support Orders Act and Uniform Interstate Family Support Act: Federal Preemption

## **C. MODIFICATION AND ENFORCEMENT OF SISTER-STATE CHILD SUPPORT ORDERS UNDER 28 U.S.C.A. § 1738B**

§ 80:19 Full Faith and Credit to Child Support Orders Act (28 U.S.C.A. § 1738B)—In general

§ 80:20 Definitions

§ 80:21 General rule

§ 80:22 Requirements of child support orders

§ 80:23 Continuing jurisdiction

§ 80:24 Authority to modify orders

§ 80:25 Recognition of child support orders

§ 80:26 Enforcement of modified orders

§ 80:27 Choice of law

§ 80:28 Registration for modification

## **D. DIFFERENCES BETWEEN RURESA AND UIFSA 2001**

### **1. IN GENERAL**

§ 80:29 Terminology

§ 80:30 Reorganization

§ 80:31 Reciprocity Not Required

§ 80:32 Long-Arm jurisdiction

§ 80:33 Parentage

### **2. ESTABLISHING A SUPPORT ORDER**

§ 80:34 Family support

§ 80:35 Local law

§ 80:36 One order system

§ 80:37 —Private attorneys

§ 80:38 —Efficiency

§ 80:39 Interstate Parentage

§ 80:40 —Direct Enforcement

§ 80:41 Registration

### **3. MODIFYING A SUPPORT ORDER**

§ 80:42 Registration

§ 80:43 —Modification limited

## **E. GENERAL PROVISIONS—UNIFORM INTERSTATE FAMILY SUPPORT ACT—UIFSA 2001**

§ 80:44 UIFSA 2001—Generally

§ 80:45 —Definitions

§ 80:46 —Tribunal of State

§ 80:47 —Remedies cumulative

## **F. UIFSA 2001—JURISDICTION**

### **1. EXTENDED PERSONAL JURISDICTION**

§ 80:48 UIFSA 2001—Basis for jurisdiction over non-resident

§ 80:49 —Procedure when exercising jurisdiction over non-resident

## **2. PROCEEDINGS INVOLVING TWO OR MORE STATES**

§ 80:50 UIFSA 2001—Initiating and responding tribunal of state

§ 80:51 —Simultaneous proceedings in another state

§ 80:52 —Continuing exclusive jurisdiction

§ 80:53 —Enforcement and modification of support order by tribunal having continuing jurisdiction

## **3. RECONCILIATION OF MULTIPLE ORDERS**

§ 80:54 UIFSA 2001—Recognition of controlling child support order

§ 80:55 —Multiple child support orders for two or more Obligees

§ 80:56 —Credit for payments

## **G. UIFSA 2001—CIVIL PROVISIONS OF GENERAL APPLICATION**

§ 80:57 UIFSA 2001—Commencement of proceedings under Article 5-B

§ 80:58 —Action by minor parent

§ 80:59 —Application of law of the state

§ 80:60 —Duties of the Family Court as an initiating tribunal

§ 80:61 —Duties and powers of the Family Court as a responding tribunal

§ 80:62 —Inappropriate tribunal

§ 80:63 —Duties of support enforcement agency

§ 80:64 —Duty of attorney general

§ 80:65 —Private Counsel

§ 80:66 —Duties of state information agency

§ 80:67 —Pleadings and accompanying documents

§ 80:68 —Nondisclosure of information in exceptional Circumstances

§ 80:69 —Costs and fees

§ 80:70 —Limited immunity of petitioner

§ 80:71 —Nonparentage as a defense

§ 80:72 —Special rules of evidence and procedure

§ 80:73 —Communications between tribunals

§ 80:74 —Assistance with discovery

§ 80:75 —Receipt and disbursement of payments

§ 80:76 —Petition to establish support order

## **H. UIFSA 2001—ENFORCEMENT OF ORDER OF ANOTHER STATE WITHOUT REGISTRATION**

§ 80:77 UIFSA 2001—Employer's receipt of income—Withholding order of another state

§ 80:78 —Employer's compliance with income—Withholding order of another state

§ 80:79 —Compliance with multiple income—Withholding orders

§ 80:80 —Immunity from civil liability

§ 80:81 —Penalties for noncompliance

§ 80:82 —Contest by obligor

§ 80:83 —Administrative enforcement of orders

## **I. UIFSA 2001—ENFORCEMENT AND MODIFICATION OF SUPPORT ORDER AFTER REGISTRATION**

### **1. REGISTRATION AND ENFORCEMENT OF SUPPORT ORDER**

§ 80:84 UIFSA 2001—Registration of order for enforcement

§ 80:85 —Procedure to register order for enforcement

§ 80:86 —Effect of registration for enforcement

§ 80:87 —Choice of law

### **2. CONTEST OF VALIDITY OR ENFORCEMENT**

§ 80:88 UIFSA 2001—Notice of registration of order

§ 80:89 —Procedure to Contest Validity or Enforcement of Registered Order

§ 80:90 —Contest of registration or enforcement

§ 80:91 —Confirmed order

### **3. REGISTRATION AND MODIFICATION OF CHILD SUPPORT ORDER**

§ 80:92 UIFSA 2001—Procedure to register the child support order of another state for modification

§ 80:93 —Effect of registration for modification

§ 80:94 —Modification of child support order of another state

§ 80:95 —Recognition of order modified in another state

§ 80:96 —Jurisdiction to modify child support order of another state

§ 80:97 —Notice to issuing tribunal of modification

## **J. UIFSA 2001—DETERMINATION OF PARENTAGE**

§ 80:98 UIFSA 2001—Proceeding to determine parentage

## **K. UIFSA 2001—INTERSTATE RENDITION**

§ 80:99 UIFSA 2001—Grounds for Rendition

§ 80:100 —Conditions of rendition

## **L. UIFSA 2001—MISCELLANEOUS PROVISIONS**

§ 80:101 UIFSA 2001—Uniformity of application and construction

§ 80:102 —Short title

§ 80:103 —Severability

§ 80:104 —Effective date

§ 80:105 —Repeals

## **M. THE UNIFORM INTERSTATE FAMILY SUPPORT ACT (2008)—(UIFSA 2008)—ARTICLE 5-B—EFFECTIVE JANUARY 1, 2016**

### **PART 1. GENERAL PROVISIONS**

§ 80:106 The Uniform Interstate Family Support Act (2008)—UIFSA 2008—Generally

§ 80:107 UIFSA 2008—Definitions

§ 80:108 —Tribunal of state

§ 80:109 —Remedies cumulative

§ 80:110 —Application of Article 5-B to resident of foreign country and foreign support proceedings.

### **PART 2. JURISDICTION**

§ 80:111 UIFSA 2008—Basis for Jurisdiction Over Non-resident

§ 80:112 —Duration of personal jurisdiction

§ 80:113 —Procedure when exercising jurisdiction over nonresident  
§ 80:114 —Initiating and responding tribunal of state  
§ 80:115 —Simultaneous proceedings in another state  
§ 80:116 —Continuing exclusive jurisdiction  
§ 80:117 —Continuing exclusive jurisdiction to modify child support order  
§ 80:118 —Continuing jurisdiction to enforce child support order  
§ 80:119 —Recognition of controlling child support order  
§ 80:120 —Multiple child support orders for two or more obligees  
§ 80:121 —Credit for payments  
§ 80:122 —Continuing exclusive jurisdiction to modify spousal-support order

### **PART 3. CIVIL PROVISIONS OF GENERAL APPLICATION**

§ 80:123 UIFSA 2008—Continuing exclusive jurisdiction to modify spousal-support order—Civil provisions of general application—In general  
§ 80:124 —Commencement of proceedings under Article 5-B  
§ 80:125 —Action by Minor Parent  
§ 80:126 —Application of law of the state  
§ 80:127 —Duties of the Family Court as an initiating tribunal  
§ 80:128 —Duties and powers of the Family Court as a responding tribunal  
§ 80:129 —Inappropriate tribunal  
§ 80:130 —Duties of support enforcement agency  
§ 80:131 —Duty of attorney general  
§ 80:132 —Duties of state information agency  
§ 80:133 —Pleadings and accompanying documents  
§ 80:134 —Nondisclosure of information in exceptional circumstances  
§ 80:135 —Costs and fees  
§ 80:136 —Limited immunity of petitioner  
§ 80:137 —Nonparentage as defense  
§ 80:138 —Special rules of evidence and procedure  
§ 80:139 —Communications between tribunals  
§ 80:140 —Assistance with discovery  
§ 80:141 —Receipt and disbursement of payments

### **PART 4. ESTABLISHMENT OF SUPPORT ORDER OR OF PARENTAGE**

§ 80:142 UIFSA 2008—Petition to establish support order  
§ 80:143 —Proceeding to determine parentage

### **PART 5. ENFORCEMENT OF SUPPORT ORDER WITHOUT REGISTRATION**

§ 80:144 UIFSA 2008—Employer’s receipt of income—Withholding order of another state  
§ 80:145 —Employer’s compliance with income—Withholding order of another state  
§ 80:146 —Compliance with multiple income—Withholding orders  
§ 80:147 —Immunity from civil liability

- § 80:148 —Penalties for Noncompliance
- § 80:149 —Contest by obligor
- § 80:150 —Administrative enforcement of orders

#### **PART 6. REGISTRATION, ENFORCEMENT AND MODIFICATION OF SUPPORT ORDER**

- § 80:151 UIFSA 2008—Registration of order for enforcement
- § 80:152 —Procedure to register order for enforcement
- § 80:153 —Effect of registration for enforcement
- § 80:154 —Choice of Law
- § 80:155 —Notice of registration of order
- § 80:156 —Procedure to contest validity or enforcement of registered order
- § 80:157 —Contest of registration or enforcement
- § 80:158 —Confirmed order
- § 80:159 —Procedure to register the child support order of another state for modification
- § 80:160 —Effect of registration for modification
- § 80:161 —Modification of child support order of another state
- § 80:162 —Recognition of order modified in another state
- § 80:163 —Jurisdiction to modify child support order of another state
- § 80:164 —Notice to issuing tribunal of modification
- § 80:165 —Jurisdiction to modify child support order of foreign country
- § 80:166 —Procedure to register child support order of foreign country for modification.

#### **PART 7. SUPPORT PROCEEDINGS UNDER THE FAMILY MAINTENANCE CONVENTION**

- § 80:167 UIFSA 2008—Support Proceedings under the convention—In general
- § 80:168 —Applicability
- § 80:169 —Definitions
- § 80:170 —Relationship of office of temporary and disability assistance to United States central authority
- § 80:171 —Initiation by state support enforcement agencies of support proceeding under Convention
- § 80:172 —Direct request
- § 80:173 —Registration of Convention support order
- § 80:174 —Contest of registered Convention support order
- § 80:175 —Recognition and enforcement of registered Convention support order
- § 80:176 —Partial enforcement
- § 80:177 —Foreign support agreement
- § 80:178 —Modification of Convention child support order
- § 80:179 —Personal information; limit on use
- § 80:180 —Record in original language; English translation

#### **PART 8. INTERSTATE RENDITION**

- § 80:181 UIFSA 2008—Grounds for rendition
- § 80:182 —Conditions of rendition

#### **PART 9. MISCELLANEOUS PROVISIONS**

- § 80:183 UIFSA 2008—Uniformity of application and construction

§ 80:184 —Severability

## **CHAPTER 81. THE CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE (“FAMILY MAINTENANCE CONVENTION”)**

§ 81:1 Introduction—In general

§ 81:2 Article 1. Object

§ 81:3 Article 2. Scope

§ 81:4 Article 3. Definitions

§ 81:5 Article 4. Designation of Central Authorities

§ 81:6 Article 5. General functions of Central Authorities

§ 81:7 Article 6. Specific functions of Central Authorities

§ 81:8 Article 7. Requests for specific measures

§ 81:9 Article 8. Central Authority costs

§ 81:10 Article 9. Application through Central Authorities

§ 81:11 Article 10. Available applications

§ 81:12 Article 11. Application contents

§ 81:13 Article 12. Transmission, receipt and processing

§ 81:14 Article 13. Means of communication

§ 81:15 Article 14. Effective access procedures

§ 81:16 Article 15. Free legal assistance for child support applications

§ 81:17 Article 16. Declaration to permit use of child-centered means test

§ 81:18 Article 17. Applications not qualifying under Articles 15 or 16

§ 81:19 Article 18. Limit on proceedings

§ 81:20 Article 19. Scope of Chapter

§ 81:21 Article 20. Basis for recognition and enforcement

§ 81:22 Article 21. Severability and partial recognition and enforcement

§ 81:23 Article 22. Grounds for refusing recognition and enforcement

§ 81:24 Article 23. Procedure on an application for recognition and enforcement

§ 81:25 Article 24. Alternative procedure on an application for recognition and enforcement

§ 81:26 Article 25. Documents

§ 81:27 Article 26. Procedure on an application for recognition

§ 81:28 Article 27. Findings of fact

§ 81:29 Article 28. No review on the merits

§ 81:30 Article 29. Physical presence of the child or the applicant not required

§ 81:31 Article 30. Maintenance arrangements

§ 81:32 Article 31. Decisions produced by the combined effect of provisional and confirmation orders

§ 81:33 Article 32. Enforcement under internal law

§ 81:34 Article 33. Non-discrimination

§ 81:35 Article 34. Enforcement measures

§ 81:36 Article 35. Transfer of funds

§ 81:37 Article 36. Public bodies as applicants

§ 81:38 Article 37. Direct requests to competent authorities  
§ 81:39 Protection of personal data  
§ 81:40 Article 41. No legalisation  
§ 81:41 Article 42. Power of Attorney  
§ 81:42 Article 43. Recovery of costs  
§ 81:43 Article 44. Language requirements  
§ 81:44 Article 45. Means and costs of translation  
§ 81:45 Article 46. Non-unified legal systems—interpretation  
§ 81:46 Article 47. Non-unified legal systems—Substantive rules  
§ 81:47 Articles 48 and 49. Prior conventions  
§ 81:48 Article 50. Relationship with prior Hague Conventions on service of documents and taking of evidence  
§ 81:49 Article 51. Co-ordination of instruments and supplementary agreements  
§ 81:50 Article 52. Most effective rule  
§ 81:51 Article 53.  
§ 81:52 Article 54. Review of practical operation of the Convention  
§ 81:53 Article 55. Amendment of forms  
§ 81:54 Article 56. Transitional provisions  
§ 81:55 Article 57. Provision of information concerning laws, procedures and services  
§ 81:56 Article 58. Signature, Ratification and Accession  
§ 81:57 Article 59. Regional Economic Integration Organisations  
§ 81:58 Article 60. Entry into force  
§ 81:59 Article 61. Declarations with respect to non-unified legal systems  
§ 81:60 Article 62. Reservations  
§ 81:61 Article 63. Declarations  
§ 81:62 Article 64. Denunciation  
§ 81:63 Article 65. Notification  
§ 81:64 Annex 1—Transmittal form under Article 12(2)  
§ 81:65 Annex 2—Acknowledgment form under Article 12(3)

## **Volume 11 Table of Contents**

### **FAMILY COURT PROCEEDINGS (CONTINUED)**

#### **PART ONE FAMILY COURT PROCEEDINGS (CONTINUED)**

##### **CHAPTER 82. PATERNITY PROCEEDINGS**

###### **I. OVERVIEW**

§ 82:1 Establishment of the parent-child relationship  
§ 82:2 —Parents obligation to support child  
§ 82:3 Acknowledgment of parentage—Public Health Law § 4135-b  
§ 82:4 —Estates, Powers, and Trusts Law § 4-1.2

§ 82:5 Motion to vacate acknowledgment of parentage  
§ 82:6 Establishment of parentage—Effect of death, absence,  
or mental illness of father  
§ 82:7 —Putative father registry  
§ 82:8 —Effect of death, absence, or mental illness of  
mother  
§ 82:9 —Effect of Civil Rights Law provision for civil death  
§ 82:10 Nonjudicial legitimation  
§ 82:11 Need for trial  
§ 82:12 Right to counsel

## **II. CONSTITUTIONAL ISSUES**

§ 82:13 Due process and equal protection  
§ 82:14 Other issues

## **III. PROCEDURE**

§ 82:15 Initial considerations—Statute of limitations  
§ 82:16 Other initial considerations  
§ 82:17 Settlement considerations—Family Court Act § 516  
repealed  
§ 82:18 Jurisdiction  
§ 82:19 —Service of process outside the state on non-resident  
§ 82:20 Definitions  
§ 82:21 Venue  
§ 82:22 Parties  
§ 82:23 Res Judicata considerations  
§ 82:24 The petition  
§ 82:25 Temporary order of protection  
§ 82:26 Issuance of summons  
§ 82:27 Service of summons  
§ 82:28 Proof of service  
§ 82:29 Default of respondent  
§ 82:30 Issuance of warrant  
§ 82:31 Procedure on warrant  
§ 82:32 Availability of closed proceedings and records  
§ 82:33 Jury trial not available  
§ 82:34 Hearing  
§ 82:35 Testimony by telephone, audio-visual means or other  
electronic means  
§ 82:36 Presumptions  
§ 82:37 Defensive Considerations  
§ 82:38 Orders  
§ 82:39 Orders—Effect of request for order of support  
§ 82:40 Protective orders  
§ 82:41 Paternity or child support proceedings; suspension of  
driving privileges  
§ 82:42 Paternity or child support proceedings; suspension of  
state professional, occupational and business  
licenses  
§ 82:43 Paternity or child support proceedings; suspension of  
recreational licenses  
§ 82:44 Firearms; surrender and license suspension,  
revocation and ineligibility  
§ 82:45 Name change and birth certificate considerations

- § 82:46 Counsel fees and costs—Family Court Act § 536
- § 82:47 Post-Trial considerations—Modification—Enforcement

#### **IV. BLOOD TESTS AND OTHER EVIDENCE**

- § 82:48 Overview
- § 82:49 Types of testing
- § 82:50 Levels of testing
- § 82:51 Determination of probability of paternity by blood testing
- § 82:52 DNA evidence
- § 82:53 Genetic marker and DNA tests
- § 82:54 Other evidence
- § 82:55 Sterility, low sperm count, and impotence
- § 82:56 Use of experts
- § 82:57 Paternity cases

#### **V. SURROGATE PARENTING CONTRACTS AND BIOTECHNICAL REPRODUCTION**

- § 82:58 Introductory note—Domestic Relations Law § 73
- § 82:59 Alternative reproductive techniques
- § 82:60 Disposition of cryopreserved pre-embryos
- § 82:61 Children born of artificial insemination—Domestic Relations Law § 73
- § 82:62 Surrogate parenting contracts
- § 82:63 Surrogate parenting contracts and genetic surrogate parenting agreements
- § 82:64 Surrogate parenting contracts void in New York—Public policy
- § 82:65 Genetic surrogate parenting agreements void in New York—Public policy
- § 82:66 Surrogate parenting contracts—Definitions
- § 82:67 Genetic surrogate parenting agreements—Definitions
- § 82:68 Surrogate parenting contracts—Prohibitions
- § 82:69 Genetic surrogate parenting agreements—Prohibitions
- § 82:70 Surrogate parenting contracts—Penalties
- § 82:71 Genetic Surrogate Parenting Agreements—Penalties
- § 82:72 Surrogate parenting contracts—Consideration of birth mother’s participation in proceedings regarding parental rights
- § 82:73 Genetic surrogate parenting agreements—Proceedings regarding parental rights, status or obligations
- § 82:74 Surrogate Parenting contracts—Counsel fees—Domestic Relations Law § 124
- § 82:75 Genetic surrogate parenting agreements—Counsel fees—Domestic Relations Law § 124
- § 82:76 Surrogate parenting act not illegal
- § 82:77 Genetic surrogate parenting act not illegal

#### **VI. JUDGMENTS OF PARENTAGE OF CHILDREN CONCEIVED THROUGH ASSISTED REPRODUCTION OR PURSUANT TO SURROGACY AGREEMENTS**

##### **PART 1. GENERAL PROVISIONS**

- § 82:78 Judgments of parentage—In general
- § 82:79 Judgment of parentage—Jurisdiction, and exclusive

continuing jurisdiction.

§ 82:80 General provisions—Purpose

§ 82:81 —Definitions

## **PART 2. JUDGMENT OF PARENTAGE OF CHILD CONCEIVED THROUGH ASSISTED REPRODUCTION**

### **A. Child Conceived through Assisted Reproduction**

§ 82:82 Judgment of parentage in donor and surrogacy arrangements—In general

§ 82:83 Judgment of parentage—Proceeding for judgment of parentage of a child conceived through assisted reproduction—Who may initiate

§ 82:84 — —Venue

§ 82:85 — —Contents of the Petition

§ 82:86 — —Proof of donative intent

§ 82:87 — —Notice to donor

§ 82:88 — —Cases not covered by Family Court Act

§ 581-202(c)

§ 82:89 — —Issuance of Judgment of parentage

### **B. Child Conceived Pursuant to Surrogacy agreement**

§ 82:90 Judgment of Parentage—Proceeding for judgment of parentage of a child conceived pursuant to a surrogacy agreement—Commencement

§ 82:91 — —Venue

§ 82:92 — —Contents of petition—Six months residence

§ 82:93 — —Issuance of judgment of parentage

§ 82:94 — —Issuance of judgment of parentage where no certification

§ 82:95 Judgment of parentage—Judgment of parentage for intended parents who are spouses

§ 82:96 Judgment of Parentage—Inspection of records

## **PART 3. CHILD OF ASSISTED REPRODUCTION**

§ 82:97 Child of assisted reproduction—Scope of article

§ 82:98 —Status of donor

§ 82:99 —Parentage of child of assisted reproduction

§ 82:100 —Consent to assisted reproduction

§ 82:101 —Limitation on spouses' dispute of parentage of child of assisted reproduction

### **C. Embryo Disposition Agreement**

§ 82:102 Child of assisted reproduction—Effect of embryo disposition agreement between intended parents which transfers legal rights and dispositional control to one intended parent

### **D. Death of Intended Parent**

§ 82:103 Effect of death of intended parent

## **PART 4. SURROGACY AGREEMENTS**

§ 82:104 Surrogacy agreement—Surrogacy agreement authorized

§ 82:105 —Eligibility of person acting as surrogate to enter surrogacy agreement

§ 82:106 — —Legal representation

§ 82:107 — —Comprehensive Health Insurance Policy

§ 82:108 — —Life insurance policy for surrogate  
§ 82:109 — —Additional requirements  
§ 82:110 —Eligibility of intended parent or parents to enter surrogacy agreement  
§ 82:111 —Eligibility of adult in a spousal relationship to enter surrogacy agreement.  
§ 82:112 —Effect upon spouse of an intended parent who is not a required party  
§ 82:113 —Requirements of surrogacy agreement  
§ 82:114 —Further requirements of surrogacy agreement  
§ 82:115 —Surrogacy agreement: Effect of subsequent spousal relationship  
§ 82:116 —Termination of surrogacy agreement  
§ 82:117 —Parentage under complaint surrogacy agreement  
§ 82:118 —Insufficient surrogacy agreement  
§ 82:119 —Absence of surrogacy agreement  
§ 82:120 Dispute as to surrogacy agreement

## **PART 5. PAYMENT TO DONORS AND PERSONS ACTING AS SURROGATES**

§ 82:121 Payment to donors and surrogates—Reimbursement  
§ 82:122 —Compensation

## **PART 6. SURROGATES' BILL OF RIGHTS**

§ 82:123 Surrogates' Bill of Rights—Applicability  
§ 82:124 —Health and welfare decisions  
§ 82:125 —Independent legal counsel  
§ 82:126 —Health insurance and medical costs  
§ 82:127 —Comprehensive health insurance policy  
§ 82:128 —Life insurance  
§ 82:129 —Termination of surrogacy agreement

## **PART 7. MISCELLANEOUS PROVISIONS**

§ 82:130 Remedial  
§ 82:131 Severability  
§ 82:132 Parent under Domestic Relations Law § 70  
§ 82:133 Interpretation

# **CHAPTER 83. CONCILIATION PROCEEDINGS**

## **I. PURPOSE AND JURISDICTION**

§ 83:1 Overview  
§ 83:2 Purpose  
§ 83:3 Jurisdiction  
§ 83:4 Power to direct commencement of other Family Court proceedings  
§ 83:5 Effect on marital status

## **II. PROCEDURE**

§ 83:6 Commencing conciliation  
§ 83:7 Preliminary conference  
§ 83:8 Referrals  
§ 83:9 Hearings  
§ 83:10 Goals of proceeding  
§ 83:11 Continuation of proceeding  
§ 83:12 Length of conciliation proceeding

§ 83:13 Confidentiality of statements

## **CHAPTER 84. GUARDIANSHIP AND FOSTER CARE**

### **I. BASIC CONCEPTS—GUARDIANSHIP**

- § 84:1 Nature of guardianship
- § 84:2 Custody and guardianship distinguished
- § 84:3 Guardianships by court order—Permanent Guardian
- § 84:4 — —Appointment
- § 84:5 —Guardianship of the person of a minor or infant
- § 84:6 Guardianship by court order—Special provisions in relation to guardianship of a foster child
- § 84:7 —Rules of court
- § 84:8 —Guardian of person to file copy of order of appointment
- § 84:9 —Recording in camera interviews of infants
- § 84:10 Permanent guardianship of a child
- § 84:11 —Who may petition
- § 84:12 —Venue
- § 84:13 Guardian for special immigrant juvenile—In general
- § 84:14 —“special immigrant” defined
- § 84:15 — —Jurisdiction to make factual findings and declare dependency on juvenile court
- § 84:16 —Who may qualify as guardian
- § 84:17 —Who may qualify as child
- § 84:18 —What proceedings qualify for dependency
- § 84:19 —Factors considered

### **II. GUARDIAN**

#### **A. BASIC PROCEDURES**

- § 84:20 Choice of court
- § 84:21 Appointed guardians—Guardians in socage
- § 84:22 —Appointment of guardians by parent
- § 84:23 —Powers of guardian appointed by parent under Domestic Relations Law § 81
- § 84:24 —Duties and liabilities of all general guardians
- § 84:25 —Guardianship of a married minor
- § 84:26 —Investment of trust funds by guardian

### **III. FOSTER CARE—BASIC CONCEPTS**

#### **A. OVERVIEW**

- § 84:27 Overview

#### **B. FAMILY COURT ACT PROVISIONS**

- § 84:28 Termination of parental rights proceeding
- § 84:29 PINS proceeding
- § 84:30 Child protective proceeding

#### **C. SOCIAL SERVICES LAW PROVISIONS**

- § 84:31 Voluntary Placement Procedure
- § 84:32 Involuntary Placement Procedure

## **CHAPTER 85. ADOPTION**

### **I. OVERVIEW**

#### **A. IN GENERAL**

- § 85:1 Types of adoption proceedings—Overview
- § 85:2 Statutory framework
- § 85:3 What law governs
- § 85:4 Jurisdiction and venue
- § 85:5 Jurisdiction—Determination of issue of paternity by surrogate—Limitations
- § 85:6 Who may adopt
- § 85:7 Who may be adopted; adoption of adult
- § 85:8 Effect of death of potential adoptive parent—Authorized adoption agency
- § 85:9 —Private placement adoption
- § 85:10 Fees for placing children for adoption
- § 85:11 Open adoptions
- § 85:12 Adoption of Native American Children—Interstate Compact Act on the placement of children
- § 85:13 Policy considerations
- § 85:14 Statutory definitions
- § 85:15 Application of the compact
- § 85:16 Notice requirements
- § 85:17 Circumstances in which the compact does not apply
- § 85:18 The court of appeals decision in matter of Shaida W.—Sending agency
- § 85:19 Violation of the compact
- § 85:20 Financial responsibility for the child
- § 85:21 Delinquent children
- § 85:22 Other matters

#### **B. STATEWIDE ADOPTION SERVICE**

- § 85:23 Role of department of social services
- § 85:24 Pre-Termination foster care

### **II. CONSENT**

#### **A. IN GENERAL**

- § 85:25 Overview
- § 85:26 Whose consent required

#### **B. WHEN DISPENSED WITH**

- § 85:27 By Act or conduct of parent
- § 85:28 Where adoptive child is over 18
- § 85:29 Judicial termination of parental control
- § 85:30 Parent mentally ill or with intellectual disability
- § 85:31 Abandonment
- § 85:32 —Guidelines to determine intent to forgo parental rights
- § 85:33 Surrender of child to authorized agency for adoption—Surrender defined
- § 85:34 —Adoption proceeding
- § 85:35 —Intervention
- § 85:36 —Adoption and permanency hearing

- § 85:37 —Execution of the surrender instrument
- § 85:38 —Terms of surrender
- § 85:39 —Opportunity to withdraw surrender
- § 85:40 —Judicial surrenders
- § 85:41 —Notice of judicial surrender proceeding
- § 85:42 —Extra-judicial surrenders
- § 85:43 —Notice of extra-judicial surrender
- § 85:44 —Form of instrument for surrender
- § 85:45 —Effect of surrender and revocation
- § 85:46 Execution of instrument denying parentage
- § 85:47 Readoptions

## **C. WITHDRAWAL OR REVOCATION OF CONSENT TO ADOPTION**

- § 85:48 In general
- § 85:49 Requirements for and revocation of consents to private—Placement adoptions
- § 85:50 Procedure
- § 85:51 Special provisions relating to private placement adoptions—Domestic Relations Law § 115-b
- § 85:52 Effect of fraud, duress or coercion upon right to revoke consent to adoption or surrender
- § 85:53 The tort of wrongful adoption
- § 85:54 Equality of rights of natural and adoptive parents
- § 85:55 Best interests of child as determining factor in revocation of consent cases

## **III. PROCEDURE**

- § 85:56 In general
- § 85:57 Certification as qualified adoptive parent—Applicability
- § 85:58 Presumption of unfitness to serve as adoptive or foster parents
- § 85:59 Temporary guardianship
- § 85:60 Agreement of adoption
- § 85:61 Petition
- § 85:62 Papers to accompany petition
- § 85:63 Notice of adoption—Generally
- § 85:64 Notice to adoption to fathers of children born out-of-wedlock
- § 85:65 Investigation and report
- § 85:66 Removal of child on basis of investigation and report
- § 85:67 Period of probation
- § 85:68 Appearances before court
- § 85:69 Expedited calendaring of adoption proceedings
- § 85:70 Power to dispense with court appearance
- § 85:71 Factors considered by court—Generally
- § 85:72 Religion
- § 85:73 Contested proceeding

## **IV. ORDER OF ADOPTION**

- § 85:74 In general
- § 85:75 Filing, entry and sealing of order
- § 85:76 Access to and inspection of adoption records on medical grounds

§ 85:77 Review or vacation of order

## **V. FOREIGN CHILDREN BROUGHT INTO NEW YORK FOR PRIVATE-PLACEMENT**

§ 85:78 In general

§ 85:79 Application for preadoptive investigation

§ 85:80 Appearances; documents to be submitted

§ 85:81 Order for investigation

§ 85:82 Report of investigation

§ 85:83 Preadoption certificate

§ 85:84 Sealing of papers

§ 85:85 Failure to comply with provisions

## **VI. EFFECT OF ADOPTION**

### **A. IN GENERAL**

§ 85:86 Overview

§ 85:87 Tax consequences

§ 85:88 Citizenship

§ 85:89 Natural parents

§ 85:90 Adoptive parents

§ 85:91 Adoption by stepparent

§ 85:92 Child

§ 85:93 Postadoption contract agreements

### **B. INHERITANCE AND PROPERTY RIGHTS**

§ 85:94 In general

§ 85:95 Right to inherit—Through natural parents—In general

§ 85:96 — —Intestate succession

§ 85:97 — —By will

§ 85:98 Through adoptive parents

§ 85:99 From or Through Adopted Child

§ 85:100 Adopted child as “Issue,” “Heir” and the like

§ 85:101 Disinheriting adopted child

§ 85:102 Defective adoption—Adoption procured by fraud

§ 85:103 Rights under contract to adopt

## **VII. LAWFUL DISCLOSURE OF INFORMATION**

§ 85:104 Examination and disclosure of contents of records

§ 85:105 New York Adoption information registry system—Public Health Law § 4138-c

§ 85:106 Registration of Parties to Adoption—Mutual consent voluntary adoption registry-Public Health Law § 4138-d

§ 85:107 Release of non-identifying information

§ 85:108 Release of identifying information

§ 85:109 Confidentiality; prohibitions

§ 85:110 Access to and inspection of adoption records on medical grounds

§ 85:111 Full faith and credit to foreign adoptions

## **CHAPTER 86. FAMILY OFFENSES**

### **I. OVERVIEW**

§ 86:1 Introduction

§ 86:2 Definition of family offense

- § 86:3 Notice of shelter, rights, and remedies
- § 86:4 Relationship to other articles of the Family Court Act
- § 86:5 Relationship to other laws
- § 86:6 Constitutional issues
- § 86:7 Standing
- § 86:8 Limitations
- § 86:9 Availability of closed proceedings and records
- § 86:10 Right to counsel
- § 86:11 Counsel fees

## **II. INVOLVEMENT OF PROBATION SERVICE**

- § 86:12 Overview
- § 86:13 Conference procedures
- § 86:14 Adjustment process procedures

## **III. JURISDICTION**

- § 86:15 Concurrent jurisdiction with criminal courts
- § 86:16 —Personal jurisdiction
- § 86:17 Effect of election
- § 86:18 Unrestricted access for family offense petitions
- § 86:19 Choice of forum
- § 86:20 Temporary custody, child support and spousal support award
- § 86:21 Extension of order of protection
- § 86:22 Limits of Family Court jurisdiction
- § 86:23 Transfer to Criminal Court
- § 86:24 Transfer from Criminal Court
- § 86:25 Long-arm jurisdiction
- § 86:26 Venue

## **IV. PRELIMINARY PROCEDURE**

- § 86:27 Arrest
- § 86:28 Required information for complainant
- § 86:29 Conduct that constitutes a family offense
- § 86:30 —Disorderly Conduct
- § 86:31 Originating proceedings
- § 86:32 Preliminary procedure
- § 86:33 Issuance and service of summons
- § 86:34 Answer and counterclaims and disclosure
- § 86:35 Amendment of family offense petition
- § 86:36 Sufficiency of pleadings
- § 86:37 —Dismissal for lack of jurisdiction or failure to state cause of action
- § 86:38 Issuance, extension and modification of temporary order of protection—Requirement of counterclaim for temporary order

## **V. HEARING**

- § 86:39 Emergency power of local Criminal Court to issue orders of protection when Family Court not in session
- § 86:40 Ex parte modification of Family Court order of protection or temporary order of protection by local Criminal Court
- § 86:41 Fact-finding hearing and burden of proof

- § 86:42 Dispositional hearing
- § 86:43 Adjournments
- § 86:44 Parties' entitlement to third party's presence
- § 86:45 Evidence—Fact finding hearing—Burden of proof
- § 86:46 —Dispositional hearing

## **VI. ORDERS**

- § 86:47 Order of disposition—Dismissal of petition
- § 86:48 —Final orders
- § 86:49 —Restitution
- § 86:50 —Order suspending judgment
- § 86:51 —Order of probation
- § 86:52 —Order of protection—In general
- § 86:53 — —Permissible conditions
- § 86:54 — —Aggravating circumstances
- § 86:55 — —Extension of period of order
- § 86:56 — —Custody and child support
- § 86:57 — —Copies of order to parties
- § 86:58 — —Order to terminate lease
- § 86:59 — —temporary order of spousal support
- § 86:60 Translation and interpretation of orders of protection by interpreter
- § 86:61 Willful violation of order of protection—Modification—Family Court Act § 846-a
- § 86:62 Suspension and revocation of firearms license—Family Court Act § 842-a
- § 86:63 Temporary order of protection—Suspension—Family Court Act § 842-a
- § 86:64 — — —Supporting cases
- § 86:65 — —Family Court Act § 842-a and Family Court Act § 946-a
- § 86:66 Right to hearing
- § 86:67 Duration of suspension order
- § 86:68 Terms of order directing surrender of firearms
- § 86:69 Notice to authorities
- § 86:70 Return of confiscated firearms
- § 86:71 Reconsideration and modification of orders
- § 86:72 Reconsideration and modification of orders-Effect of Supreme Court order

## **VII. VIOLATION OF ORDERS**

- § 86:73 Petition for violation
- § 86:74 Petitioner's election in certain cases
- § 86:75 Court's powers on violation of order
- § 86:76 Court's powers on violation—Burden of proof—Commitment to jail term
- § 86:77 Full faith and credit to protective orders—Family Court Act § 154-e

# **CHAPTER 87. PERSONS IN NEED OF SUPERVISION**

## **I. JURISDICTION AND DETENTION**

### **A. INTRODUCTION**

- § 87:1 Purpose

- § 87:2 Nature and effect of adjudication
- § 87:3 Definitions
- § 87:4 Jurisdiction
- § 87:5 Venue
- § 87:6 Constitutional rights

## **B. PRE-PROCEEDING CUSTODY AND DETENTION**

- § 87:7 Pre-disposition placement
- § 87:8 Return of runaway
- § 87:9 Detention by private person
- § 87:10 Duty to notify parents; release
- § 87:11 Questioning
- § 87:12 —Miranda warnings
- § 87:13 —Presence of parents
- § 87:14 Judicial hearing and release

## **II. PRELIMINARY PROCEDURE**

### **A. FILING AND SERVING PETITION**

- § 87:15 Persons who can originate proceedings and petition
- § 87:16 Diversion services
- § 87:17 Substitution of petition
- § 87:18 Effects of diversion services on petition
- § 87:19 Issuance and service of summons
- § 87:20 Service of summons
- § 87:21 Issuance of warrant
- § 87:22 Summons or warrant on failure to appear
- § 87:23 Temporary order of protection
- § 87:24 Release or detention after petition is filed

### **B. ADJUSTMENT OF THE CASE**

- § 87:25 Diversion services
- § 87:26 Diversion attempts
- § 87:27 Confidentiality of statements during diversion services
- § 87:28 Diversion services records
- § 87:29 Protections during diversion services

## **III. HEARINGS AND DISPOSITION**

### **A. FACT-FINDING HEARINGS**

- § 87:30 Generally
- § 87:31 Pre-Hearing Discovery
- § 87:32 Suppression hearing
- § 87:33 Notice of rights at initial appearance
- § 87:34 Notice and right to be heard
- § 87:35 Procedure for allocution
- § 87:36 Persons present
- § 87:37 Notice and opportunity to be heard
- § 87:38 Fact Finding hearing—Evidence
- § 87:39 Adjournment of fact-finding hearing
- § 87:40 Adjournment and adjournment in contemplation of dismissal

### **B. DISPOSITIONAL HEARING**

- § 87:41 Dispositional hearing—Generally—Adjournment

- § 87:42 Adjournment of dispositional hearing
- § 87:43 Probation reports and investigation
- § 87:44 Diagnostic assessment
- § 87:45 Dispositional hearing—Evidence

### **C. ORDERS**

- § 87:46 Orders—Generally
- § 87:47 Order dismissing petition
- § 87:48 Order adjudicating need for supervision
- § 87:49 Disposition on adjudication
- § 87:50 Suspended judgment
- § 87:51 Placement
- § 87:52 —Restrictive placement
- § 87:53 Probation
- § 87:54 Restitution
- § 87:55 Order of protection

## **IV. POST-DISPOSITION PROCEDURES**

### **A. ATTACKS ON OR CHANGES IN DISPOSITION**

- § 87:56 Generally
- § 87:57 Reconsideration, stay, modification, set aside or vacation of order
- § 87:58 Appeal
- § 87:59 Extension of placement and permanency hearing
- § 87:60 Petition to terminate placement
- § 87:61 Discontinuation of treatment by agency or institution
- § 87:62 Petition for transfer for incorrigibility

### **B. COMPLIANCE WITH ORDERS**

- § 87:63 Failure to comply—Generally
- § 87:64 Failure to comply with suspended judgment
- § 87:65 Absconding from placement
- § 87:66 Failure to comply with terms of probation
- § 87:67 Procedures for violations of orders of suspended judgment and violations of probation
- § 87:68 Noncompliance with order of protection

### **C. RECORDS**

- § 87:69 Probation records
- § 87:70 Transfer of records
- § 87:71 Use of records in other court
- § 87:72 Use of police records
- § 87:73 Duties of counsel
- § 87:74 Nature of adjudication
- § 87:75 Effect of adjudication
- § 87:76 Firearms; surrender and license suspension, revocation and ineligibility

# Volume 11 Table of Contents

## FAMILY COURT PROCEEDINGS (CONTINUED)

### PART ONE FAMILY COURT PROCEEDINGS (CONTINUED)

#### CHAPTER 88. JUVENILE DELINQUENCY

##### I. JURISDICTION AND DETENTION

###### A. INTRODUCTION

§ 88:1 Purpose of Article 3 of the Family Court Act

§ 88:2 Definitions

§ 88:3 Applicability and Separability

§ 88:4 Jurisdiction of the family court—Age of criminal responsibility

§ 88:5 —Changes in age of criminal responsibility since 1978

§ 88:6 Statute of limitations

§ 88:7 Venue

###### B. COMPARISON WITH CRIMINAL PROCEEDINGS

§ 88:8 Nature of delinquency proceedings; Applicability of Criminal Procedure Law

§ 88:9 Constitutional rights

§ 88:10 Defenses—Applicability of the Penal Law

§ 88:11 Family Court Rules

###### C. CUSTODY AND DETENTION

§ 88:12 Custody by private person—Duty to notify

§ 88:13 Custody by public person—Duty to notify

§ 88:14 Questioning, generally

§ 88:15 —Location of questioning

§ 88:16 —Miranda warnings

§ 88:17 —Presence of parents

§ 88:18 Fingerprinting

§ 88:19 Appearance ticket

§ 88:20 Release before filing of petition

§ 88:21 Hearing on detention—Appointment of attorney for child

§ 88:22 Detention

§ 88:23 Temporary order of protection

##### II. COMMENCING PROCEEDINGS

###### A. REMOVAL OF PROCEEDINGS FROM SUPREME COURT

§ 88:24 In general

§ 88:25 —Order of removal

§ 88:26 —Effect of removal

§ 88:27 After Verdict

§ 88:28 —Order of Removal

§ 88:29 —Effect of Removal

###### B. ADJUSTMENT OF CASE BY PROBATION SERVICE

§ 88:30 In general

- § 88:31 Adjustment conference
- § 88:32 Adjustment or failure to adjust

### C. DELINQUENCY PETITION

- § 88:33 Time limits to file and commence action
- § 88:34 Contents
- § 88:35 Sufficiency
- § 88:36 Joinder, severance, and consolidation
- § 88:37 Consolidated fact-finding hearings
- § 88:38 Substitution of petition or finding
- § 88:39 Amendment of petition

### D. PROCESS

- § 88:40 Issuance and service of summons
- § 88:41 Issuance of a warrant

## III. PRELIMINARY MATTERS

### A. INITIAL APPEARANCE

- § 88:42 In general
- § 88:43 Appointment of counsel
- § 88:44 Procedure
- § 88:45 Release or detention
- § 88:46 Referral to probation

### B. PLEA

- § 88:47 Entry of admission or denial
- § 88:48 Acceptance or withdrawal of plea
- § 88:49 Capacity to make plea—Examination
- § 88:50 Proceedings to determine capacity

### C. PRETRIAL MOTIONS

- § 88:51 In general
- § 88:52 Procedure on Pretrial motions
- § 88:53 Motions to dismiss
- § 88:54 —Furtherance of justice
- § 88:55 Adjournments

### D. PROBABLE CAUSE HEARING

- § 88:56 Time
- § 88:57 Procedure
- § 88:58 Determination—Adjournment

### E. DISCOVERY

- § 88:59 In general
- § 88:60 Discovery—Definition of terms
- § 88:61 Items subject to discovery
- § 88:62 Discovery—Demand and motion procedure
- § 88:63 Bill of particulars
- § 88:64 Request for bill of particulars
- § 88:65 Refusal to comply with request for bill of particulars
- § 88:66 Bill of particulars—Discovery motion procedure
- § 88:67 —Court-ordered discovery
- § 88:68 —Protective order
- § 88:69 Amended Bill of Particulars
- § 88:70 Additional Discovery
- § 88:71 Prior statements and history of witnesses

- § 88:72 Duty to disclose additional material—Protective order
- § 88:73 Motion to suppress evidence
- § 88:74 —Appeal
- § 88:75 Sanctions

#### **IV. FACT-FINDING HEARING**

- § 88:76 In general
- § 88:77 Time
- § 88:78 Presiding Judge
- § 88:79 Persons present
- § 88:80 —Removal of disruptive respondent
- § 88:81 Order of procedure
- § 88:82 Evidence—Burden of proof
- § 88:83 —Notice of defense of mental disease or defect and notice of alibi
- § 88:84 Evidence, generally—Identification
- § 88:85 —Testimony given by children
- § 88:86 —Accomplice testimony
- § 88:87 —Impeachment of party’s own witness
- § 88:88 —Proof of prior record
- § 88:89 —Statements of respondent
- § 88:90 —Burden of proof of affirmative defense
- § 88:91 —Psychiatric testimony—Defense of mental disease or defect
- § 88:92 —Sex offense cases
- § 88:93 Required testing of the respondent in certain proceedings
- § 88:94 Evidence, generally—Nonsexual prior acts of victim
- § 88:95 Orders
- § 88:96 Effect of adjudication

#### **V. DISPOSITIONAL HEARING**

##### **A. IN GENERAL**

- § 88:97 Time of hearing
- § 88:98 Adjournment
- § 88:99 Presence of parties and right to make statement
- § 88:100 Order of procedure

##### **B. EVIDENCE**

- § 88:101 Standard
- § 88:102 Probation investigation
- § 88:103 Victim impact statement
- § 88:104 Diagnostic assessment
- § 88:105 Disclosure of probation and diagnostic reports
- § 88:106 Findings based on evidence

##### **C. ORDERS OF DISPOSITION**

- § 88:107 In general
- § 88:108 “Close to home” initiative
- § 88:109 Order of protection
- § 88:110 Conditional discharge
- § 88:111 Probation
- § 88:112 Placement, generally
- § 88:113 Placement at home or in foster care

- § 88:114 Placement of mentally disabled respondents
- § 88:115 Provisions for routine medical, dental, and mental health services and treatment
- § 88:116 Restrictive placement
- § 88:117 Permanency hearing
- § 88:118 Restitution
- § 88:119 Duties of counsel on disposition

## **VI. POST-DISPOSITION PROCEDURES**

### **A. DISPOSITION OF RECORDS**

- § 88:120 Sealing records on termination in favor of respondent
- § 88:121 Motion to seal records after finding of delinquency
- § 88:122 Retention or destruction of fingerprints
- § 88:123 Expungement of court records
- § 88:124 Transfer of records and information
- § 88:125 Use of records
- § 88:126 Statistics on delinquency cases
- § 88:127 Consolidation of records

### **B. VIOLATIONS OF CONDITIONS OF PLACEMENT**

- § 88:128 Violation of probation, generally
- § 88:129 Petition of violation
- § 88:130 Hearing on violation
- § 88:131 Contempt proceedings

### **C. ATTACKS ON OR CHANGES IN DISPOSITION**

- § 88:132 In general
- § 88:133 Motion procedures
- § 88:134 Petition to extend placement
- § 88:135 Stay, modification, or termination of order

### **D. APPEALS**

- § 88:136 Article 3—Appeal of right
- § 88:137 —Appeal by permission—Appeal as a poor person
- § 88:138 —Notice of appeal
- § 88:139 —Standards on appeal
- § 88:140 —Disposition on appeal

## **CHAPTER 89. CHILD PROTECTION PROCEEDINGS**

### **I. OVERVIEW**

- § 89:1 Purpose and nature of child protective proceedings
- § 89:2 Civil nature of proceedings

### **II. FAMILY COURT JURISDICTION**

- § 89:3 Introduction—Statutory basis—Concurrent jurisdiction with supreme court
- § 89:4 — —Concurrent criminal proceedings
- § 89:5 — —Effect of prior or concurrent criminal proceeding
- § 89:6 — —Age of child as affecting jurisdiction
- § 89:7 — —UCCJEA and other factors affecting subject matter jurisdiction
- § 89:8 Subject matter jurisdiction upon death of the child
- § 89:9 Transfers to and from criminal court—Transfer to

criminal court

§ 89:10 Investigations

§ 89:11 Substitution of PINS petition

§ 89:12 Court-ordered services

### **III. REMOVAL OF CHILD WITHOUT COURT ORDER**

§ 89:13 Introduction

§ 89:14 Removal of child without court order—With consent

§ 89:15 Emergency removal without court order—Generally

§ 89:16 —Grounds for emergency removal

§ 89:17 — —Obligations upon removing child

§ 89:18 —Physicians and hospitals

§ 89:19 —Obligations of child protective agency

### **IV. PRE-PETITION ORDERS**

§ 89:20 Pre-petition orders—Temporary removal orders

§ 89:21 —Orders authorizing the provision of services or assistance, including authorization for medical treatment of the child

§ 89:22 —Temporary orders of protection

§ 89:23 Procedure for issuance of temporary orders

§ 89:24 Temporary orders of protection

§ 89:25 Pre-petition orders—Temporary removal orders—Grounds for removal

### **V. VISITATION WITH CHILD AFTER REMOVAL**

§ 89:26 Generally

§ 89:27 Hearing and Orders

### **VI. RETURN OF CHILD TEMPORARILY REMOVED**

§ 89:28 Return of child temporarily removed—Application—Family Court Act § 1028

§ 89:29 Return of child—1028 hearing

### **VII. ORIGINATING PROCEEDING**

§ 89:30 Filing of Petition

§ 89:31 Termination of reasonable efforts

§ 89:32 —Permanency hearing

§ 89:33 Venue

§ 89:34 Definitions

§ 89:35 Parties—Petitioners

§ 89:36 —Respondents—Parent or person legally responsible for child's care

§ 89:37 — — —Additional persons who may be named a respondent

§ 89:38 —Intervention

§ 89:39 — —Intervention by nonparent relative

§ 89:40 — —Intervention by other third parties; foster parents, school district

§ 89:41 —Nonparent respondent—Notice to certain interested persons—Intervention

§ 89:42 —Non-Respondent Parents

§ 89:43 Issuance of summons

§ 89:44 —Nonrespondent parent

§ 89:45 Service of summons

- § 89:46 Issuance of warrant
- § 89:47 Initial appearance—Appointment of attorney
- § 89:48 Mediation and conferencing

## **VIII. POST-PETITION PRELIMINARY AND TEMPORARY ORDERS**

- § 89:49 Introduction
- § 89:50 Preliminary orders—Applications for hearings
- § 89:51 —Considerations for the court in making removal decision
- § 89:52 Orders after hearing
- § 89:53 Visitation or contact with separated siblings—The 2016 Amendments
- § 89:54 Presumption of “appropriate and regular” sibling contact
- § 89:55 Discovery—In general
- § 89:56 —Court-ordered discovery—Nontestimonial evidence

### **A. HEARINGS — OVERVIEW**

- § 89:57 Closed hearings
- § 89:58 Child abuse part

### **B. RIGHT TO COUNSEL**

- § 89:59 Petitioner
- § 89:60 Respondent
- § 89:61 —Presence of counsel at mental health evaluation
- § 89:62 —Ineffective assistance of counsel
- § 89:63 Attorney for the child
- § 89:64 Special duties of attorney for child

### **C. FACT-FINDING HEARING**

#### **1. Overview**

- § 89:65 Fact-finding hearing—Overview
- § 89:66 Fact-finding hearing
- § 89:67 —Special Consideration in Abuse Case
- § 89:68 Required findings as to notice
- § 89:69 Effect of respondent’s absence
- § 89:70 Mental health evaluations

#### **2. Grounds for Findings**

- § 89:71 Abuse and neglect—In general
- § 89:72 Derivative neglect
- § 89:73 Admissions—Abuse and neglect
- § 89:74 Abuse—Physical injury
- § 89:75 —Sexual abuse
- § 89:76 Neglect—Minimum degree of care
- § 89:77 —Food, clothing and shelter
- § 89:78 —Domestic violence
- § 89:79 —Educational neglect
- § 89:80 —Failure to provide medical care
- § 89:81 Failure to provide supervision or guardianship—Generally
- § 89:82 —Excessive corporal punishment
- § 89:83 —Substance abuse by respondent
- § 89:84 Mental illness of parent
- § 89:85 Abandonment

### 3. Evidentiary Considerations

- § 89:86 Fact-finding hearing—Competent, material, and relevant evidence
- § 89:87 Dispositional hearing—Material and relevant evidence
- § 89:88 Standard and burden of proof
- § 89:89 Inapplicability of privileges
- § 89:90 —Drug or alcohol abuse by respondent
- § 89:91 Documentary evidence—Hospital and agency records
- § 89:92 — —Production of records by hospital or agency
- § 89:93 — —Runaway and homeless youth programs and facilities
- § 89:94 —Alcohol or drug abuse treatment records
- § 89:95 —Child abuse reports
- § 89:96 —Probation reports
- § 89:97 —Business records—Limitations
- § 89:98 Child’s statements
- § 89:99 —In camera interview with child
- § 89:100 —Testimony of child
- § 89:101 —Closed circuit and videotaped testimony
- § 89:102 Child’s injuries
- § 89:103 Polygraph examinations
- § 89:104 Evidence of prior criminal acts
- § 89:105 Evidence as to another child
- § 89:106 Expert witnesses
- § 89:107 Sirois hearing

### D. SUSTAINING OR DISMISSING THE PETITION

- § 89:108 Sustaining the petition
- § 89:109 —Orders pending disposition
- § 89:110 —Abuse findings
- § 89:111 Dismissing the petition—Neglect or abuse
- § 89:112 —Neglect—Aid of court not required
- § 89:113 —Voluntary placement of child

### E. DISPOSITIONAL HEARING

- § 89:114 Dispositional hearing—Introduction—Definition
- § 89:115 —Notice of dispositional hearing to agency
- § 89:116 —Evidence—Material and relevant evidence
- § 89:117 — —Probation or agency reports

### IX. ORDERS OF DISPOSITION

- § 89:118 Court-ordered placement
- § 89:119 Dispositional order—Duties of counsel
- § 89:120 Order of disposition—Placement under Family Court Act § 1055
- § 89:121 Duty to report investigations to locate nonrespondent parents or relatives
- § 89:122 Court-ordered placement—Suspension and expiration of a placement order
- § 89:123 Notice of report of abuse or maltreatment
- § 89:124 Placement of children—Notice of placement change—Family Court Act § 1055

§ 89:125 Suspended judgment  
§ 89:126 Release of child—Non-respondent parent or parents  
or legal custodian  
§ 89:127 —Respondent or respondents; supervision of the  
respondent or respondents  
§ 89:128 Custody of the child to a respondent parent,  
relative, or suitable person—In general  
§ 89:129 Joint hearing with Article 6 custody proceeding  
§ 89:130 Joint hearing with custody petition by  
nonrespondent parent under Domestic Relations

Law

§ 89:131 Order of protection  
§ 89:132 Supervision  
§ 89:133 Order of assistance and cooperation—Family Court  
Act § 255

#### **A. RETENTION OF JURISDICTION AND MODIFICATION OF ORDER**

§ 89:134 Retention of jurisdiction—Tolling of period of  
supervision—Commitment for violation  
§ 89:135 Motion to stay arrest, set aside, modify or vacate  
order

#### **B. COMPLIANCE WITH ORDERS**

§ 89:136 Failure to Comply with Suspended Judgment  
§ 89:137 Failure to comply with supervision  
§ 89:138 Firearms; surrender and license suspension,  
revocation, and ineligibility

#### **C. CHANGES AFFECTING PLACEMENT ORDERS**

§ 89:139 Placement—Effect of child running away  
§ 89:140 Change in placement  
§ 89:141 Extension—Generally - Motion to return to foster  
care  
§ 89:142 Notice of permanency hearing  
§ 89:143 —Notice and hearing  
§ 89:144 —Additional and alternative orders on extension  
§ 89:145 Termination of placement

#### **X. VISITATION BY NONCUSTODIAL PARENTS AND GRANDPARENTS WITH MINORS IN**

##### **FOSTER CARE**

§ 89:146 Petition  
§ 89:147 —Petition by noncustodial parent  
§ 89:148 —Petition by grandparents  
§ 89:149 —Service of petition  
§ 89:150 —Incorporation of visitation rights in Article 10  
orders  
§ 89:151 —Order to comply with visitation rights  
§ 89:152 Approval, denial, and modification of visitation  
rights—Duties of local department of social  
services  
§ 89:153 —Opposition to the petition—Hearing  
§ 89:154 —Granting or denying the petition  
§ 89:155 —Alternative visitation schedules  
§ 89:156 Duration of visitation orders

§ 89:157 Visitation and custody rights unenforceable where murder of parent, custodian, guardian, or child  
§ 89:158 Visitation rights—Out-of-wedlock children  
§ 89:159 Substantial failure of a material condition of surrender—Enforcement of a contact agreement  
§ 89:160 Expiration of orders under Family Court Act §§ 1052 or 1039

## **XI. FAMILY COURT ACT ARTICLE 10-A**

§ 89:161 Family Court Act Article 10-A—Preliminary hearings for children placed out of their homes—Purpose of Article 10-A  
§ 89:162 — —Definitions  
§ 89:163 — —Continuing court jurisdiction  
§ 89:164 — —Permanency hearings  
§ 89:165 — —Notice of permanency hearings  
§ 89:166 Participation of children in their permanency hearings  
§ 89:167 Family Court Act Article 10-A—Preliminary hearings for children placed out of their homes—Content of the permanency hearing report  
§ 89:168 — —Court findings and order  
§ 89:169 Notice of report of abuse or maltreatment—Family Court Act § 1089  
§ 89:170 Family Court Act Article 10-A—Preliminary hearings for children placed out of their homes—reasonable efforts under the Americans with Disabilities Act (ADA)  
§ 89:171 — —Service of court order and permanency hearing report  
§ 89:172 — —Appointment of attorney for parties  
§ 89:173 Participation of children in permanency hearings  
§ 89:174 Family Court Act Article 10-A—Preliminary hearings for children placed out of their homes—Custody or guardianship with relatives or suitable persons

## **CHAPTER 90. TERMINATION OF PARENTAL RIGHTS**

### **I. OVERVIEW**

§ 90:1 Parental rights generally  
§ 90:2 Constitutional aspects  
§ 90:3 Termination methods  
§ 90:4 Role of the authorized agency

### **II. SURRENDER AGREEMENTS**

§ 90:5 Generally  
§ 90:6 —Indian children  
§ 90:7 Effect of surrender agreement  
§ 90:8 —Voluntary commitment agreements compared  
§ 90:9 —Adoption consents compared  
§ 90:10 Surrender agreement provisions—Consent to adoption, revocation, communication  
§ 90:11 Surrender agreement—Executing, recording, and

filing the surrender agreement  
§ 90:12 —Waiver of action to revoke or annul  
§ 90:13 —Substantial failure of a material condition  
§ 90:14 —Rights of parent who surrendered child to custody of child  
§ 90:15 —Initial freed child permanency hearing  
§ 90:16 —Requirement of surrendering parent to provide information  
§ 90:17 —Effect on right to contact siblings  
§ 90:18 Capacity issues  
§ 90:19 Judicial approval of the agreement—Private agency  
§ 90:20 Judicial approval of the agreement executed pursuant to provisions of Social Services Law § 384 or § 384-a—Government agency—Social Services Law § 358-a initiation of judicial proceeding  
§ 90:21 — — —Contents of petition  
§ 90:22 — — —Continuing jurisdiction  
§ 90:23 — — —Disposition of the petition  
§ 90:24 — — —Notice  
§ 90:25 — — —Hearing and waiver  
§ 90:26 — — —Social Services Law § 358-a initiation of judicial proceeding Representation  
§ 90:27 — — —Social Services Law § 358-a initiation of judicial proceeding—Return of child  
§ 90:28 — — —Appealable orders  
§ 90:29 — — —Duty of social services official  
§ 90:30 — — —Visitation rights; non-custodial parents and grandparents  
§ 90:31 — — —Siblings, placement and visitation  
§ 90:32 Revocation of the surrender agreement by natural parents  
§ 90:33 Surrender agreement—Intervention in proceeding to set aside surrender  
§ 90:34 Revocation of the agreement—Grounds  
§ 90:35 Notice of report of abuse or maltreatment—Social Services Law § 384-b

### **III. AGENCY’S DUTY TO STRENGTHEN THE PARENT-CHILD RELATIONSHIP BEFORE COMMENCING TERMINATION PROCEEDING**

§ 90:36 Overview  
§ 90:37 —Scope of the duty  
§ 90:38 —Situations excusing agency from the duty  
§ 90:39 —Proof as to agency’s fulfillment of its duty  
§ 90:40 Effect of breach of duty

### **IV. GROUNDS FOR JUDICIAL TERMINATION**

#### **A. OVERVIEW**

§ 90:41 Purposes of judicial termination proceedings  
§ 90:42 Summary of grounds for terminating parental rights  
§ 90:43 —Definition of “parents who must consent to an adoption”

#### **B. ABANDONMENT**

§ 90:44 Definition

- § 90:45 Defenses to Abandonment—Generally
- § 90:46 —Acts of agency or of foster parents
- § 90:47 Proof of abandonment—Burden of proof

## C. MENTAL INCAPACITY

- § 90:48 Definition—Generally
- § 90:49 —Mental illness
- § 90:50 —Intellectual disability
- § 90:51 Constitutional and federal law aspects
- § 90:52 Defenses
- § 90:53 Proof of mental incapacity—Burden of proof

## D. PERMANENT NEGLECT

### 1. Overview

- § 90:54 Purpose of permanent neglect proceedings
- § 90:55 Definition of permanent neglect
- § 90:56 —Parent’s failure to maintain contact
- § 90:57 —Failure to plan for future of child
- § 90:58 —Cases where petition to terminate parental rights dismissed
- § 90:59 —Cases where parental rights terminated
- § 90:60 Constitutional aspects
- § 90:61 Proof of permanent neglect
- § 90:62 —Burden of proof—Evidence sufficient
- § 90:63 — —Evidence insufficient
- § 90:64 Exception to requirement of filing petition pursuant to Social Services Law § 384-b

### 2. Defenses

- § 90:65 Lack of financial ability to avoid neglect
- § 90:66 Lack of physical ability to avoid neglect
- § 90:67 Incarceration
- § 90:68 Other defenses

## E. PARENTAL ABUSE OF CHILD

- § 90:69 Definition—Generally
- § 90:70 —Severe abuse
- § 90:71 —Repeated abuse
- § 90:72 Proof of abuse
- § 90:73 Service of notice of entry of order authorizing commencement of adoption proceeding
- § 90:74 Inquiry by court requiring persons interested in adoption of child
- § 90:75 Inquiry by court as to persons entitled to notice of adoption pursuant to Domestic Relations Law § 111-a
- § 90:76 Effect of termination of parental rights upon other rights of child
- § 90:77 Effect of termination of parental rights upon sibling relationship
- § 90:78 Effect of termination of parental rights upon child in foster care
- § 90:79 Petition to restore parental rights

## **V. JUDICIAL TERMINATION PROCEEDINGS**

### **A. OVERVIEW**

§ 90:80 Applicable procedural rules

§ 90:81 —Where Indian child is involved

### **B. ORIGATION OF THE PROCEEDING**

§ 90:82 Procedure to commence

§ 90:83 Persons who may commence

§ 90:84 —Intervention

§ 90:85 Respondents

§ 90:86 When proceeding may and must be commenced

§ 90:87 Jurisdiction

§ 90:88 Determination of jurisdiction where child in termination proceeding is under jurisdiction of another Family Court

§ 90:89 Venue

### **C. PLEADINGS AND NOTICE**

§ 90:90 Pleadings—The petition

§ 90:91 Temporary order of protection

§ 90:92 Issuance of summons and service of process

§ 90:93 Rights of putative fathers

§ 90:94 —Contents and service of the notice on putative fathers

§ 90:95 Effect of appearance by respondent

### **D. PROCEEDINGS BEFORE THE HEARING**

§ 90:96 Discovery

§ 90:97 Appointment of attorney for child or guardian ad litem for parent

§ 90:98 Medical and psychological examination of the respondent

### **E. HEARINGS**

§ 90:99 Overview

§ 90:100 Fact-finding hearing

§ 90:101 Dispositional hearing

§ 90:102 Adjournments

LAW AND THE FAMILY NEW YORK

xxxii

§ 90:103 Burden and standard of proof

§ 90:104 Evidentiary issues

§ 90:105 —Case progress notes

§ 90:106 —Reports of child abuse and maltreatment—admissibility

§ 90:107 —Privileges

### **F. RIGHTS OF THE PARTIES**

§ 90:108 Right to be present

§ 90:109 Right to counsel

§ 90:110 —At the respondent's psychiatric examination

§ 90:111 Right to present evidence

### **G. DISPOSITION**

§ 90:112 Alternative dispositions

§ 90:113 —Child’s best interest  
§ 90:114 Placement of children with relatives—In general  
§ 90:115 —Temporary removal without court order  
§ 90:116 Application of a relative to become a foster parent—  
Family Court Act § 1028-a  
§ 90:117 Duty to report investigations to locate nonrespondent  
parents or relatives—Family Court Act  
§ 1052-c  
§ 90:118 Dismissal of the petition  
§ 90:119 Suspended judgment  
§ 90:120 —Effect of respondent’s failure to comply with a  
suspended judgment  
§ 90:121 Commitment of the child  
§ 90:122 —Effect of the child’s desires  
§ 90:123 —Effect of the child’s relationship with relatives  
§ 90:124 —Determination as to post termination visitation  
§ 90:125 Filing the order

#### H. POST-JUDGMENT PROCEEDINGS

§ 90:126 Setting aside respondent’s default  
§ 90:127 Motion or to vacate, reconsider, or modify judgment  
§ 90:128 Restoration of parental rights after termination of  
parental rights—In General  
§ 90:129 —When Petition May Be filed  
§ 90:130 —Who May File Petition  
§ 90:131 —Service of the Petition  
§ 90:132 —Issuance and Service of Summons  
§ 90:133 —Filing of the Petition  
§ 90:134 —Representation of the Child  
§ 90:135 —Burden of Proof by Clear and Convincing  
Evidence  
§ 90:136 —Statement of Reasons for Disposition  
§ 90:137 —Orders of Disposition  
§ 90:138 —Social Service Law amendment  
§ 90:139 Appeal  
§ 90:140 Habeas corpus or custody proceedings  
§ 90:141 Article 78 Proceedings

#### I. THE DESTITUTE CHILDREN’S ACT—ARTICLE 10-C OF THE FAMILY COURT ACT

§ 90:142 Article 10-C of the Family Court Act—The  
“Destitute Children’s Act”—In general  
§ 90:143 — —Definitions  
§ 90:144 — —Originating proceedings—Filing of the petition  
§ 90:145 — — —Venue  
§ 90:146 — — —Contents of the petition  
§ 90:147 — — —Service of summons  
§ 90:148 — —Initial appearance and preliminary proceedings  
§ 90:149 — —Fact finding  
§ 90:150 — —Disposition—Sustain the petition  
§ 90:151 — — —Dismiss the petition  
§ 90:152 — — —Dispositional Hearing  
§ 90:153 — — —Order of Disposition  
§ 90:154 — — —Custody or guardianship with relatives or  
suitable persons

## **CHAPTER 91. APPEALS—APPEALS FROM FAMILY COURT—PRACTICE AND PROCEDURE**

§ 91:1 Overview

§ 91:2 Appealable Orders

§ 91:3 Aggrieved party

§ 91:4 Representation on appeal

§ 91:5 Appeals from family court—Notice of Appeal—Time to take appeal

§ 91:6 —Form of Notice of appeal

§ 91:7 Appeals from family court—Effect of appeal—stay

§ 91:8 Appeals from family court—Perfecting the appeal—Printed record or printed brief not required

§ 91:9 —Preferences

§ 91:10 —Special procedures—Duty of counsel

§ 91:11 —Preparation of transcript of proceedings

§ 91:12 —Time to perfect appeal

§ 91:13 —Costs

§ 91:14 —Applicability of civil practice law and rules

§ 91:15 —Practice Rules of the Appellate Division—Part 1250—Poor person relief

§ 91:16 — — —Certification

§ 91:17 — — —Original Record